The Once and Future MAI:
International Investor Rights,
The Environment, and Your Community

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Introduction

The Multilateral Agreement on Investment is an international treaty for investor, corporate and property rights that was to be established under the auspices of the Organization for Economic Cooperation and Development (OECD). But when France withdrew from MAI negotiations in October 1998 it effectively scuttled efforts to

establish this global regime in the OECD.

However, the MAI is far from dead, and Canada is already actively promoting similar initiatives at the World Trade Organization and other fora. In fact, the prototype for the MAI is alive and well in the North American Free Trade Agreement (NAFTA) where it currently serves as an important weapon for attacking government efforts to achieve health and environmental protection, and other societal goals. Similar investor protections can also been found in dozens of bilateral investment agreements that Canada has quietly negotiated over the past few years.

It is also important to understand that the MAI and the investment rules of NAFTA are elements of a larger corporate strategy to establish the rules upon which global systems of production and trade depend. Often described as globalization, the common themes of this agenda — de-regulation, privatization and free trade — explicitly seek to reduce the authority of governments to regulate corporate activity in the public interest. For these reasons understanding the MAI, its origins and, the larger context within which it exists, is as relevant today as it was before the wheels recently came off the OECD-MAI cart.

De-regulation by any other

In the simplest terms, the investment rules of NAFTA and the MAI create a broadly defined list of investor rights to conduct business free from government oversight or regulatory control. This is accomplished by explicitly prohibiting an extensive catalogue of government policies, laws and programs. To guarantee that governments respect these new limits on their authority these treaties also include very powerful and secretive legal enforcement mechanisms that can be invoked by any foreign investor.

The following environmental analysis of these investment agreements paints a disturbing picture of far-reaching and decidedly adverse impacts on environmental policy and law in Canada. It demonstrates how, in a fundamental way, treaty-based investor rights will undermine the environmental and conservation goals so many environmentalists are working to achieve.

For these reasons it is critical for those concerned about the environment to join a growing number of citizen groups, municipalities, workers, small businesses and even governments who are now working to raise public awareness about, these international treaties. While the subject of international trade and investment agreements is unfamiliar to most of us, in the context of globalization, we simply can not afford to ignore the forces that have now emerged as among the most important determinants of Canadian policy and law.

In fact, NAFTA`s investment rules have already allowed US-based corporations to successfully challenge or derail Canadian environmental and public health protection laws. Therefore the challenge for Canadians is not only to prevent the extension of

these investor rights in international treaties like the MAI, but also to insist that Canada renegotiate the investment chapter of NAFTA and the other investment treaties it has bound us to.

The key elements of the MAI have already been established in NAFTA, where they are now proving to be powerful weapons to deter and even dismantle government efforts to protect the environment.

The following analysis examines how the agenda of investor-rights protection will impact the environment. It begins by providing an overview of the context within which these treaties are being pursued and, then describes how their essential provisions operate. Because of the importance of forest, fisheries and other natural resources to BC, a more detailed look at how these agreements impact these sectors is also included.

Finally we discuss the need for new rules to regulate the activities of foreign investors in Canada, and of our own investors in other countries. Unless we find ways to redirect the course of current trade and investment policies, it seems that we have little hope of confronting the enormous environmental challenges that loom so large on our horizon.

The "Stealth Agreement"

It has been the deliberate strategy of those negotiating the MAI to limit public awareness of and debate about the treaty. Indeed for some time, negotiations proceeded entirely behind closed doors and were actually to have been concluded more than two years ago, well in advance of its terms being made public. This approach appears to be based on the well founded assumption that the MAI would not survive the light of public scrutiny.

In fact negotiations were such a closely guarded secret that even within government, few ministers were aware of its progress or significance. Some members of the Liberal government have even denounced the MAI as a "stealth agreement."[1]

Fortunately a leaked copy of the text became available just before negotiations were originally to have been concluded. Ever since, protests have grown as the profound dimensions of this investment treaty have become apparent to citizens in Canada and other OECD countries. In addition to opposition from public interest and labour groups a number of governments are now voicing their concerns and opposition to the MAI.

It is significant that the two countries to have withdrawn from MAI negotiations, France and Australia, are the only ones to have undertaken meaningful public consultations which led both to reject the MAI as fundamentally flawed.[2] Nevertheless our federal government remains steadfast in support of the MAI and

continues to reject calls for meaningful public hearings. It still seems intent on negotiating international agreements to protect foreign investors without giving Canadians an opportunity to discuss the implications of its agenda.

Make Up Your Own Mind

While the issues raised by the investment rules of the MAI or NAFTA will be unfamiliar to most of us, its provisions are not particularly hard to understand. For this reason we have, where appropriate, reproduced the wording of these treaties as part of this analysis.

