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The Multilateral Agreement on Investment and the Environment: Context and Concerns

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I. CANADIAN ENVIRONMENTAL LAW ASSOCIATION (CELA)

The Canadian Environmental Law Association was formed in 1970 to use environmental law to protect the environment, and to work to improve environmental laws. Since 1987, we have analyzed and written on the impacts on environmental law and policy flowing from international trade agreements.

We have reviewed the submissions made to you by the Canadian Labour Congress, the Sierra Club of Canada, and Mr. Barry Appleton, and share the concerns expressed in those submissions.

II. ENVIRONMENTAL IMPACTS

The international discussions of the MAI have raised questions of whether it will have impacts on the environment. After nearly ten years of free trade regimes in Canada, we are in a position to conclude that it certainly will. It is intended to have impacts on various areas of public policy, including environmental policy.

The MAI is the latest in a network of international agreements being used to undermine local, national, provincial and international initiatives for various public policy goals, through the creation of a legal regime of deregulated trade and deregulated investment. The goal is achieved by regulating national governments, through the agreements, preventing them from exercising powers available to them in their national constitutions.

Domestic regulations, including environmental ones, are precisely the targets of investor-rights documents like the MAI, since regulations do affect the capacity of corporations to engage in profit-generating activities. "Investment protection" actually means the removal of regulatory controls on corporate activity. The MAI is therefore the latest in the international de-regulation initiatives.

In the environmental field, there has been a progressive undermining of domestic environmental regulation over the past ten years through the Canada-US Free Trade Agreement, NAFTA, and the 1994 GATT. This has occurred despite consistent public opinion polls showing very high levels of public support for strong environmental laws, including in areas where Canadian governments refuse to regulate, such as climate change issues.

Given this new international de-regulation initiative, the MAI, it is useful to review how international trade agreements have been used up to now to weaken environmental laws, and how those strategies are reflected in the MAI. From the perspective of Canada and many Southern countries, it is important to recall that resource management is a fundamental element of both environmental protection and community stability.

Environmental de-regulation: let us count the ways.[1]

1. GATT Article XX: General exception

Since 1947, the GATT regime has included a general exemption from the other disciplines of the agreement, including national treatment and most favoured nation principles. Article XX "permits" countries to maintain standards deemed necessary for protection of "human, animal or plant life or health" and for "conservation of exhaustible resources..."[2] This article was included in the Canada-US FTA.[3]

With the conclusion of the Uruguay Round of GATT negotiations in 1994, and the implementation of the new World Trade Organization/GATT agreements, an expanded trade law regime has been implemented globally, and an increased number of trade disputes have arisen in which environmental or health standards have been in issue.[4] In every case, the domestic standard that was at issue has been found incompatible with GATT (or the FTA) leading to a requirement that it be rescinded.

It must be understood that the GATT could have accommodated environmental and health concerns from the beginning, given the wording of Article XX. However, every case has gone against national standards, leading to the systematic elimination of governmental options previously thought available under the article.

The interpretation of the MAI, whatever its final wording, will be carried out in GATT-style "confidential" dispute processes using these precedents. In fact, the MAI doesn't even provide for such a general exemption. Only "essential security interests" are exempted in the current

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[1]For a review of the staggering pace of removal of environmental regulation in Ontario, see Environmental Commissioner of Ontario, Annual Report 1996: Keep the Doors Open to Better Environmental Decision Making, Toronto, April 1997. At the federal level, we note that despite the 1993 Red Book commitments to improve the Canadian Environmental Protection Act and to adopt an Endangered Species Act, neither commitment has been kept. At both levels of government, very large cuts in budget and staff have been imposed on the environmental ministries.

[2]GATT Article XX: Measures which are applied in a non-discriminatory manner and are not "a disguised restriction on international trade" are permitted if: (b) necessary to protect human, animal or plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption.

[3]Canada-US Free Trtade Agreement Article 1201.

[4]In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, 1989; US Restrictions on Imports of Tuna, GATT doc. DS21/R Sept. 3, 1991; Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. 375/200; EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WTO WT/DS48/R/Can, August 18, 1997.

draft (Article VI. Exceptions and Safeguards), although discussions are continuing regarding the inclusion of some reference to GATT Article XX.

With regard to Performance Requirements, (Article III, Performance Requirements, subparagraph 4) "permits" governments to maintain measures including environmental ones, using wording from Article XX of the GATT. However, given the trade jurisprudence on Article XX, it is unlikely that this clause will be interpreted to actually protect such measures.

We therefore conclude that when environmental or health laws are contested by business using the MAI, there is very little chance that they will be held justifiable in themselves, without a need for the legislator to pay "compensation" pursuant to Article IV, Investment Protection.

