Submissions to the Standing Committee on Environment and Sustainable Development

Regarding the Investor-State Suit Provisions of the Multilateral Agreement on Investment (MAI)

Steven Shrybman

Executive Director

sshrybman@wcel.org

West Coast Environmental Law Association

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Introduction

Thank you Mr. Chair and Members of the Committee for inviting me here today. As you will know from the material we have provided, our Association has several broad concerns about the impacts of the Multilateral Agreement on Investment (MAI). We should also indicate that we have reviewed the submissions of our colleagues on this panel and are supportive of their submissions. Rather than repeat concerns that have been canvassed by our colleagues, and in the materials we have filed, we will concentrate our comments on the investor-state suit provisions of this investment treaty.

Our Association has worked for over two decades to establish and defend the participatory rights of all Canadians to be involved in environmental decision making processes. Whether the forum is an informal, consultative process or the superior courts of the land - we believe that these rights are essential for the development of sound public policy and law with respect to all societal goals. They are no less than the hallmarks of a democratic society. For this reason we appear here today to express our grave concerns about the impact of these particular provisions of the MAI because of their far reaching and adverse implications for the very founding principles upon which our justice system has been established.

As this Committee will know, the investor-state provisions of the MAI are not unique, but rather build on similar provisions found in Chapter 11 of NAFTA and in several bilateral investment agreements that Canada has negotiated in recent years. However, the potential implications of these precedential agreements have gone largely unnoticed and have never, to our knowledge, been the subject of informed debate in this country.

In broad terms, the investor-state suit provisions of the MAI, and the precedents

upon which they rely, extend the principles of international commercial dispute resolution to a vast and new array of potential disputes that have very little to do with international legal commercial relationships. In effect, the MAI would provide foreign investors with a large number of new substantive rights, which then can be enlisted to challenge a diverse array of government policies, programs and laws. We believe that this transposition of the principles of international commercial dispute resolution to the virtually unbounded domaine of investor-state disputes engendered by the MAI, was accomplished with very little analysis or consideration of the potential public policy consequences of such a transformation.

There has certainly been no informed debate about the consequences of these initiatives in this country, and we are unpersuaded by the assurances of the Department of Foreign Affairs and International Trade that these developments are without any adverse public policy implications. Quite to the contrary, we believe that these aspects of the MAI, and of the agreements upon which it would build, represent a profound challenge not only to the progress of environmental policy and law, but as well to the very democratic foundations of our legal system.

The principle of encouraging the resolution of international commercial disputes in accordance with normative arbitration processes may have sound public policy support when those disputes are essentially commercial in character, and founded most often in contractual relationships between parties of relatively equal bargaining power. However, when those regimes are applied, holus polus, to the resolution of disputes that concern the broadest sphere of public policies, which have no grounding in contract, and which may, only in the most tangential way, be considered commercial in character - the potential consequences create very real challenges for the democratic norms of Canadian society.

The following submissions are not offered as an exhaustive or rigorous review of the policy, legal and constitutional issues that arise in this context. It is telling, in our view, that a search of the legal literature, and of the public record, suggests that the issues we raise have yet to be given any meaningful consideration. In our view, it is critical that they be submitted to thorough and public scrutiny before any further steps are taken to proceed with them.

Rather, our submissions are intended to identify a number of issues that should give rise to very serious concerns about the compatibility of the investor-state suit provisions of the MAI, and other investment agreements, with the fundamental principles of justice upon which our society is founded.

1. International Commercial Dispute Resolution

The following provisions of the MAI provide the essential elements of this dispute resolution regime. Under the heading "Investor-State Procedures", the October draft of the MAI provides as follows:

"D. DISPUTES BETWEEN AN INVESTMENT AND A CONTRACTING

PARTY

1. Scope and Standing

a. This article applies to disputes between a Contracting Party, and an investor of another Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.

b. An investor of another Contracting Party may also submit to arbitration under this article any investment dispute concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:

i. An investment authorization granted by its competent authorities specifically to the investor or investment,

ii. a written agreement granting rights with respect to [categories of subject matters] on which the investor has relied in establishing acquiring, or significantly expanding an investment.

2. Means of Settlement

Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:

a. to any competent courts or administrative tribunals of the Contracting Party to the dispute;

b. in accordance with any dispute settlement procedure agreed upon prior to the dispute arising; or

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 (the "ICSID Convention"), if the ICSID Convention is available;

ii. the Additional Facility Rules of the Centre for Settlement of Investment Disputes (the "ICSID Additional Facility"), if the ICSID Facility is available;

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 ("ICC").[1]

2. Canada and International Commercial Dispute Arbitration

Canada's adherence to the norms of international commercial dispute arbitration is a relatively recent development in Canadian law. Under Canada's constitutional division of powers, arbitration agreements and awards are purely a head of provincial legislative competence. The reluctance of provincial governments, and uncertainty about the competence of the federal government to enact legislation on the topic of arbitration stalled efforts to join or implement international commercial dispute resolution agreements for many years.[2] Thus, until relatively recently, Canada had not yet incorporated international conventions concerning commercial dispute resolution into its domestic law.

In fact it was not 1985 that agreement was finally reached among the provinces and the federal government to adhere to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention), which had been signed nearly thirty years earlier. Following that agreement Canada enacted the *United Nations Foreign Arbitral Awards Convention Act* [R.S.C. 1985, c.16 (2nd supp.)] declaring the Convention to have the force of law in Canada. Federal legislation concerning the UNICTRAL Model Law was also enacted in that year as *The Commercial Arbitrations Act* [R.S.C. 1985, c.17 (2nd supp.)].

At the same time, the provinces and the federal territories proceeded to enact their own provincial legislative regimes to implement either, or both, the New York Convention and the UNICTRAL Model Law. In this endeavour various provinces and territories adopted somewhat different approaches, but it is not our purpose here to recount the particular details of these legislative initiatives.

However, two key points stand out. The first is to note that Canadian legislation implementing international conventions for the resolution of commercial disputes is a very recent phenomenon in this country. These are not regimes that have been a feature of the Canadian legislative landscape, nor do we have very much experience with them. Nor has the constitutional authority of the federal government in this sphere ever been determined.

The second, and more important point, is that the enactment of these provincial and federal statutes, as well as the international conventions to which they give effect, preceded by several years the provisions of NAFTA, and other international agreements that have so dramatically extended their application. Moreover, we have been unable to find any evidence that Canadian legislators understood the potential future extension of these legislative regimes to disputes other than those of a commercial and contractual nature between contracting parties.

It is very significant that under MAI rules, literally millions of foreign investors would be given substantive rights to invoke the investor-state suit provisions of the

MAI, notwithstanding the fact that they are not parties to this investment agreement, nor need they have any other contractual relationship with, or obligations to the Canadian government. Moreover, the potential grounds upon which such claims might be asserted are also virtually unbounded by any clear or precise parametres. In addition, it would be very difficult to describe many of the potential grounds for such claims as being of a commercial character. In this regard, the recent claims by US investors under the investment provisions of NAFTA illustrate how large the potential domaine for litigation under these rules really is.

To summarize then to this point. The investor-state provisions of the MAI attempt to build on a foundation of domestic Canadian law that was never established for that purpose. Nor is there any indication that the framers of these statutes had any notion that they might serve one day to give effect to an international arbitration regime of such radically different character than those based on resolving commercial legal disputes most often between contracting parties. Nor are we aware of there ever having been any informed debate about these issues in this country. Finally, we are very concerned by the apparent efforts of the Department of Foreign Affairs and International Trade to understate the significance of these provisions and to frustrate an informed discussion of these issues by legislators and parliamentarians.

3. Dispute Resolution Procedures under the MAI

Quite apart from our opposition to the substantive investor rights that would be established under the MAI, we also have very serious concerns about the character of the dispute resolution procedures that it would put in place. In particular, the highly secretive character of these investor-state procedures are, in our view, fundamentally incompatible with the founding principles upon which our judicial system is based.

Federal Authority Under Section 96 of the Constitution

As you will know, Canadian courts are first and foremost public institutions. They are established and operate under federal and provincial legislation firmly rooted in our Constitution. In contrast, the Arbitral Tribunals established under the MAI would not be creatures of the Canadian state, but would rather operate under the auspices of international institutions (see paragraph 7 of the MAI). Nor would Canada maintain its constitutional authority under S. 96 of the Constitution Act to appoint the members for these tribunals. Under the MAI Canada would have the right to appoint only one of three members of an arbitral panel.