The other reason we decided to include portions of the text was to confront the most common response to critiques of these investment agreements — disbelief. "Surely no government no matter how short sighted, would support a treaty so destructive of its own authority" or, "it isn't possible that any agreement could have such sweeping impacts." This skepticism is understandable, so we have included the actual text — to enable readers to judge for themselves. The entire MAI text can now be found on several web sites, including the OECD's: http://www.oecd.org

The MAI and Globalization

The MAI represents a critical element of a larger strategy to codify the rules upon which a global system of investment, production and trade depend. While this agenda is fundamentally the project of the world's largest corporations, it also enjoys enthusiastic support by Canada and some other OECD countries. This support seems to be founded on the faith that sustained market-driven growth will bring wealth and economic stability to the world community. In order to achieve this prosperity, governments need only allow market forces to operate unfettered by regulation or other government "interference."

If this sounds familiar, that's because this global economic model is simply an amplification of the policies — de-regulation, privatization and free trade — that have guided domestic policy for the past decade. Absent, as always, is any notion of ecological limits, or of the need to address how the proceeds of growth will be distributed. Also missing is any real evidence to support the grand claims of those promoting liberalized trade and investment rules. In fact, our experience with this "grow-now, pay-later" paradigm shows that it has been a disaster for the environment and most of the world's population. Whether measured in terms of wealth distribution, environmental impacts, or economic stability — globalization of the world's economy has accelerated our course along a path that appears to be headed towards an ecological dead-end.

While multi-national corporations have existed for many years, the advent of truly global and integrated production and distribution systems — globalization — is a relatively recent phenomenon. When the world is viewed from this global corporate perspective the notion of national regulation is extremely problematic. In a world of

fickle capital investment and volatile stock markets, any degree of government regulation can interfere with the imperative to maximize growth and profits. But even more important is the fact that laws and regulations that differ from place to place are entirely incompatible with free capital flows or the integrated production of commodities and products for global markets.

That is why the essential thrust of modern trade and investment agreements is to reduce, and even eliminate, the capacity of national and local governments to regulate investment (read corporate) activity. It matters not whether the purpose of that regulation is to protect the environment and public health, preserve biodiversity, conserve natural resources, promote sustainable economic development or accomplish other societal goals. Treaties like the MAI represent an integral part of this larger global agenda.

The MAI in Five Easy Pieces

1 Investment Defined in the Broadest Terms

Who is a Foreign Investor?

While the MAI and its antecedents are framed in terms of investor rights, in most cases these investors will be corporations and, their "rights" have to do with conducting business free from government regulation. Under the MAI "investment" is defined very expansively to include *every kind of asset owned or controlled, directly or indirectly, by an investor, including:* any type of business, rights under contract, and intellectual property.

Of particular importance from an environmental point of view is the fact that unlike NAFTA, the MAI defines investment to include ***rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits*** [Article II 2.(vii)]. These provisions remove any doubt that fishing, mining, energy resource, and forest licenses permits, contracts, concessions and authorizations give rise to investor rights under the MAI.[3]

In this, and several other ways, the MAI definition of investment goes far beyond that included in NAFTA. Because the central reference point of the MAI is "investment," the expanded definition of this term greatly increases the scope and application of most MAI provisions, even where these provisions otherwise mirror those of NAFTA.

While MAI and NAFTA -based investor rights are predominantly created in favour of foreign investors, the *Performance Requirement* rules of these treaties apply equally to Canadian or domestic investors. This is one of the more astonishing features of

these agreements because, as we will discuss below, under these international treaties Canada is actually abandoning its domestic legislative prerogatives to regulate all investors, including Canadian investors, operating entirely within Canada.

Giving Foreign Investors Preferential Treatment

One aspect of the MAI that has drawn particular criticism from all sectors is the preferential treatment it accords foreign investors. As noted, MAI prohibitions against government regulations in the form of *Performance Requirements* treat domestic and foreign investors in the same way. Many other aspects of the MAI do not. This is true under NAFTA as well. Instead, these treaties establish an array of new investor rights that are only available to foreign companies and individuals — thus reducing Canadian citizens and companies to the status of second class citizens in their own country.

While representatives of the Federal government have promoted these agreements as doing no more than assuring foreign investors equal treatment under Canadian law — even those who are in favour of the MAI agree that this is not the case.[4]

Before withdrawing from negotiations France described the combined effect of MAI provisions as "explosive" and as creating a dual dyssymmetry by favouring the rights of corporations over those of nations and by favouring foreign over national investors.

2 National Treatment: All of the Rights — None of the Responsibility

The first principle of the MAI and its prototypes, *National Treatment*, prohibits government policies or laws that favour domestic companies or investors. Under this rule, foreign investors and corporations must be given every right, concession or privilege that a government might extend to local companies or communities. When these rules are considered against the objectives of British Columbia's resource management policy, several conflicts become readily apparent.

For example, the essential goal of provincial forest policy is to optimize the value of public resources to the benefit of the province, its communities and its residents. Section 2 of *The Forest Renewal Act of BC* puts it this way:

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.

Indeed, these are the common themes of several other provincial laws and programs including:

- the *Forest Act,*
- the *Forest Practices Code,*
- the *Small Business Forest Enterprise Program*,
- the *Woodlot Licence Program*,
- the *Community Forest Program*, and
- *Forest Renewal BC*.