2. Internationalization and harmonization of standard setting

NAFTA was the first agreement which provided detailed wording on development of environmental (and other) standards through its chapters on Technical Barriers to Trade and Sanitary and Phytosanitary Standards. The 1994 GATT included similar chapters.[5] They include very specific wording regarding how domestic standards must be written to ensure compatibility with the trade regimes. They also specify a number of international bodies as standard-setters: the Codex-Alimentarius Commission; the North American Plant Protection Organization, the International Office of Epizootics; the Food and Agriculture Organization (regarding the International Plant Protection Convention); and the International Standardization Organization.

Environmentalists have seen that, as we predicted, the increased emphasis on internationalization and harmonization of environmental standard setting, has made it more difficult to achieve improved standards at home. These bodies are largely inaccessible to citizens and environmental groups; they have considerable corporate participation; and they seek to set standards that can be achieved internationally, rather than standards that would be best for a particular country's environment of health requirements.

Further, the Beef Hormone[6] decision of a WTO/GATT panel, released in August 1997 in response to a Canadian complaint, makes explicit that international standards take precedence over domestic ones, even retroactively. The Canadian government complained to the WTO that the European Communities ban on hormone residues in beef contravened the Sanitary and Phytosanitary Chapter of the GATT, and won. The dispute panel found that since the EC standards were more stringent than those of the Codex Alimentarius, they could not be

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[5]NAFTA Chapter 7, Section B; and Chapter 9; GATT Agreement on Sanitary and Phytosanitary Standards, and Agreement on Technical Barriers to Trade.

[6]World Trade Organization, EC Measures Concerning Meat and Meat Products (Hormones): Complaint by Canada; WT/DS48/R/CAN; 18 August 1997.

maintained, thus confirming the primacy of international standards over domestic ones.[7]

Again, should investor-state claims arise under the MAI based on local or national environmental standards, they will be judged against this jurisprudence and are unlikely to be held justifiable. It is likely that corporations will be contesting them using the "expropriation" articles of the MAI, a prospect that will make it even harder to achieve enhanced domestic protections in Canada and elsewhere.

3. Voluntarism to replace law

At both levels of government in Canada, environmental laws are being replaced or undermined by an increased willingness to rely on corporate "voluntary" initiatives for environmental protection. Globally, this is promoted by the promotion of the International standardization Organization in the GATT, and its movement into policy areas where it has not previously worked, including environmental management regimes. (ISO 14000 series.) In Canada, we have seen the governmental and corporate collaboration in a sustainable forest certification scheme that has little environmental credibility.[8] Also, the 1996 proposed reform of the Statutory Instruments Act, the Regulations Act would have incorporated the wording of ISO standardization documents into Canadian law[9] in place of enforceable regulations.

The incorporation of the OECD Guidelines for Multinational Enterprises in the MAI reflects this non-binding, voluntary approach to corporate responsibility. The MAI does not require mandatory corporate compliance with domestic public interest laws in the countries in which companies operate as "investors."

4. "Investor protection"

In addition to these three strategies for undermining public interest legislation, governments and their business allies have now added, in NAFTA and the proposed MAI, another powerful tool for preventing legislation that controls corporate behaviour, the misnamed "expropriation" clause. This use of the term "expropriation" is a departure from Canadian law to date, since it appears to encompass any governmental action which reduces the potential returns on an investment.

In Canada, the issue of expropriation generally arises in relation to real estate, and not other forms of property. Land use zoning, however, although it may substantially change a landowner's

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[7]See "Intervenor", August-September, 1997, for an analysis of the implications of the decision.

[8]An Environmentalist and First Nations Response the Canadian Standards Association Proposed Certifcation System for Sustainable Forest Management, October 1995, CELA.

[9]The Regulations Act was passed by the House of Commons in early 1997, but as the Senate had not adopted it prior to the June 1997 election, it did not become law.

profits from a piece of land, is not at law compensable expropriation. CELA has previously written on this subject:[10]

> ...the term"expropriation" traditionally refers to a landowner's loss of use, title or benefit of property and a transfer of the value of use, title or benefit to a public authority. Thus, an aggrieved landowner must be able to demonstrate that not only has proprerty been taken, but that the taking has also benefitted the expropriating authority.
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> However, Canadian courts have long recognized that land use regulation is not "expropriation," primarily because zoning by-laws or other planning instruments do not generally involve a taking or transfer of the full use, title or benefit of property. Therefore, if a landowner's ability to use or develop his or her property is constrained by a properly enacted zoning by-law, the landowner is not entitled to compensation, even if the zoning by-law causes a diminution in property value.
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> The distinction between expropriation and land use regulation has been noted by the Supreme Court of Canada on several occasions. For example in Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie, the Supreme Court of Canada rejected arguments that a municipal by-law was invalid because its effect was to prohibit any practical use of the appellant's land. In this case, Chief Justice Laskin went on to state that it is open to a municipality to freeze development in accordance with the purposes of official plans and zoning by-laws, provided the municiaplity has not acted in bad faith. This principle was also expressed by Chief Justice Laskin in Sanbay Developments Ltd. v. City of London, where a municipal development freeze was again upheld by the court.
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> Similarly, in Hartel Holdings Co. Ltd. v. Council of the City of Calgary, the Supreme Court of Canada refused to grant an order directing a municipality to expropriate land which had been designated as a proposed park:
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> "The appellant's case in a nutshell is that by freezing its land with a view to its subsequent acquisition as a park, the respondent has deprived the appellant of the potential value of its land for residential development. No doubt, this is true. The difficulty the appellant faces, however, is that in the absence of bad faith on the part of the respondent, this seems to be exactly what the statute contemplates. The crucial rider is that the City's actions must have been taken pursuant to a legitimate and valid planning purpose. If they were, then the resulting detriment to the appellant is one that must be endured in