We believe that by removing disputes about Canadian policy and law to international fora, the MAI rules represent a direct challenge to Canadian constitutional authority. For these reasons then, in our view, the investor-state suit provisions of the MAI represent an ouster of federal constitutional authority under S. 96.

Investor-State Suits as Bargaining Leverage

It is also significant to note that paragraph 3(a) of the investor-state suit provisions

of the MAI provides:

"Subject only to paragraph 3.b, each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article."

Thus, under this provision, Canada has conceded to all foreign investors the right to invoke the dispute resolution machinery of the MAI without any constraint, and no matter how specious or ill-founded their claims may be. Moreover, should Canada decline to participate in the establishment of an arbitral panel, under paragraph 7(b) a panel will be established in its absence. While any particular claim may fail, the unqualified right to initiate dispute resolution is likely to be used as a harassing measure by corporations and business associations attempting to discourage government initiatives they oppose. Indeed, representatives of the Canadian business community have conceded as much.[3]

Supplanting Canadian Law

A second key concern arises under S. 14 of Part D, which provides as follows:

"14. Applicable law

a. Issues in dispute under paragraph 1.a. of this article shall be decided in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.

b. Issues in dispute under paragraph 1.b. of this article shall be decided in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, such issues shall be decided in accordance with the law of the Contracting Party to the dispute (including its rules on conflict of laws), the law governing the authorisation or agreement and such rules of international law as may be applicable."

In other words, under this rule the standard against which Canadian policy and law will be measured may have no foundation in Canadian law. In other words, we have agreed to have Canadian law judged by standards that may be entirely alien to the principles of law engendered in our Constitution. For example, under the MAI, as is the case under NAFTA, the term "expropriation" is not defined. Thus in the Ethyl case when the panel attempts to interpret the meaning of "expropriation" it must have recourse to meaning of this term as it is defined under international law. However, international law on the subject of expropriation has been greatly influenced by the US position which reflects the fact that private property rights have been accorded constitutional status in that country. Of course, in Canada they have not. Moreover, we have agreed to submit our legislative prerogatives to this test of international law, not only it now exists, but as it may evolve.

4. Investor-State Suits and International Trade Agreements

If the investor-state suit provisions of the MAI represent a dramatic extension of the reach of international commercial arbitration, they also represent an equally significant departure from the norms of dispute resolution that apply to international trade agreements which, with the exception of NAFTA's investment rules, provide for no analogous investor rights.

Conventionally, only national governments have standing to invoke dispute resolution processes under international trade agreements. For this reason, national governments have often acted to constrain the appetite of their domestic corporations to assail the policies and practices of other governments.

But under the MAI, a corporation need no longer persuade any government of the legitimacy of its complaint before seeking enforcement under an agreement to which, ironically, it is not even a party. It is worth making this point as well to raise the prospect of investor-state suit regimes gradually acquiring larger and larger ambit.

It is an explicit goal of the OECD to eventually negotiate the inclusion of an MAI based regime under the WTO. Conversely, others have argued for the extension of investor-state suits to international trade disputes. Thus as NAFTA's investment rules effectively and quietly enlarged the ambit of Canadian law concerning international commercial dispute arbitration, so too may this investment agreement act as the Trojan horse that introduces these powerful and private enforcement rights to the much larger domaine of international economic relationships.

5. Investor-State Suits and Participatory Rights

Another critical element of these investor-state dispute rules are embodied in paragraph 17 of Part D, which provides as follows:

"Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorisation from the party which provided it."

This rule also engenders an irreconcilable contradiction with the norms of accountability, transparency, openness and democratic process that represent the bedrock of all Canadian adjudicative processes, whether those be administrative or judicial in character. Perhaps the best way to expose these contradictions is to contrast the procedures that are being applied in the two different disputes between Ethyl Corporation and the Government of Canada. One of those disputes is proceeding under the auspices of the investor-state suit provisions of NAFTA, the other in the Supreme Court of Ontario.

Under the latter, the dispute is taking place in a domestic public forum with full public access to the proceedings and to all of the documents filed. Under NAFTA's rules, Ethyl claim is proceeding in an international forum that is entirely closed to public scrutiny, and where there is no right to access the record of proceedings. The Supreme Court of Ontario may direct that notice be given in whatever terms it considers appropriate, and it may add as parties to the proceeding those interested in the outcome, either as parties or as friends of the court (Amicus Curiae) - the latter where the interest is only of a broad policy nature. Under NAFTA's rules, there are no provisions for notice, certainly not public notice and there is no opportunity for third party or amicus interventions other than for the consolidation of claims of a like nature by other foreign investors (paragraph 9.)

In our submission, it is utterly unacceptable to establish a forum for resolving international disputes about Canadian law and policy that represents such a profound departure from the rules of natural justice, and the norms of democratic adjudicative process.

In our view, the first fundamental mistake engendered by these elements of the MAI was the assumption that a regime designed for resolving legal commercial disputes could be applied, without modification, to public policy disputes between foreign investors and Canadian governments. However, even were one to concede this point, which we would emphatically discourage, this would still leave the question: what conceivable rationale is there for adopting a model of adjudication that is highly secretive, exclusive, opaque and undemocratic in order to resolve such disputes?

Encouraging the parties to commercial relationships to resolve their commercial and contractual disputes on their own, makes good public policy sense. Absent any overriding public policy concern, society has no more interest in overseeing such dispute resolution than it has in participating in private contractual negotiations. But when disputes involve the exercise by Canadian governments of their policy and legislative prerogatives in the broadest sense, there is an overwhelming imperative that such disputes be resolved under the auspices of public institutions, established fully in accordance with Canadian constitutional principles and the rule of law.

6. Recognition and Enforcement of Arbitration Awards

Paragraph 16(c) of the MAI provides as follows:

"An arbitration award shall be final and binding between the parties to the dispute and shall be carried out without delay by the party against whom it is issued, subject to its post-award rights under the arbitral systems utilised."

Canadian laws which implement the international arbitration conventions provide for the efficacious enforcement of international arbitration awards. For example, under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards Convention Act* (the *New York Convention Act*) a party seeking enforcement can apply to the Federal Court or to any superior, district or

county court. Under Article III:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

While no right of appeal or other review is provided for under MAI rules, Canadian implementing legislation does provide for judicial oversight. The most broadly worded provisions in this regard can be found under s.2 of Article V of the *New York Convention Act*:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

While the terms of this provision are broadly put, there is little guidance as to how this language might be interpreted by Canadian courts. We are aware of no case that has arisen under the investment rules of NAFTA that has tested this language. A review of the case authority that has addressed issues relating to international commercial dispute arbitration demonstrates a strong deference in favour of supporting the autonomy of the arbitration process. For example, in *Quinette Coal Limited v. Nippon Steel Corp* (1990), 50 B.C.L.R. (2d) 207 (C.A.), Mr. Justice Gibbs stated,

"It is appropriate for the court to adopt, as a matter of policy, a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitration awards."

But given the commercial and contractual nature of the dispute at issue in this particular case, it is impossible to know whether the same approach would be taken in a dispute such as the one currently underway between Ethyl Corporation and the government of Canada. Neither can we gauge how the courts would deal with the issues of notice or standing under these statutory regimes. Nor can we know in a case where neither party to the dispute invokes the court's jurisdiction, whether a court would grant an application by a third party to do so.

While the possibility of invoking judicial oversight of arbitration awards provides

some hope that these dispute procedures will be required to respect some of the norms of Canadian law, it provides no answer to either the substantive or procedural complaints that we have raised here.

Summary

We have attempted in these submissions to address one particular aspect of this proposed investment treaty - the investor-state procedures that it would establish. Our Department of Foreign Affairs and International Trade has taken the position that there is nothing unique of untoward about these dispute resolution rules (see correspondence attached) and points to a number of precedential agreements. However, as our submissions indicate, the advent of such investor-state suit provisions is a very recent phenomenon in Canadian law. In fact, it was only in 1985 that Canadian governments even decided to adhere to the norms of international commercial dispute arbitration. Of course the advent of investor-state suit procedures under multi-lateral investment agreements such as are being proposed in the MAI date only from the implementation of NAFTA - a scant half decade ago.