The same priority access to crown fishery resources is also accorded Canadians and First Nations under Canada's *Coastal Fisheries Protection Act*, the *Fisheries Act*, BC's *Fisheries Act* and several federal-provincial agreements such as the *Agreement on the Management of the Pacific Salmon Fishery*.

By definition however, measures that favour Canadian citizens, companies and communities — discriminate against foreign citizens and enterprises. In other words, they represent precisely the type of discriminatory treatment that these investment treaties were drafted to eliminate. It is this fundamental contradiction that explains why so many aspects of Canadian natural resources law and regulation are incompatible with the rules of the MAI and NAFTA.

National Treatment would, for example, prohibit:

- policies that favour community land tenure or resource management rights,
- citizenship requirements for those seeking fishing or woodlot licenses, or,
- subsidies to support community economic development such as are provided by forest or Fisheries Renewal BC

Another area in which unconstrained foreign access is incompatible with provincial policy and law concerns access to Canadian water resources.

The Special Case of Water

Canada has one of the most abundant supplies of fresh water in the world, exceeding the volume of US water resources by a factor of 10. As extravagant water consumption patterns persist, water shortages in parts of the US are certain to become more acute - increasing pressure for large-scale water exports from Canada. The environmental implications of wholesale water diversions and exports are enormous and have given rise to determined opposition by Canadian environmental groups to such exports.

Nevertheless many entrepreneurs and several politicians have attempted to turn

Canadian water resources into profits. That is why ever since the advent of free trade Canadians have worried that trade rules would one day be used to challenge Canadian efforts to restrict bulk water exports. They needn't hold their breath any longer because a US based company, Sun Belt Water Inc., has decided to do just that.

The Sun Belt claim follows the lead of the other US corporations (Ethyl Corporation and S.D. Myers) which have taken advantage of the powerful enforcement provisions in NAFTA's investment chapter to challenge other Canadian environmental laws. Relying on these rules, Sun Belt is seeking more than $200 million (US) from Canada because of BC legislation banning bulk water exports. The company claims that BC's law violates several NAFTA-based investor rights including, in this case, its right to export BC water by tanker to California.

Sun Belt argues that it is entitled to the same access to Canadian water as Canadians enjoy. Anything less is discriminatory and offends the principle of National Treatment, a cornerstone of free trade. Having been denied that access by BC's export ban, it now claims compensation for the profits it would have made, had free trade rules been observed.

For years the federal government has assured Canadians that water would not be subject to the type of claim that Sun Belt has just made. There is only one certain way for Canada to guarantee that protection and this is to negotiate within NAFTA a clear and unequivocal exception for water. But more importantly, Canada, the US and Mexico should also rectify another serious error that was made during NAFTA negotiations, which was to allow foreign corporations direct access to NAFTA's powerful enforcement machinery.

The "Tragedy of the Commons" and Your Community

The principle of providing foreign corporations precisely the same access to crown resources as is available to Canadian citizens, companies and First Nations offends many people’s sense of fairness or equity. It is also clearly incompatible with any notion of First Nation entitlements or land claims. However, there is also a strong environmental rationale for "discriminating" in favour of local communities and first nations when it comes to allocating public natural resources.

When access to resources engenders no obligation of stewardship, the result has inevitably spelled disaster. Sometimes referred to as the "tragedy of the commons," these are the dynamics that underlie the current crises affecting global ecosystems from our oceans to the earth’s atmosphere. Because of the absence of any meaningful international controls, the exploitation of these global of common resources is effectively unregulated or supervised.

In this context, there is little incentive for any particular user to practice conservation or restraint. Moreover the logic of "if I don't, someone else will" is reinforced by the dictates of global competitiveness which will often punish a corporation for deferring immediate profits in favour of longer term or more sustainable returns. This inevitably has meant rapacious rates of resource consumption that soon exhaust non-renewable resources or overwhelm the capacity of renewable resources to regenerate.

There is strong environmental rationale for favouring local communities, First Nations, companies and residents when allocating public natural resources.

By imposing international market imperatives, while reducing local government control, the MAI and NAFTA investment rules would effectively subject domestic natural resources to the same destructive dynamics that have devastated the global commons. In other words, natural resources that were once subject to national priorities and controls, would now become the common property of all foreign and domestic investors. At the same time the capacity of government to impose conservation constraints would be weakened, and in some instances explicitly removed. The result is certain to accelerate already unsustainable rates of resource exploitation.

Indeed the challenge before us is to find new ways to strengthen the role of local communities when it comes to natural resources management. Those that must live with the consequences of destructive resource practices will often have the greatest stake in ensuring long-term sustainable management. They should, therefore, be given a central role in determining local management issues and priorities. But under the MAI and NAFTA such preferential treatment would clearly offend the principle of *National Treatment*.

It is fundamental to sustainability that the right to exploit a resource come with the obligation to ensure its long-term stewardship. The principle of *National Treatment* would permanently sever this fundamental relationship.