We believe that it is irresponsible and misleading to suggest that there regimes are either tried or true. We have discovered in the years since NAFTA was implemented that foreign corporations will make ready use of the new rights they have acquired under these investment regimes. In Canada, US based corporations have enlisted NAFTA's investment rules in support of claims and lobbying efforts intended to frustrate, or challenge Canadian initiatives on issues as diverse as restricting the trade of a toxic fuel additive, mandating plain packaging for cigarettes, terminating leases to the terminals at the Toronto International Airport, and establishing a public auto insurance system.

While much has been made of Ethyl Corporation's claim for compensation under the expropriation rules of NAFTA, often overlooked is the fact that it is also claiming breaches by Canada of the national treatment and performance requirement rules of NAFTA. Indeed its claims on these grounds may be stronger than the one it has founded on the expropriation rule.

What has made the arguments of these investors so powerful is the direct recourse that each enjoys to the dispute resolution apparatus of international arbitration. Simply the resource demands that such claims impose on scarce government resources is more than sufficient cause for governments to think very carefully about proceeding in the face of such complaints, no matter how compelling the public policy rationale for doing so.

These cases of have brought to light just how far reaching these investment regimes may be in constraining the policy and legislative authority of democratically elected governments. We believe that they represent the tip of a much larger iceberg, the full dimensions of which will only become clear after it is too late to change course if we continue to proceed full speed ahead.

ENDNOTES

1. Organisation for Economic Co-operation and Development, Directorate for Financial, Fiscal and Enterprise Affairs, Multilateral Agreement on Investment: Consolidated Text and Commentary (Paris: OECD, 1997) at 62.
2. John E.C. Brierly, Canadian Acceptance of International Commercial Arbitration, in Maine Law Review, Vol. 40:263 (1988) at 287.
3. According to a trade lawyer, who represents large corporations, Canadians should regard the Ethyl suit as a harbinger of things to come, as corporations make more frequent use of investment treaties to "harass" governments contemplating regulatory initiatives those corporations oppose - see "Ethyl sues Canada over MMT law," Globe and Mail, April 15, 1997.

1. The Multilateral Agreement on Investment: Key Provisions

We have narrowed the ambit of this opinion to certain key elements of the MAI. We have reproduced these, with added emphasis below.

1.1 Interpretation (Uncharted terrain)

As a preliminary matter, we should point out the inherent difficulty of making confident predictions concerning the potential consequences of current MAI proposals. There are several factors that compound the difficulty of this task. The most important of these has to do with the lack of experience with, or definitive interpretation of, a great many of the concepts and principles of this investment treaty. While precedents exist for many of the provisions comprising the MAI, these are relatively recent innovations in the area of international treaty law and have not yet been given formal or judicial interpretation. Moreover, other concepts engendered by this investment treaty are entirely without precedent.

In addition, many key phrases and provisions of the MAI are not defined by the Agreement. Examples would include such key concepts and phrases as "expropriation," "sustainable development," "advantage," "in like circumstances," and "exhaustible natural resources." Nor is there settled international law that might provide guidance with respect to the meaning that might be assigned to such terms by a dispute panel some years down the road.

A further difficulty arises because the principle of binding precedent (*stare decisis*) does not apply in the area of international commercial arbitration or trade adjudication. This means that dispute panels would not be bound by any previous interpretation of the provision of the MAI. Under the rules of dispute resolution of

the World Trade Organization, this problem is in part addressed by the establishment of a permanent Appellate Body which will presumably lend consistency to the interpretation of WTO rules. However, under the MAI no such body is envisaged be established, and it is likely that the precise meaning of any particular term or provision will remain uncertain or unsettled for years to come.

Similar uncertainty will exist with respect to the interpretation of reservations that may be listed in annexes to the MAI. Moreover, current proposals contain no provisions similar to those in NAFTA which are intended to provide some measure of consistent interpretation and application of reservations. Thus, NAFTA Article 1132 provides for the referral of investor-state disputes where a measure is defended on the grounds that it falls within the protection of a reservation. In such a case the tribunal is directed to refer that issue to the Free Trade Commission for binding interpretation.

Another point which should be made here concerns the application of international legal principles to MAI disputes. For example, Paragraph 14 of *Investor State Procedures* provides:

> *14. Applicable law*
>
> *a. Issues in dispute under paragraph 1.a. of this article shall be decided in accordance with this Agreement,* ***interpreted and applied in accordance with the applicable rules of international law.***

There are several points at which international legal principles may diverge significantly from those established under Canadian law. A particularly notable example concerns the matter of expropriation, where international norms are likely to accord greater protection to property rights than would be the case under Canadian law. We have attempted to survey these various points of departure. Rather our purpose is to stress the need to read the provisions of the MAI with a view to the international legal principles that will ultimately determine their scope and effect. This *caveat* is particularly important because as we have noted, many of the terms and principles of this investment treaty are defined with little if any precision, and have yet to be the subject of any formal interpretation.

Definition of Investment

> II. SCOPE AND APPLICATION
>
> *DEFINITIONS*
>
> *2. Investment means:*
>
> *Every kind of asset owned or controlled, directly or indirectly, by an*

> *investor, including:*
>
> *(i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organization);*
>
> *(ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;*
>
> *(iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;*
>
> *(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing 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, authorizations, and permits;***
>
> *(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.*

There are several points of departure between the definitions of "investment" in the MAI and *NAFTA (Article 1138*). For present purposes the most important of these is the addition of subparagraph *2(vii*), hi-lighted above. The addition is particularly relevant to this assessment because it indicates a clear intention to treat the allocation of Crown resources as giving rise to investor rights under the MAI.

For example, the following commentary to the October, 1997 MAI draft text is offered concerning the purpose of this provision:

> ***Rights such as concessions, licences and permits are generally meant to cover rights to search for, cultivate, extract or exploit natural resources**. Most bilateral treaties, and the ECT, refer to rights conferred by law or under contract and extend protection to such rights. One delegation considered this item covers public law contracts.* [DAFFE/MAI/NM(97)2, fn 14 at p.101]

We take this commentary to be an accurate interpretation of the intent of the framers of the MAI, namely that its provisions are to apply fully, save for any

pertinent reservations or exceptions, to both federal and provincial measures concerning fishery and forest resources.

National Treatment

> *III. TREATMENT OF INVESTORS AND INVESTMENTS*
>
> *NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT*
>
> *1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.*
>
> *2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.*
>
> *3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Articles 1.1 and 1.2, whichever is the more favourable to those investors or investments.*

These provisions trace similar provisions found in NAFTA Chapter 11. There is no explanatory note that explains the bracketing around "in like circumstances," a phrase which is a feature of NAFTA Article 1102. This principle of non-discriminatory treatment, is central to the MAI, and as this assessment will describe, is very difficult to reconcile with a diverse array of Canadian policies, laws and programs that seek to favour Canadian citizens, businesses and communities particularly with respect to the allocation of crown resources.

Directors and Senior Managers

> *SENIOR MANAGEMENT AND MEMBERSHIP ON BOARDS OF DIRECTORS*

> *No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions [and membership on boards of directors] individuals of any particular nationality.*

The addition of the bracketed phrase "membership on boards of directors" would substantially expand the constraints imposed by the analogous provision of NAFTA, Article 1107. This also explains the omission of NAFTA 1102.2 which would have explicitly preserved the prerogative to require that majority of the board of directors be of a particular nationality.

Performance Requirements

> *PERFORMANCE REQUIREMENTS*
>
> *1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:*
>
> *(a) to export a given level or percentage of goods or services;*
>
> *(b) to achieve a given level or percentage of domestic content;*
>
> *(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;*
>
> *(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;*
>
> *(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;*
>
> *(f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement*
>
> > *— is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged*

violation of competition laws, or

— concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the TRIPS Agreement*;*

(g) ***to locate its headquarters for a specific region or the world market in the territory of that Contracting Party****;*

(h) to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively ***from the territory of that Contracting Party;***

(i) ***to achieve a given level or value of research and development in its territory;***

(j) ***to hire a given level of nationals****;*

(k) ***to establish a joint venture with domestic participation; or***

(*l****) to achieve a minimum level of domestic equity participation other than nominal qualifying shares for directors or incorporators of corporations****.*

2. A Contracting Party is not precluded by paragraph I from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a non-Contracting Party, on compliance with any of the requirements, commitments or undertakings set forth in paragraphs I(f) through 1(1).

Highlights indicate key additions or modifications to similar provisions found in the investment provisions of NAFTA. Paragraph 2 needs also to be compared with analogous NAFTA Articles 1106 (3)(4) and (5). It is also relevant to note the absence from MAI text of an exception similar to that of NAFTA Article 1106 (2). That Article allows parties to require investors to use a specified technology to meet health safety or environmental standards without offending the proscription against mandating technology transfer as set out in the Performance Requirement article.

It is also important to stress that the application of these constraints is much broader than for other provisions of the MAI because they apply to investors *of a Contracting Party or of a non-Contracting Party*. In other words, the proscriptions set out under this heading apply to all investors, including domestic investors and

investors from countries that are not a party to this proposed Treaty.

We must also underscore the fact that these provisions of the MAI go well beyond the principle of non-discrimination engendered by the *National Treatment* principle. The broadly worded proscriptions would prohibit such government measures no matter how equitable or even handed their application to foreign investors.

While similar language is found in Article 1106 of NAFTA, they nevertheless stand as a very significant constraint on government policy, legislative and programmatic options. Moreover the more expansive definition of *Investment* under the MAI, substantially enlarges the constraints imposed by these prohibitions.

Finally on this point, under NAFTA, parties are enjoined from imposing or enforcing prohibited measures. Under the MAI, parties "shall not ... impose, enforce or **maintain**" such measures. In our view, this raises the additional concern that *Performance Requirement* constraints may be given retroactive application to requirements, commitments and undertakings that predate the Treaty.

Expropriation

> *IV. INVESTMENT PROTECTION*
>
> *1. GENERAL TREATMENT*
>
> > *1.1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.*
> >
> > *1.2.* ***A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory] measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of another Contracting Party****.*
>
> *2. EXPROPRIATION AND COMPENSATION*
>
> *2.1. A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or* ***measures having equivalent effect*** *(hereinafter referred to as "expropriation")*

except:

a) for a purpose which is in the public interest,

b) on a non-discriminatory basis,

c) in accordance with due process of law, and

d) accompanied by payment of ***prompt, adequate and effective compensation*** *in accordance with Articles 2.2 to 2.5 below.*

2.2. Compensation shall be paid without delay.

2.3. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

2.4 Compensation shall be fully realisable and ***freely transferable****.*

Highlights indicate key additions or modifications to similar provisions found in the investment provisions of NAFTA Most notable among these are the inclusion of Article 1.2 which has no analogue in NAFTA, and the substitution of "measures having equivalent effect" for " a measure tantamount to" nationalization or expropriation. In our view however, by far the most significant difference between these two trade regimes derives from the much more expansive definition accorded "investment" under the MAI. Because the broadly worded constraints of this Article apply to "an investment" their scope and application will be much larger than for the similarly worded proscriptions of NAFTA.

Recently a number of US based corporations have relied upon the *Expropriation and Compensation* Article of NAFTA to support claims against Canada and Mexico. As of this writing, those cases are pending. Each however asserts an aggressive interpretation of the protections accorded by these provisions which would if successful, have far reaching implications for a very diverse array of government policies, law and programs. We provide a more detailed consideration of the implications of this provision in the following assessment.

Finally we should note that this Article of the MAI is unique in that no Draft Reservation has been listed from its full application.

Dispute Settlement

These provisions are too lengthy to reproduce here, and a detailed consideration of the MAI dispute resolution regime is beyond the ambit of this assessment. However, in our opinion, there are very significant implications that are raised by these rules,

for many areas of public policy including the administration of justice. This is particularly true for *Investor-State Procedures*. Recent litigation initiated pursuant to similar provisions in NAFTA has brought to light some of these issues. As noted, we will briefly discuss these cases in assessing the implications of the MAI provision dealing with expropriation and compensation.

While the precedent exists under NAFTA, the MAI would substantially enlarge the application of this adjudicative regime in two obvious ways. The first because of the much larger community of foreign investors that would be accorded access to these extraordinary remedies. The second because the scope of the MAI is much broader than is the case under NAFTA.

While investor state procedures are available under NAFTA we should nevertheless note that they represent a relatively recent innovation of Canada's international investment agreements. As such, they represents a clear departure both from the norms of international commercial arbitration as well as from the principles of dispute resolution under international trade agreements.

Perhaps the most remarkable feature of these innovative developments is the notion of binding foreign investment arbitration without privity of contract. Thus under Article 3(a) of *Investor State Procedures*[1] Canada would give "its unconditional consent to the submission of a dispute to international arbitration...." Thus notwithstanding the absence of any contractual relationship with the Government of Canada, all foreign investors would have an unqualified right to invoke international arbitration to assert claims arising under the MAI. Nor do investors have any obligation to exhaust domestic remedies before resorting to international dispute resolution because the MAI does not adopt the "local remedies rule" which is a feature of Canada's international investment agreements[2].

The "local remedies rule," represents a principle of customary international law which requires the foreign investor to exhaust all local remedies, before resorting to diplomatic protection or other remedies. However under the MAI, the submission of a dispute arising may be submitted directly to international arbitration, without having to first exhaust remedies that may be available under the auspices of domestic law and judicial processes. It is this unconstrained access to the dispute resolution machinery that significantly increases Canada's exposure to investor-state litigation, whatever its actual substance or merit.

Finally we should note, that with one exception[3], Canada has listed no Draft Reservations from MAI *Dispute Settlement* rules.

2. Forest Resource Management

2.1 Forest Policy in British Columbia

Ninety-two percent of productive forest land in British Columbia is Crown land. Jurisdiction over these lands lies with the provincial government, as forests are considered to be matters falling within the "property and civil rights in the province" under Section 92 of the Constitution. The federal government has direct jurisdiction over forests only on lands which it owns or administers. These include Indian reserves, national parks, airports and military lands. The amount of timber harvesting on these lands in British Columbia is not significant. For these reasons it is the potential impact of the MAI on provincial forest policy and law that is the subject of the following assessment.

There is no single source from which a definitive statement of provincial forest policy can be discerned. Rather, the essential elements of British Columbia's public policy goals for this sector must be distilled from the reports of Royal Commissions, several provincial statutes, and from a number of programs that have been established to accomplish provincial objectives.

One of the most succinct encapsulations can be found in *The Forest Renewal Act of BC* which states:

> *2. The purpose of this Act is to renew the forest economy of British Columbia, enhance the productive capacity and environmental value of forest lands, create jobs, provide training for forest workers and strengthen communities.*

In a press release concerning the Jobs and Timber Accord, the Premier put it this way:

> *Getting more jobs and value from each tree cut is a central goal of our Jobs and Timber Accord," said [Premier] Clark.* [Ministry of Forests Press Release September 17, 1997].

The following assessment provides an overview of several initiatives that have been established over the years to achieve these objectives. It is clear that many of these measures are incompatible with the constraints imposed by the MAI. That there should be so many points of conflict between these respective regimes is not surprising given their very disparate objectives.

For example, the essential and overarching goal of provincial forest policy is to optimize the value of BC resources to the benefit of the province, its communities and its residents. By definition, measures that favour Canadian citizens, companies and communities, discriminate against foreign citizens and enterprises not based in the province. Such measures represent precisely the discriminatory treatment that MAI rules have been drafted to expunge. It is from this fundamental contradiction in essential objectives that many of the following conflicts derive. Moreover under Performance Requirement provisions, the MAI goes substantially beyond the principle of non-discrimination by prohibiting a diverse array of government measures.

The survey that follows is intended to be illustrative of the various points of departure between provincial objectives for this resource sector and the rules of present MAI proposals. It is by no means an exhaustive survey of all of the contradictions that might come to the fore should this investment treaty be implemented. Finally, and as noted, the premise for the following assessment assumes the unameliorated application of MAI rules to provincial initiatives. The extent to which provincial policy, law and programs may be exempt from the unmitigated application of MAI rules is considered in parts 4 and 5 below.