3 Performance Requirements: Prohibiting Government Regulation

Under the heading *Performance Requirements,* the MAI, and to a slightly lesser extent NAFTA's investment chapter, set out broadly defined lists of prohibited government policies, laws, and program. Moreover, as we have noted, the application of these constraints is much broader than for other provisions of these investment agreements because they apply to investors ***of a Contracting Party or of a non-Contracting Party***, i.e. to all investors, whatever their country of origin [Article III]. In other words, under the rubric of negotiating an international treaty, Canada would actually agree not to regulate its own investors, or those from any other

country, whether that country was a party to NAFTA or the MAI or not.

Performance Requirements also go well beyond the principle of non-discrimination engendered by *National Treatment*, because this rule prohibits government measures no matter how equitable or even -handed their application to foreign investors. Finally by providing that: *A contracting Party shall not ... impose, enforce or **maintain** any of the following requirements... Performance Requirement* constraints may apply retroactively to regulations and agreements that predate the Treaty.

Among the list of actions the MAI would prohibit are government regulations that would require an investor to:

- achieve a given level or percentage of domestic content, or to purchase goods or services locally *[Article III-1 (b) and (c)];*
- transfer environmentally sound technology *[Article III-1(f)];*
- supply local markets or value-added producers *[Article III-1(h)];*
- achieve a given level or value of production, investment, employment, or research and development *[Article III-1(b)(e)(k)]* ; or*,*
- hire local or even Canadian residents *[Article III-1(j)]*.

If we are to contain and ultimately reign in unsustainable resource management practices that are damaging once abundant and diverse ecosystems, we must work together to build more diverse resource economies; promote local economic development; foster environmentally sound technologies; and, ensure "just transitions" for workers. Unfortunately MAI and NAFTA rules will make each and every one of these goals far more difficult, if not impossible, to achieve.

Community Economic Development and Sustainable Resource Management

For many decades, Canadian natural resources policies have sought to maximize the value-added to raw natural resources before being exported. At times these policies have been expressed in the form of bans on the export of raw logs or unprocessed fish. In other instances, Canadian law has actually required investment in value-added processing as a condition for gaining access to Crown resources. For example, the following box contrasts the requirements of the Forest Act with certain performance requirement of the MAI. These contradictions are literally one example of dozens, if not hundreds, of similar conflicts that are revealed when Canadian laws are compared with MAI and NAFTA rules.

BC *Forest Act* Requirements	**Conflicting MAI Provisions Performance Requirement – subparagraph:**
127. Unless exempted...timber that is harvested from Crown land...in a tree	

farm license 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....	**(b):** Parties shall not require investors to achieve a given level or percentage of domestic content **(h):** Parties shall not require investors to supply one or more of the goods it produces... to a specific region... **(j)** Parties shall not require investors to hire a given level of nationals...

For many resource-based communities such policies and laws have meant a more dynamic and diverse economy, and a greater stake in sustainable resource management. For government, they have meant more tax revenue from processing and other activities now taking place in its jurisdiction. This revenue in turn can support investment in resource enhancement and conservation measures. It also provided a stronger rationale for making such investments, because now public expenditures benefit processing, and manufacturing companies as well as harvesting and extraction industries.

By processing resources closer to their source, these policies also reduce the energy and other environmental demands of transporting unprocessed resources over great distances, which represent a very substantial and largely uncounted cost of the global economy.

Conversely, when these policies fail, the economies of resource-based communities become poorer and less diverse. Income becomes entirely dependent upon the rate at which resources are extracted, and the viability of local economies becomes far more vulnerable to commodity price swings — fluctuations that have devastated the economies of many resource dependent countries. Furthermore, when commodity prices decline, and in the absence of other alternatives, enormous pressure is created to reduce the cost of resource extraction by lowering standards and reducing royalties, such as stumpage fees. British Columbia's forest and mining policies are currently in just such a downward spiral.

To put this another way, at the very moment when the need to change the course of resource management policies is clearest, treaties for investor rights and other aspects of the free trade agenda, would remove from governments, the tools they need to do the job.

4 Expropriation: Private Property Rights in a Global Constitution

While *National Treatment* and *Performance Requirements* rules will undermine the economic, community development and industrial policies needed to support truly sustainable resource management, the MAI's most direct assault on environmental law and policy is found under the heading of *Investment Protection*: *Expropriation and Compensation* [Article IV. 2] which reproduces the wording of NAFTA verbatim:

*A Contracting Party shall not expropriate or **nationalize 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... accompanied by payment of prompt, adequate and effective compensation ... equivalent to the fair market value of the expropriated investment ...* [Emphasis added]

The Agricultural Land Reserve

The stated purpose of BC's Agricultural Land Commission Act, is "*to preserve agricultural land*...[and to] *encourage the establishment and maintenance of farms, and the use of land in an agricultural land reserve compatible with agricultural purposes*." To achieve these goals the Commission is empowered with Cabinet approval to *designate as agricultural land, land, including Crown land, that is suitable for farm use, and on being designated the land is established as agricultural land reserve.*

Section 17(3) of the Act states that: *A person must not use agricultural land for a purpose other than farm use, except as permitted by this Act, the regulations or an order of the commission, on terms the commission may impose.*