2.2 Forest Law in British Columbia

The two most important elements of forestry law in British Columbia are the regulation of the tenure system under the *Forest Act*, R.S.B.C. 1996, c.157, which governs the exercise of rights to harvest and manage Crown forest land; and the regulation of forest practices on those lands, under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

2.2.1 The Tenure System

Rights to harvest and manage Crown forest land can only be acquired through a tenure agreement issued under Part 3 of the *Forest Act* . There are ten types of tenure agreements currently authorized in the legislation. These include a) Forest Licence, b) Timber Sale Licence, c) Timber Licence, d) Tree Farm Licence, e) Pulpwood Agreement, f) Woodlot Licence, g) Free Use Permit, h) Licence to Cut, i) Road Permit, and j) Christmas Tree Permit.

Most of the timber from public lands in the province is harvested under the first four of the above tenures. For the most part, rights to harvest timber on public land were granted long ago, and agreements have been renewed or replaced over the course of time. Few replaceable, major licences are issued for new areas of Crown land, as most of the operable forest land in the province is considered to be "allocated."

There are several ways in which the Province has used the tenure regime it has established to accomplish provincial economic, and more recently environmental, goals. Many of these are likely to run afoul of MAI constraints, as the following examples illustrate.

2.2.1.1. Discriminatory Allocation

Certain forms of tenure are available only to restricted classes of applicants. For example, a regional or district manager may specify that applications for timber sale licences only will be accepted from one or more categories of *small business forest enterprises* established by regulation (see discussion of the *Small Business Forest Enterprise Program* below). The following descriptions of the woodlot licence program and initiatives to establish community-based forest tenures also illustrate

the types of conflicts that exist with MAI constraints.

Woodlot Licence Program

Perhaps the most definitive constraints on the allocation of tenure can be found in the provisions of the *Woodlot Licence Program* which explicitly favour locally held and smaller scale tenures. It is also significant that this program is unique to British Columbia in so far as it provides access to public lands by way of small area based tenures. An applicant for a woodlot licence must satisfy various criteria which are set out in Sections 44 and 45 of the *Forest Act*.

BC *Forest Act* Requirements	**Conflicting MAI Provisions**
S.44 (4) An application for a woodlot licence must be made to the district manager or regional manager in a form required by the regional manager and must include: (a) a description of any private **land owned by the applicant contiguous to or in the vicinity** of the area of Crown land described in the advertising, and (b) a declaration by or on behalf of the applicant attesting to the qualifications of the applicant for a woodlot licence. (5) A woodlot licence must be entered into only with (a) **a Canadian citizen or permanent resident of Canada who is 19 years of age or older**, (b) **a band as defined in the *Indian Act* (Canada),** or (c) **a corporation, other than a society, that is controlled by persons who meet the qualifications referred to in paragraph (a)**. (6)A woodlot licence must not be entered	**National Treatment – Most Favoured Nation Treatment**: Parties shall accord to foreign investors no less favourable treatment with respect to the right of establishment, acquisition, expansion, operation ….. of investments. **Senior Management and Board of Directors:** No party shall require an investor of another party to appoint as directors individuals of any particular nationality. **Performance Requirement – subparagraph (g)** No party shall require an investor to locate its headquarters ... in its territory. **Performance Requirement – subparagraph** (k) No party shall require an investor to establish a joint venture with domestic participation. **Performance Requirement – subparagraph (l)** Parties shall not require investors to achieve a minimum level of local equity participation.

into with a person, corporation or band that:

> (a) **owns or leases, or controls a corporation that owns or leases, a timber processing facility in British Columbia, or**
>
> (b) **holds another woodlot licence**.

(7)The regional manager or district manager must evaluate all applications for a woodlot licence and, in evaluating the applications, he or she must consider

> (a) the **place of residence of every applicant** and, if the applicant is a corporation, the place of residence of each of its members,
>
> (b) the location and character of any private land, owned by every applicant, **contiguous to or in the vicinity of the area** of Crown land described in the applications, and
>
> **(c) other factors** that the regional manager or district manager considers to be **consistent with the goals of the woodlot licence program**.

Commentary

There are several points of contradiction between these statutory requirements and draft MAI proposals. The *proviso* that woodlot licences only may be entered into with Canadian citizens or permanent residents 19 years of age or older, a band as defined in the *Indian Act (Canada)*, or a corporation that is controlled by persons who meet these qualifications, is clearly incompatible with national treatment. These same requirements would also be in breach of constraints concerning *Senior management and Boards of Directors,* as well as the *Performance Requirements* noted above.

The requirement that an applicant own property adjacent to or in the neighbourhood of the woodlot licence can also be seen as discriminating against foreign investors who would not as often be property owners in the local community. The fact that this particular constraint is indifferent on its face to the

nationality or origins of the application would not protect it from the argument that it represents *de facto* discrimination against foreign investors.

On the other hand, the disqualification from eligibility of persons, corporations or bands that own or lease or control timber processing facilities in British Columbia is arguably inconsistent with the national treatment right to acquire and establish investments because it discriminates against foreign investors who already have made a particular type of investment in the jurisdiction. The fact that this provision would apply equally to a Canadian investor in similar circumstances, would not necessarily answer the complaint that it nevertheless favours some investors more than others.

Community Tenure

Another area where provincial policies concerning the allocation of tenure are likely to conflict with MAI provisions concerns initiatives currently underway to establish community-based tenure regimes. The provincial government is presently considering introducing a new form of tenure, possibly known as a community forest licence, which would make rights to Crown forest available to local areas in order to encourage greater local control in the management of forest land around rural communities. Three pilot projects are presently under discussion.

This is how the Ministry of Forests recently described its new initiative:

> *In British Columbia, community forestry can be loosely defined as community involvement in local forest lands for community benefits. It is a means of maintaining forest-related community lifestyles and values, while providing jobs and revenue that contribute to community stability.*
>
> *A "community" is often described by its geographical location—village, unincorporated town, municipality, regional district—and the entire range of interests represented by the people who live there.*
>
> *Many communities have expressed a desire for more control over harvesting and forest management operations to address the following objectives:*
>
> ***sustaining local manufacturing facilities;***
>
> ***creating jobs for their young people;***
>
> ***providing for new ventures such as value-added manufacturing; and***
>
> ***maintaining forest values such as visual quality,***

recreation

opportunities and environmental integrity.

As is the case for other forms of tenure allocation that seeks to foster economic development and benefits in favour of BC residents, businesses and communities, community forest tenure initiatives are in conflict with the requirement *for National Treatment*. Depending upon how local economic development is linked to permits and licences, community tenure initiatives may also violate *Performance Requirements* constraints as well. Moreover none of the stated objectives of this program, and high-lighted above, would be recognized as a legitimate reason for derogating from the constraints of MAI provisions.

Finally on the issue of community tenure initiatives is the question of whether such new measures would be allowed under a "bound" reservation, that is, one that applies only to existing non-conforming law and policy. We return to this issue under the heading "Reservations" below.

2.2.1.2 The Requirement for Value-Added Production

Under the *Forest Act,* certain tenure agreements require their holders to operate timber processing facilities in exchange for the right to harvest timber from public lands. This requirement to invest in value-added production can be found in several provisions of the *Forest Act*, including:

BC *Forest Act* Requirements	**Conflicting MAI Provisions**
13. (3) An application for a forest licence must (c) if required in the invitation for applications advertised under subsection (1), include a proposal, providing information the minister or a person authorized by the minister requests, for (i) **continuing, establishing, or expanding a timber processing facility in British Columbia,** and (ii) meeting the objectives of the government in respect of any of the items referred to in subsection (4),	**Performance Requirement-subparagraph (b):** Parties shall not require investors to achieve a given level or percentage of domestic content. **Performance Requirement-subparagraph (c):** Parties shall not require investors to purchase, use or accord a preference to goods produced or services provided in its territory ... **Performance Requirement-subparagraph (h):** Parties shall not require investors to supply one or more of the goods it produces ..... to a specific region ..... **Performance Requirement-**

and

(4) The minister or a person authorized by the minister must evaluate each application, including its potential for

(a) **creating or maintaining employment opportunities** and other social benefits in British Columbia,

(b) providing for the management and utilization of Crown timber, (c) **furthering the development objectives of the government**,

(d) **meeting objectives of the government in respect of environmental quality and the management of water, fisheries, wildlife and cultural heritage resources**, and

(e) **contributing to government revenues**

Section 14. **A forest licence**

(f) **must require its holder**, in accordance with a proposal referred to in section 13 (3) (c), as modified at the request or with the approval of the minister or a person authorized by the minister,

(i) **to continue to operate, to construct or to expand a timber processing facility**, and

(ii) **to carry out specified measures to meet the objectives of the government in respect of any of the items referred to in section 13 (4)**;

subparagraph (i) Parties shall not require investors to hire a given level of nationals

A similar statutory scheme is set in sections 33(5) and 35(1) of the *Act* with respect to the issuance of tree farm licences. In addition, s.35(1)j requires that every holder of valid tree farm licence contract out at least 50% of the logging to other companies. This particular requirement would likely also offend the *Performance*

Requirement rule prohibiting the imposition of requirements that investors establish joint ventures (subparagraph (k)).

Finally, Part 10 the *Act* is titled "Manufacture in British Columbia" and section 127 provides as follows:

BC *Forest Act* Requirements	**Conflicting MAI Provisions**
127. Unless exempted under this Part, timber that is harvested from Crown land, from land granted by the government after March 12, 1906 or from land granted by the government on or before March 12, 1906 in a tree farm licence area, and wood residue produced from the timber, must be: (a) **used in British Columbia**, or (b) **manufactured in British Columbia** into (i) lumber, (ii) sawn wood products, other than lumber, manufactured to an extent required by the minister, (iii) shingles or fully manufactured shakes, (iv) veneer, plywood or other wood-based panel products, (v) pulp, newsprint or paper, (vi) peeled poles and piles having top diameters less than 28 cm and fence posts, (vii) Christmas trees, or (viii) sticks and timbers having diameters less than 15 cm, ties and mining timbers	**Performance Requirement-subparagraph (b):** Parties shall not require investors to achieve a given level or percentage of domestic content. **Performance Requirement-subparagraph (h):** Parties shall not require investors to supply one or more of the goods it produces ..... to a specific region ..... **Performance Requirement-subparagraph (j)** Parties shall not require investors to hire a given level of nationals...

Commentary

In our view, many of the measures intended to foster community economic

development as the *quid pro quo* for the right to harvest trees from public land are vulnerable to challenge as offending the *National Treatment* and *Performance Requirement* rules. The ultimate resolution of such a dispute will also depend upon the particular details of how forest and tree farm licences are actually granted, particularly with respect to the broad discretion that officials are provided under the statutory scheme.

For example, the exemption noted in Section 127 of the *Forest Act* above, may be granted where Cabinet or the Minister of Forests is satisfied that the timber or wood residue is surplus to the requirements of timber for processing facilities in British Columbia, that it cannot be processed economically in the vicinity of the land from which it is cut or produced, or transported economically elsewhere in the province. The exemption is also available to prevent a waste of or improve the utilization of timber cut from Crown land. It is unlikely that any of these criteria could be justified under the MAI should an exemption be granted to one investor and denied to others " in like circumstances."

While it is conceivable that these provisions might be read in a manner consistent with *National Treatment* requirements, it is very unlikely that they could be reconciled with the *Performance Requirements* noted above. Moreover these latter constraints apply to all investors, domestic and foreign.

The issue of whether the application of *Performance Requirement*s might be moderated if the type of licence and permit described here is considered an "advantage" pursuant to paragraph 2 of Performance Requirement rules, is one we will canvass in part 4.1.2 below.

2.2.1.3 Tenure Reallocation and Reform

Most public forest land in British has been allocated for decades. In order to ensure that licence holders comply with the terms of their tenure agreements, and to allow some opportunity for tenure reallocation, various mechanisms have been established to provide for the periodic review of tenure assignments, and in some cases the cancellation or reallocation of tenure commitments.

One of the principal devices for achieving this goal is set out in several sections of the *Forest Act* which requires a "claw back" of 5% of the allowable annual cut upon approval by the Minister of Forests of applications to transfer tenure, or approval of the change of control of a corporation that holds a tenure agreement. This is one of the only opportunities the provincial government has to free up rights to allocated forest land, and make them available to new entrants. These reallocations or claw backs have occurred historically by act of the Legislature without compensation to tenure holders.

The provisions of the *Forest Act* that provide authority for reducing tenure holdings are too lengthy to reproduce here, but the following provides a summary of several

key elements of this statutory scheme:

BC *Forest Act* Requirements	Conflicting MAI Provisions
Section 54 Consent to Transfer This section requires the Minister's prior written consent with respect to various transactions concerning the disposition of tenure agreements, the restructuring or disposition of corporations holding such agreements, or the sale of private land in an area that is the subject of tree farm licence or a woodlot license. The section applies to woodlot licences, road and other permits.	**National Treatment and Most Favoured Nation Treatment**: Each party shall accord to foreign investors treatment no less favourable than accorded its own investors with respect to the sale or disposition of investments. **Transfers:** Parties shall ensure that all payments relating to an investment may be freely transferred
Section 55 Cancellation for Failure to Obtain Consent. This section provides for the cancellation of the tenure agreements noted in the preceding provision if the holder has failed to obtain the Minister's prior consent. The Minister is also given the discretion to waive non-compliance in certain cases.	**Expropriation and Compensation:** A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect……
Section 56 Reduction in Annual Allowable Cut (1) If the minister gives consent under section 54 or is deemed to have given consent under section 55 (2): (a) **in respect of a replaceable agreement that is a forest licence or timber sale licence, the allowable annual cut specified in the licence is reduced by 5%, and** (b) in respect of an agreement that is a tree farm licence, the government portion of the allowable annual cut available to the licence holder is reduced by 5%. ……. (10) **No compensation is payable under this Act or otherwise in respect of a**	**Performance Requirement-subparagraph (b):** Parties shall not require investors to achieve a given level or percentage of domestic content. **Performance Requirement-subparagraph (h):** Parties shall not require investors to supply one or more of the goods it produces to a specific region **Performance Requirement-subparagraph (j)** Parties shall not require investors to hire a given level of nationals. **Expropriation and Compensation:** A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect……

reduction under subsection (1).

(11) The minister may waive the requirements of subsection (1) and (5) in respect of

> (a) a disposition of an agreement or an interest in an agreement to a business enterprise, as defined in the *Job Protection Act*, that is a participant in an economic plan under that *Act* and acquires the agreement or interest disposed of in furtherance of the economic plan,
>
> (b) a change in or acquisition of control of a corporation that occurs in furtherance of an economic plan, in which the corporation is a participant, under the *Job Protection Act*, or

(c) an amalgamation of corporations that occurs in furtherance of an economic plan under the *Job Protection Act*.

Section 66 Inadequate Volume

(as above)

66. (1) **If the volume of timber harvested** during a calendar year under a forest licence replaceable under this *Act* **is less than the minimum volume required** by section 64 (1) (a) to be harvested in the calendar year, the regional manager, by a notice served on the holder of the licence, **may reduce the allowable annual cut** authorized under the licence or a replacement for it.

Section 71 Reduction of Cut for Mill Closure

This section authorizes the **Minister to reduce the annual allowable cut specified in a tenure agreement where the holder of that agreement is an owner or operator of timber processing facility.**

Commentary

We have not to this point considered the potential impact of MAI rules concerning expropriation. However in light of the broadly worded character of this prohibition, its impacts may well overshadow those of any other provision of this investment treaty. The far reaching implications of this provision have been only recently been brought to light by claims that have been brought under the identical provisions of NAFTA. One of these is a claim by Ethyl Corporation of Richmond, Virginia against the government of Canada. Two others have been brought by other US-based corporation against Mexico. In the claim against Canada, Ethyl is seeking $210(US) million in compensation because of Canadian legislation banning the import and inter-provincial trade of a gasoline fuel additive, manufactured by Ethyl Corporation in the US and processed at a facility it owns in Sarnia, Ontario.

In its claim, Ethyl Corporation argues that the federal statute violates the national treatment, performance requirement and expropriation provisions of NAFTA. These provisions have essentially been replicated in the MAI. The case is currently before an arbitration panel convened under the auspices of the UNCITRAL commercial dispute resolution process.