But this, and other land use constraints clearly diminish the

It has long been the goal of property rights advocates to have these private rights entrenched in Canada's constitution. Their campaign is primarily directed at Canadian laws that asserted that private property rights must give way, in certain instances, to the greater public good. Thus challenges to such measures as zoning bylaws or habitat protection laws as interfering with private property rights have been consistently rebuffed by Canadian courts. But what has been unacceptable to the courts, and rejected as part of Canadian constitutional reform, now appears to have been accomplished by NAFTA and would be expanded under the MAI. Moreover, the "constitutional" rights conferred through this back door are far more expansive than those dreamed of by most property rights proponents.

development value of land and therefore offend the MAI's prohibition against expropriation. The preservation of agricultural land is simply not a justifiable exception to the MAI - nor is any other conservation or preservation objective.

Habitat Protection as Expropriation

The most obvious examples of how these rules will undermine the capacity of all governments to achieve environmental and planning objectives concern land use controls and regulation.

Whether it is for the purpose of preserving salmon habitat, or to protect endangered species, the imposition of habitat protection measures can have significant impacts upon the use of land subject to such protective measures. For example, stream habitat protection measures can substantially limit the extent and character of forest harvesting activities. Similarly, land use bylaws, agricultural land protection (see box), parks creation and other initiatives can impact development activity, whether occurring in remote or urban areas of the province.

By limiting the uses to which land may be put, the imposition of habitat protection measures can significantly reduce the development value of property or the profitability of harvesting licenses or other permits. But under MAI and NAFTA expropriation rules, any government action that even indirectly interferes with the profitability of an investment may give rise to a claim for damages and compensation. Nor are there any exceptions to this prohibition against such government actions. While such measures are permitted when taken for legitimate public purposes, in every instance full compensation must be promptly paid to any foreign investor and for the full market value of any investment "expropriated" [*Article IV 2.3 and 2.2*]. This is true no matter how compelling the public policy rationale for infringing investor rights.

Environmental and Public Health Regulation as Expropriation

It is also important to understand that this expropriation rule applies to the full

range of economic interests that fall within the treaties expansive definition of investment. This means that an investor need not have a direct interest in real property to assert a claim for compensation. Because the MAI defines "expropriation" in the broadest terms, its rules may effectively prohibit a broad array of government regulations that even indirectly reduces the profitability of corporate investment.

In fact, it would be difficult to identify an environmental or conservation initiative that would not have this effect, at least for some investors. Indeed there is recent evidence that environmental regulations are the most likely target of this prohibition against government "taking." One case in point is a law suit brought by Ethyl Corporation, an US-based transnational, against the government of Canada. Because the suit was among the first to be brought under the investment rules of NAFTA, we have summarized the important details in the following box.

"Threat of NAFTA Case kills Canada's MMT ban"

Ethyl Corp, a US multi-national corporation, is the only North American manufacturer of MMT, a controversial manganese fuel additive. According to the auto industry MMT damages pollution control systems, increasing emissions of VOCs, CO_2, and Carbon Monoxide. Like other heavy metals, MMT is also a neurotoxin, and its impacts on human health have not yet been adequately assessed.

In fact, understanding how exposure to airborne heavy metals damages human nervous systems is often very difficult. In the case of lead took more than 60 years to finally establish. This explains why many countries have relied on the *precautionary principle* to ban or restrict the use of MMT as a fuel additive. While Ethyl denies that MMT is harmful to human health or the environment, this is the same corporation that stonewalled action on leaded gasoline for years.

When Environment Canada finally decided to regulate MMT in April, 1996 it did so by banning the importation and inter-provincial transport of MMT. But no sooner was the bill proclaimed than Ethyl Corp. filed a claim under NAFTA's investment rules for $350 million in damages. Ethyl's suit alleged that by effectively banning MMT, Canada had expropriated its business, and violated the *national treatment* and *performance requirement* provisions of NAFTA as well. that can only be considered a complete capitulation to Ethyl's claims.

Canadians learned of Ethyl's claim only because the company decided to make it public. When West Coast Environmental Law and other groups sought to

intervene in the case, we were rebuffed by the Canadian government, which also denied access to any of the documents relating to the case, either Ethyl's or its own. Thus during 1997 and early 1998 the case proceeding under the cone of silence imposed by NAFTA's highly secretive arbitration rules.

While Federal officials publicly discounted Ethyl's claim, internal memoranda offered a more sober assessment. In fact the government was so concerned about losing the case that it decided to settle on terms that can only be considered a complete capitulation to Ethyl's claims.

On July 20,1998 under front page headlines *Threat of NAFTA Case kills Canada's MMT ban,* the Globe and Mail reported on the settlement that Canada had agreed to rescind the MMT ban, pay Ethyl in access of $19 million, and take the unprecedented step of issuing a statement that MMT was neither an environmental nor a health risk. Not surprisingly even prominent members of the Liberal government "slammed" the deal as a "sell-out of the public interest" [Southam Newspapers "MPs defy colleagues on MMT," Vancouver Sun July 24, 1998].