From news reports about one of the cases involving the government of Mexico, we understand that Metalclad, a US based corporation, is claiming compensation under the provisions of NAFTA by reason of the refusal of a Mexican state government to issue it a permit to operate a hazardous waste treatment facility. Metalclad had purchased that facility from a Mexican company after it was closed by state officials for non-compliance with state environmental laws. Accounts do not reveal whether Metalclad has asserted its claim on grounds other than that the refusal of the state to issue it a permit represents a measure that is "tantamount to expropriation" under NAFTA. Under the MAI the phrase "tantamount to... expropriation" is now been replaced with the phrase "having equivalent effect". In neither NAFTA nor the MAI is the word "expropriation" defined.

We understand that the other case against Mexico has been brought by California-based investors operating under the company name "Desona." In this instance the claim concerns an investment in a solid-waste landfill project in Naucalpan de Juarez. The company alleges that a decision by a local county government expropriated its investment in violation of NAFTA Chapter 11. The first session of the tribunal was to be held Sept. 26, 1997. Because of the secretive nature of these proceedings, few details are available

It is not our purpose here to provide a detailed consideration of this provision of the MAI; however, the following points should be noted.

The first concerns the significantly different ways in which expropriation is dealt with under the legal regimes of the countries party to MAI negotiations. While we have not canvassed those differences, it is clear that US law concerning expropriation is significantly more protective of private property rights than are our statutory and common law rules. The difference in part springs from the fact that where the protection of private property rights is a feature of the US constitution, it

has no similar status in Canada. Moreover it is likely that international legal principles are more closely aligned with US legal traditions than on our own.

Second, the degree to which the concept of "expropriation" has been liberally defined may be moot given the very broad qualifying language included in the MAI rule on this matter. Thus, even measures that "indirectly" expropriate or that have the "equivalent effect" of expropriation are in many cases prohibited, and in all cases, compensable.

Third, the expansive definition of investment to include such matters as rights under contract, shares, stocks, claims to money, or licences and permits also substantially enlarges the domain of proprietary rights that this rule might be invoked to protect.

It is no doubt for these reasons that some commentators have questioned whether there is any sphere of government initiative – particularly with regard to the exercise of contractual or regulatory authority – that would not be vulnerable to challenge under this rule, where the result is to diminish the value of investments as defined by the MAI. Until this rule has been tested by dispute resolution, or by the courts, and some definitive interpretation is available, it would not be prudent in our view to discount the expansive interpretations of this provision that are being asserted by corporate claimants under similar provisions in NAFTA. It is from this sense of caution that we have identified a broad array of resource related initiatives as being vulnerable to the argument that, in diminishing the full potential of any given investment, these measures are actionable under MAI provisions on expropriation.

Small Business Forest Enterprise Program (SBFEP)

The SBFEP is an example of a policy initiative in the area of forest tenure that was made possible by the reallocation rules noted above. The SBFEP was established in 1981 to foster economic diversity in the forest sector, including value-added production, increased employment, and integrated forest management. Cut allocations necessary to support the program would be made available pursuant to the reallocation provisions noted above. In fact in 1988 the SBFEP was expanded through a one time take back of 5% of the provinces Annual Allowable Cut from all major tenures. We have already noted the various MAI provisions that may come into play both with respect to the reduction in cut allowances and by reason of the preference that is given to local or community economic development. Authority for this program is found under S.21 of the *Forest Act*.

2.2.2 Forest Planning

The provincial government currently has a policy to conduct land and resource management planning across the province. Three regions of the province have land use plans which were initially generated through the Commission on Resources and

Environment but approved by government. These are the Kootenay Boundary Land Use Plan, the Cariboo Chilcotin Land Use Plan, and the Vancouver Island Land Use Plan. Land use planning for the remainder of the province is being conducted through a Land and Resource Management Planning Process (LRMP), which includes involvement by several agencies of government and interested stakeholders.

The outcome of all of these land use planning exercises is commonly identification of areas to be protected under the Protected Areas Strategy, and the zonation of the remainder of the forest land base according to resource use priorities. For example, it is common for an LRMP to recommend three zones such as an enhanced management zone (in which timber harvesting and intensive silviculture treatments have priority), special resource management zones (in which special management constraints are to be applied in recognition of other forest values such as wildlife, recreation and tourism), and integrated resource management zones (which preserve more or less the *status quo*).

With the exception of Protected Areas, there is no policy or expectation of compensation for diminished forest resource extraction opportunities as a result of zonation.

Elements of land use plans which relate to forest operations become legally binding under the *Forest Practices Code of British Columbia Act* through designation as "resource management zones" with specified objectives. The Code distinguishes between "strategic" plans, which include Resource Management Zones, Landscape Units and Sensitive Areas, and "operational" plans which include Forest Development Plans, Silviculture Prescriptions, Logging Plans and Stand Management Plans. Operational plans are prepared by tenure holders, with the exception of timber sale licences issued under the Small Business Forest Enterprise Program, in which the Ministry of Forests conducts the planning. Operational plans prepared by licensees must comply with the objectives specified in strategic plans, as well as the content requirements of the Code.

Commentary

MAI rules concerning expropriation may come into play either to bolster current claims by foreign affiliated investors for compensation with respect to the designation of protected areas, or to support claims for compensation for planning related constraints that have not traditionally been considered compensable.

2.2.3 Harvest Regulation

The rate of logging in British Columbia is determined by the Chief Forester under section 8 of the *Forest Act*. The Chief Forester sets an allowable annual cut (AAC) at least once every five years for tree farm licence areas, in which the right to harvest timber is more or less exclusive for the tenure holder, subject to obligations to have

a specified amount the AAC harvested by contractors. Tree farm licences are considered area-based tenures. The Chief Forester must also determine, at least once every five years, the allowable annual cut for each timber supply area. This AAC is apportioned among licensees holding volume-based tenures. In most parts of the province, the apportionment has already occurred through historic issuance of tenure. The apportioned volume is sometimes referred to as "quota." Any AAC reductions affect licensees proportionally according to their quota.

In determining allowable annual cuts, the Chief Forester operates as an independent decision maker. The legislation requires that he review allowable annual cut determinations at least once every five years, and to this end his office has undertaken a systematic review of cutting levels over the last five years under a program known as the Timber Supply Review. Under the legislation, no compensation is payable for reductions in allowable annual cuts, unless they relate to government decisions to withdraw land from forestry uses such as the creation of a provincial park. Where this occurs, compensation is payable only to the extent that it exceeds 5% of the allowable annual cut, or in the case of tree farm licences, the equivalent land area that would contribute to 5% of the cut.[4]

Commentary

We have already considered various issues concerning the way in which cut allocations are addressed under the tenure system for provincial forest allocation. To these should be added the issue of compensation under MAI expropriation rules. Without the benefit of safeguard or reservation, it is very likely, in our view, that current practices could be successfully challenged under this rule particularly with respect to the *de facto* ceiling of 5% for allocation reductions.

2.2.4 Forest Practices

In 1994, British Columbia passed legislation governing forest practices, the *Forest Practices Code of British Columbia Act* (the "Code"). The Code took effect on June 15, 1995. The main approach of the Code is to regulate forest practices by requiring tenure holders to prepare operational plans according to content requirements set out in regulations, and secondly by specifying certain standard forest practice requirements across the province. Eighteen regulations have been promulgated under the Code. Some of these are considered *planning* regulations, while others are considered *practices* regulations. By government direction, the *Forest Practices Code* has been developed to result in no more than a 6% reduction in allowable annual cuts across the province. No compensation is payable for this anticipated reduction.

Commentary

Here again the implications of the expropriation rule must come into play. As has been noted with respect to other regulatory initiatives that actually restrict access to

particular areas of a given tenure, we believe that substantial grounds exist for a tenure holder to claim compensation under this rule. However in regulating harvesting techniques and other matters that determine how harvesting takes place, provincial regulations may indirectly diminish the value of a given licence or permit. It is not unreasonable, in our view, to anticipate such arguments by those subject to such regulatory constraints, whether these are asserted formally under MAI dispute resolution, or informally as part of a company's negotiating strategy with government.

2.2.5 Forest Renewal BC.

Forest Renewal BC. (FRBC) is a Crown corporation which was created to invest a portion of the revenues from the logging of public lands back into the forest economy. The overall objectives are described by the FRBC this way:

> **Enhanced Forestry:** Giving back to the forests through enhanced forestry (Silviculture) improved reforestation and tending of forests; increasing the lands available for planting new trees; silviculture research and development.
>
> **Environment:** Restoring and Protecting the forest environment enhancing all environmental values within BC's forests (such as stream rehabilitation and wildlife habitat).
>
> **Workforce:** Creating new skills and jobs for forest workers supporting the creation of new jobs, training programs and adjustment programs; maintaining existing jobs in harvesting and processing; training for new forestry techniques, intensive renewal and environmental cleanup; training to increase productivity.
>
> **Value-Added:** Getting more jobs and value from every tree cut promoting industry diversification and increased processing of wood supply; increasing secondary manufacturing while maintaining primary production; identifying markets for value-added products.
>
> **Communities:** Strengthening the communities that rely on the forests supporting forestry-related community development and adjustment.

The programs funded by FRBC, and the way in which they are delivered, are therefore strategically chosen to accomplish broader social and economic goals.

Under the *Forest Renewal Act,* RSBC 1995, c.160, s.4, the corporation must ensure that its spending is regionally equitable, and it must be responsive to general and special directions made by Cabinet. The general principle behind FRBC is that the programs expenditures are incremental to existing obligations of forest licensees in

order to avoid complaints that the industry is being subsidized. FRBC-funded activities are carried out through agreements with individual forest companies, First Nations, labour, government agencies, academic and others comprising the FRBC "partnership."

The Crown corporation has an 18-member board, of whom 12 members are non-government appointments. Board members represent the above noted constituencies and the board oversees expenditures in five strategically chosen program areas, all of which have multi-stakeholder committees to advise the corporation on its programs and investments.

The five programs areas are Land and Resources, Environment, Workforce, Communities and Value-Added. A sampling of the activities funded under the Land and Environment programs includes enhanced silviculture, watershed restoration, resource inventory, research, forest recreation, backlog silviculture, woodlot expansion, forest health, road and bridge maintenance and recreation infrastructure maintenance. Investments in worker and community transition include programs for forest worker transition, employment and training, community economic development, and research and technology. Programs to aid diversification of the forest industry include the financing of value-added projects, forest community businesses, wood supply, value-added marketing and research.

Although FRBC initially implemented these programs by responding to *ad hoc* proposals and applications, recent restructuring in the FRBC "delivery model" has occurred to emphasize more strategic spending, focused on the particular needs of regions, greater use of multi-year agreements to accomplish long term goals and more stable employment for workers in transition. This restructuring was one component of the provincial government's Jobs and Timber Accord announced in the spring of 1997.

With the assumption that the discretion provided to FRBC will be exercised to achieve the overall objectives of the Agency, the following points of conflict with the provisions of the MAI can be anticipated.

***Forest Renewal Act* Requirements**	**Conflicting MAI Provisions**
4. (1) Forest Renewal BC must: (a) plan and implement a **regionally-equitable program of expenditures** in	**National Treatment – Most Favoured Nation Treatment**: Parties shall accord to foreign investors no less favourable treatment with respect to the right of

order to carry out the purpose of this *Act*;

(a.1) **give first priority hiring, on Forest Renewal BC funded projects, to eligible British Columbia forest workers** who have experienced or are facing work reductions, and

(b) do other things, consistent with this *Act*, that the Lieutenant Governor in Council may authorize.

(2) Without limiting subsection (1), Forest Renewal BC may:

(a) enter into contracts with individuals, First Nations, businesses, institutions, local governments, groups and other organizations for the delivery of programs within the purpose of this *Act*;

(b) subject to the approval of the Lieutenant Governor in Council, provide financial assistance by way of grant, loan or guarantee; and

(c) subject to the approval of the Lieutenant Governor in Council, enter into agreements with the Government of Canada, the **government of the province, First Nations or a local government,** or with an official or agency of any of them.

(3) Forest Renewal BC must comply with any general or special direction, with respect to the exercise of its powers and functions, that is made by order of the Lieutenant Governor in Council.

establishment, acquisition, expansion, operation ..... of investments.

Senior Management and Board of Directors: No party shall require an investor of another party to appoint as directors individuals of any particular nationality.

Performance Requirement-subparagraph (b): Parties shall not require investors to achieve a given level or percentage of domestic content.

Performance Requirement-subparagraph (c): Parties shall not require investors to purchase, use or accord a preference to goods produced or services provided in its territory

Performance Requirement – subparagraph (g) No party shall require an investor to locate its headquarters ... in its territory....

Performance Requirement-subparagraph (h): Parties shall not require investors to supply one or more of the goods it produces ..... to a specific region .....

Performance Requirement-subparagraph (i) Parties shall not require investors to hire a given level of nationals

Performance Requirement – subparagraph (k) No party shall require an investor to establish a joint venture with domestic participation.

Performance Requirement – subparagraph (l) Parties shall not require investors to achieve a minimum level of local equity participation.

While the potential conflicts between FRBC programs and initiatives are similar to those that have been identified above, there is a strong argument that FRBC funding would fall squarely within the definition of an "advantage" set out in subparagraphs 2 and 3 of the performance requirement rules. In this case provincial prerogatives would be significantly less encumbered by the constraints of this rule concerning the requirement to locate production, construct or expand facilities, provide

particular services, train or employ workers, or carry out research and development.

However even in this case, conflicts with *National Treatment*, *Board of Directors* and *Performance Requirements* set in subparagraphs (a) through (e) noted above, would still apply. much of the text of these subparagraphs remains bracketed however, and other MAI provisions would apply notwithstanding the characterization of FRBC funding. We will return to consider this issue in part 4.1 below.

2.2.6 The Jobs and Timber Accord

The Jobs and Timber Accord is an agreement reached between the provincial government and major forest companies which links certain incentives regarding tenure privileges to job creation. The Accord aims to create 39,800 new forest jobs, both direct and indirect, by the year 2001 through a combination of initiatives. The jobs are to be created through increased secondary manufacturing, increased logging (of the full allowable annual cut), reforestation and intensive silviculture funded by FRBC, community forest pilot projects, and job sharing.

In return for increasing the number of jobs through these measures, government has held out the incentive to industry of priority access to Forest Renewal BC funds; eligibility for exemption from the 5% "take-back" of the AAC which normally applies to the sale or transfer of a licence; eligibility for access to unallocated AAC where it becomes available; priority for innovative forestry practices agreements; and eligibility to carry forward undercut volumes where job creation or maintenance can be demonstrated.

The Accord also incorporates measures to increase unionization of FRBC-funded silviculture work on the coast; create a forest worker agency to assist displaced forest workers; and establish industry's agreement to a layoff procedure involving 4 months notice.

For the reasons noted above with respect to similar objectives framed by provincial forest policy and law, much of the substance of this Accord would be incompatible with MAI provisions. Furthermore, given the retroactive application of MAI rules, it is not clear that the Province could hold companies to any commitments they may have made under the Accord.

2.3 Summary

As this assessment illustrates the essential economic development and conservation goals of BC forest policy and law management policy are very difficult to reconcile with the objectives of the MAI. One critical point of departure arises in consequence of provincial policies that favour Canadian citizens, companies and communities when it comes to allocating crown resources. These are likely to offend National Treatment and other MAI rules proscribing discriminatory treatment of foreign

investors.

Other contradictions arise because many of the devices the Province has adopted to further its economic, and employment policies for this sector run afoul of the broadly worded prohibitions set out in the Performance Requirements Article of the MAI. Moreover these provisions of the MAI apply equally to domestic, and foreign investors (whether from a Party of non Party) and would simply prohibit many of the measures that are currently integral to government policy in this area.

Another important constraint on government prerogatives for the forest sector arises under the *Expropriation and Compensation* Provisions of the MAI. The broad wording of these provisions may require extensive revisions to several aspects of provincial forest policy and law, particularly concerning tenure and habitat protection. While similar provisions exist under NAFTA, the MAI would substantially enlarge their scope and application. Moreover recent litigation relying upon this NAFTA precedent raises the prospect of these constraints being given much broader application than the Canadian government appears to have anticipated when negotiating these provisions.

Given the numerous and extensive character of these conflicts, in our view it is not possible to reconcile current provincial forest policy and law with the provisions of the MAI. This leaves the question whether any exception and or reservations would operate to ameliorate these conflicts. This issue is addressed in parts 4 and 5 below.