Thus, the first case to invoke the powerful enforcement rules of NAFTA has resulted in a stunning victory for a US -based transnational corporation unhappy with Canadian environmental regulation. Moreover to avoid a whopping damage settlement, the Federal government has set a dangerous precedent that we can expect to invite similar challenges by other foreign investors.

In fact, it is clear that other corporations have already gotten the message because Canada has recently been served with another claim by a US-based corporation, S.D. Myers, for damages arising from a ban (since removed) on the international trade of PCB waste. Even more chilling is the fact that Federal officials have refused to disclose how many other law suits have been made under NAFTA's investment rules, arguing that even the fact that a claim has been made against the Canadian Government is protected by the secrecy rules of NAFTA's dispute procedures.

More than one trade lawyer from the corporate sector has warned that there will be many more of these suits as their clients make more frequent use of their rights under these investment treaties to "harass" governments contemplating regulatory initiatives those corporations oppose.[5]

As disturbing as these developments are, they have brought to greater public attention the truly draconian rules for dispute resolution put in place by these investment treaties. Even the editorial boards of the Globe and Mail and Financial Post have criticized the extraordinary and secretive character of these investor-state suits.[6]

We can also hope that the Ethyl case will spark long overdue attention to NAFTA and

the need to eliminate rules that expose Canadian laws and regulation to the withering fire of investor-state litigation.

5 Investor-State Procedures: A "Revolution" in International Law

Rarely is an agreement more effective than the enforcement mechanisms that may be enlisted to ensure that its terms are observed. For this reason, the most important provisions in the MAI are likely to be the ones with teeth — i.e., those that will compel governments to comply with its dictates. These can be found in Article V of the MAI under the heading *Dispute Settlement***.**

The *Dispute Settlement* rules of both NAFTA and the MAI are virtually identical. Both establish two distinct enforcement regimes to ensure that governments respect new limits on their authority. These are: *State-State Procedures;* and, *Investor-State Procedures*. State-to-state dispute processes are not without controversy, largely because they exclude public access and participation. However, these concerns pale by comparison with those raised by *Investor-State Procedures*.

To begin, it is important to understand that prior to NAFTA, only national governments had standing to invoke dispute resolution processes under international trade agreements. For this reason, governments often constrained the appetite of domestic corporations to assail the policies and practices of other governments, by refusing to file trade complaints every time they were asked. But under *Investor-State procedures*, the role of national governments as intermediaries would be eliminated.

Thus under NAFTA and MAI rules, all foreign investors have an unqualified right to sue national governments directly, and for any alleged breach of the broadly-worded investor rights they are granted by these investment treaties. These disputes are then decided, not by domestic courts or judges, but by international arbitration panels operating under the auspices of such institutions as the World Bank and the International Chamber of Commerce.

Arbitration panels do not follow domestic legal principles and procedures, but rather apply international legal rules and operate according to procedures established for resolving international commercial disputes. These are procedures, so highly secretive, that they must be seen as antithetical to the open and accountable judicial processes that are the hallmarks of contemporary legal systems.

For example, under these dispute rules, panel hearings are entirely closed to public view or participation. Public access to documents or evidence is permitted, but only when both parties agree. In fact as we have noted, the federal government has taken the position that it can not even reveal whether a claim has been made against it under these procedures. Most astonishingly — under NAFTA and MAI rules, the cone of silence actually includes the decisions made by these international tribunals,

even when they involve major damage awards against government.

In addition to representing a fundamental assault on the democratic traditions of Canadian law, investor-state suits represent a radical departure from the norms of international law as well. First, by providing corporations with the right to directly enforce an international treaty to which they are neither parties, nor under which, they have any obligations. Second, by extending international commercial arbitration to claims that have nothing to do with commercial contracts and everything to do with public policy and law. This is why even conservative legal experts have described these rules as representing a "revolutionary departure"[7] from the principles of international and Canadian law.

Most of us take for granted the fact that we have an open, democratic and accountable judicial system. We no doubt share the conviction that the public administration of justice is so fundamental to a democratic society that it would be unassailable in the contemporary political context.

But as the Ethyl and S.D. Myers cases illustrate, NAFTA has already established a regime for enforcing investor rights that has supplanted Canadian laws and courts with procedures that exist entirely outside the legal norms of our society. It would be very difficult to overstate the seriousness of this challenge to democratic process.

Environmental Conditionalities and Other Greenwash

In response to critiques such as this, defenders of these treaties will point to provisions that appear to reflect some willingness to accept that investment rights respect environmental limits. For example, MAI negotiators were considering the inclusion of the following provision taken from language in the Investment Chapter of NAFTA:

The Parties recognize that it is inappropriate to encourage investment by lowering domestic health, safety or environmental standards or relaxing domestic labour standards.

But unlike all other provisions of these treaties, this one would not be unenforceable, and for that reason would be virtually meaningless -- particularly in the context of a trade regime that encourages countries to compete for investment by allowing corporations to externalize environmental and other social costs.

Similarly, *Performance Requirements* include an "exception" that would allow governments to regulate where "*necessary*":

- *to protect human, animal or plant life or health, or:*
- *for the conservation of living or non-living exhaustible natural resources.*

Again what isn't clear to those unfamiliar with the esoteric rules of trade agreements is that this is identical language to that used in a general exception to World Trade Organization rules.[8] In that context, it has been given such narrow interpretation that it has proven entirely ineffective for defending a growing list of environmental laws (from US Clean Air Act regulations to Canadian Salmon and Herring Conservation programs) that have been caught in the cross fire of international trade dispute resolution — an encounter that no environmental measure has survived.

Finally, it is important to recognize that even should this environmental language prove to be far more effective than it has in other trade agreements, it would still have no impact on the MAI rules concerning national treatment and expropriation because it simply doesn't apply to these provisions.

Exceptions and Reservations

When it really matters, governments have been willing to create meaningful exceptions to NAFTA and MAI rules. For example, a broad and unequivocal exemption has been included, at the insistence of the US, for measures deemed necessary for the "protection of essential security interests." But a similar exception is included for government actions deemed necessary for the protection of our essential ecological security.

In addition to this deficiency, and unlike NAFTA, under the MAI no exception would be allowed for measures taken to honor Canada's obligations under international environmental agreements, such as the *Montreal Protocol* on ozone depletion or the *Basel Convention* on hazardous waste trade.

Instead of including such exceptions, the federal government has "reserved" various policies and practices from the full application of NAFTA and MAI rules. There are however, several reasons to discount these assurances as having only modest value. To begin with, the extent of reservations that Canada may claim is a subject for negotiation and compromise, and may simply not get everything that it has asked for. More to the point however, environmental measures aren't even on Canada's list of reservations.

Moreover, most reservations are subject to the "standstill" rule which effectively precludes new policy or regulatory measures that might even marginally impair investor rights. This means that even for most of the matters reserved, Canadian policy would be frozen in time, becoming increasingly obsolete and irrelevant with each passing day.

In addition, Canada hasn't been willing to discuss reservations from the most problematic provisions of NAFTA and the MAI, such as the *Expropriation and*

Compensation rule. As we have noted, there is no other provision of these treaties that is more likely to be more destructive of environmental law and policy. While France and other governments have indicated that this provision is unacceptable, Canada vigorously defends it as an essential investor protection.

Similarly, with the single exception of the *Investment Canada Act,* there is no reservation from dispute settlement provisions, including *Investor-State Procedures*. Therefore, all other matters, including the effect of a listed reservation, are vulnerable to challenge under these procedures.

The demands of a growing number of such claims will easily overwhelm scarce and ever-declining government resources. As demonstrated by the outcome of the Ethyl case, the costs of litigation, together with the risks of losing a major claim will often prove intolerable, particularly when the expedient of simply eliminating offending regulations is available. The very real concern is that governments will simply opt for the safest course, which will be to avoid environmental and other regulatory initiatives altogether. In fact we can already observe the pernicious effect of this new global reality as governments shed regulatory standards in favour of voluntary programs and initiatives.

Finally on this subject, if reservations are broad enough to provide meaningful opportunity for progressive environmental reforms, they would undo much of what NAFTA and the MAI are intended to accomplish. In seeking to entrench the dominant paradigm of market-driven growth by reducing the role of government's ability to regulate corporate activity in the public interest, these rules are on a collision course with the fundamental principles of environmental protection.

Sustainable Development and other Alternatives to the MAI

If international investment rules are to foster, rather than undermine, our prospects for achieving environmental goals — they will have to be fundamentally overhauled. As noted in the official report that led to France withdrawing from MAI negotiations, it is the basic structure of the MAI that is the problem.[9]

There is probably no better way to illustrate how destructive this investor rights regime is than to contrast its principles with those needed to support the goals of environmental protection, resource conservation and sustainable economic development. The provisions of Investment Chapter of NAFTA, and of the MAI, represent the antithesis of these principles:

1. All governments have the sovereign right to regulate the activities of both foreign and domestic investors to require their activities to conform to the public interest.
2. In no case are the rights of foreign investors to take precedence over the public policy goals of environmental protection, resource conservation, and sustainable development.
3. All governments have the sovereign right to ensure that the use of natural resources within their territories serve the imperatives of conservation and biodiversity and, secondarily economic development in their communities. In all instances governments, and First Nations have the right to optimize the value of their resources to the particular benefit of their citizens and members.
4. Foreign investors must comply with the highest standards prevailing in either their home or host jurisdiction, whichever is higher.
5. All investor claims arising under any international agreement proceed only at the instance of nation states and then only in accordance with the norms of notice, participation and accountability that are fundamental to the judicial systems of democratic societies.
6. In the event of conflict with international environmental agreements, such the Framework Convention on Climate Change, the Biodiversity Convention, and the Pacific Salmon Treaty — these agreements will prevail over the MAI.
7. Claims for compensation against Canada concerning expropriation shall proceed only in Canadian courts and in accordance with Canadian law.

In many ways the alternative to NAFTA and the MAI means preserving the policies, laws and programs that it would eliminate. Because we have taken these for granted for so long, we have lost sight of the important public policy rationale for the measures that we now risk losing.

The Need for New Investment Controls in the Era of Globalization

This analysis of the MAI has focused on the need to preserve and even strengthen the capacity of our governments to regulate investors to ensure that in Canada, they operate in a manner consistent with the broad public interest. But it is also clear that we must also address the need for better controls on the foreign investment activities of the Canadian government and Canadian investors.

"The Ugly Canadian"

For example, the foreign subsidiaries of Canadian based mining companies have recently been responsible for three major mine tailings disasters (see box opposite). At the urging of Quebec's mining industry the Canadian government has recently filed a trade challenge against France because it is enacted strong asbestos regulations. Apparently the claim was motivated by a desire to protect the investments and markets of Quebec's asbestos industries in southeast Asia, that might follow the French precedent, should it be allowed to stand. As another example, Canada recently exempted the sale of Candu nuclear reactor to China from federal environmental review.

This was the title of a recent CBC documentary describing the impacts associated with several spectacular environmental disasters caused by Canadian mining companies operating abroad - all of which have occurred during the last three years. In Guyana, a spill of 860 million gallons of cyanide contaminated water from a Cambior site affected over 50 miles of primary river habitat upon which local citizens, farmers and fishers depended. In the Philippines, a holding system of a mine in which Placer Dome owns a 39.9% interest gave way releasing over 4 million tonnes of mine waste into local rivers with devastating consequences for local communities, five of which were eventually evacuated. The most recent of these disasters occurred in Spain where thousands of hectares and farmland and species habitat was devastated by a spill from Boliden's Los Freille operations in that country. Clean up costs are estimated to be in excess of $100 million, and yet enhanced protection of these companies rights in foreign countries is identified as one of the main reasons Canada is pursuing the MAI and other similar initiatives

When Canadian investors, both public and private, are responsible for environmental damage in developing countries, local communities may have little if any recourse. However, even in developed countries foreign investors may simply decide to pull up stakes rather than face clean and compensation costs. Moreover, when the foreign victims of Canadian investors have attempted to recover against them in Canadian courts they have been rebuffed.

We need to find new ways to regulate the activities of our own investors abroad — not through voluntary codes of conduct — but through meaningful, and enforceable domestic legislation and international law. Laws that will be as determined to protect the environment and our communities as the MAI is intent on protecting the interests of foreign investors. We should begin by:

1. ensuring that the foreign victims of Canadian investors have recourse under Canadian law;

2. requiring the investment activities of Canadian investors outside Canada be held to no lower standard of environmental review and performance than would be required of them in Canada;
3. mandating a process for public notice and comment before Canada files a trade complaint against another countries environmental or public health laws in response to behind-closed-door lobbying efforts by Canadian investors; and by,
4. establishing enforceable international regimes to ensure that the investors comply with the lofty principles currently expressed in voluntary codes of international corporate conduct.

What You Can Do

- Learn more about NAFTA and the MAI — visit our web site at http://www.wcel.org for information and links to other MAI resources and materials. Contact our office for a reading list of materials that you can share with friends and neighbors. Write to the editor of your local paper.
- Let your elected representatives, in every level of government, know of your opposition to these investment regimes. Many municipal governments across Canada have declared their opposition to the MAI — make sure your community is among them. The Province of BC has come out in opposition the MAI, let it know of your support. Insist that the federal government renegotiate the investment rules of NAFTA and abandon its efforts to extend this regime.
- Make sure that your group, organization or union is committed to assessing the impacts of these investment treaties and ensuring they are addressed. Join or organize a local group that can provide a focal point for public education and community action.
- Arrange to meet with your local chamber of commerce and other business groups. Unless you are a large transnational corporation with business primarily based outside Canada, international investor protection is very likely to be bad for business.

Endnotes

1. See proceedings of the federal Standing Committee on the Environment and Sustainable Development, on Feb.3, 1998.

2. See Lalumiere and Landau, "Report on the Multilateral Agreement on Investment (MAI)" published by France's Ministry of the Economy, Finance and Industry.

3. This is made explicit in annotations to the Oct. '97 draft text, at p. 102.

4. On this point members of the international trade bar are unanimous, see the proceedings of BC Special Legislative Committee on the MAI on September 30, 1998 and the evidence of Professor Bob Paterson of the UBC Law School, Milos Barutciski LLB of Davies, Ward and Beck, Barry Appleton LLB of Appleton and Associates and Steven Shrybman, LLB. of the West Coast Environmental Law Association.

5. "Ethyl sues Canada over MMT law," Globe and Mail, April 15, 1997.

6. See editorials in the Financial Post: "Why the secrecy over investor rights?" Aug. 29-31, 1998, and in the Globe and Mail: "Can we talk" Sept 10, 1998.

7. See evidence of Barry Appleton, Steven Shrybman and Professor Bob Patterson, supra fn. 4.

8. Gatt Article XX

9. See footnote 2 above.