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[10]Lindgren, Richard and Clark, Karen, "Property Rights vs. Land Use Regulation: Debunking the Myth of "Expropriation Without Compensation", Canadian Environmental Law Association, February 3, 1994, pp. 5-8. Cases cited in this discussion include: Manitoba Fisheries Limited v. R, (1978) 6. WWR 496 (SCC); The Queen in Right of British Columbia v. Tener et al (1985) 17 DLR (4th) 1 (SCC); Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie, (1975) 47 DLR (3rd)1; Sanbay Developments Ltd. v. City of London, (1975) 45 DLR (3rd) 403; Hartel Hldings Co. Ltd v. Council of the City of Calgary, (1984) 8 DLR (4th) 321.

> the public interest." (emphasis added).
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> In addition, the Supreme Court of Canada has clearly rejected the suggestion that municipalities must compensate landowners who are subject to land use restrictions such as "downsizing":
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> "Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down."....

CELA concluded:

> The important principle which emerges from these cases may be stated as follows:
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> **planning authorities may regulate, restrict or prohibit land use or development without triggering the remedy of compensation for affected landowners, provided that such measures are undertaken in good faith for a proper planning purpose.**

Thus, Canadian law maintains the principle that legislatures may legitimately regulate property use in the public interest, without having to pay compensation if the measures are undertaken in good faith and do not involve a change in title.

In contrast, the NAFTA Investment Chapter[11] and the MAI extend the concept of expropriation, with a requirement of compensation, so broadly that virtually any governmental regulatory action which reduces the potential for generating profits may generate a claim for compensation.

Public attention in Canada has been drawn to the Ethyl Corporation claim against the Canadian government for $350 million compensation for enacting an effective ban on the use of MMT in gasoline, an environmental protection measure. This case shocked the OECD negotiators with whom we discussed it in a consultation meeting in October. It is indeed shocking that the right of the Parliament of Canada to pass an environmental and health protection can now give rise to a claim from the polluter for a huge amount of compensation.

It is less well known that other claims are currently being processed under the NAFTA chapter, including one by Metalclad Corporation against Mexico.

> In January 1997, the U.S.-based waste disposal company Metalclad Corporation filed a grievance with ICSID, alleging that the Mexican state of San Luis Potosi violated a number of provisions of NAFTA when it prevented the company from opening its waste disposal plant. On the basis of a geological audit performed by environmental impact analysts at the University of San Luis Potosi, the Governor deemed the plant an environmental hazard to surrounding communities, and ordered it closed down. The study had found

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[11]NAFTA Chapter 11, especially Article 1110.

> that the facility is located on an alluvial stream and therefore could contaminate the local water supply. Eventually, the Governor declared the site part of a 600,000 acre ecological zone. Metalclad seeks compensation of some $90 million for expropriation and for violations of national treatment, most favored nation treatment and prohibitions on performance requirements. This figure is larger than the combined annual income of every family in the county where Metalclad's facility is located...
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> The Metalclad case raises other alarming questions. Metalclad claims the Mexican federal government is (unofficially) encouraging the company's NAFTA lawsuit so that it can deflect the political fall-out of forcing the state to open the facility. If Metalclad's claims are indeed accurate, this case raises the disturbing possibility that investors can use their rights to collude with governments to force unwanted or even dangerous investments on unwilling populations.[12]

There is at least one other current case, Robert Azinian et al v. Mexico, which also relates to waste disposal.[13]

The true purpose and likely result of the "expropriation" chapter of the MAI is evident in these cases. Canadian law would not treat these legitimate governmental regulatory actions to protect the environment and human health as expropriation giving rise to compensation. Indeed, the Supreme Court of Canada has recently emphasized the importance of environmental protection as a value in Canada, in upholding the constitutionality of the Canadian Environmental Protection Act.[14]

However, the MAI does not include any exception in its presumption of compensation for "legitimate objectives" undertaken by governments.

We believe that the combination of the NAFTA "expropriation" claims and those possible under the MAI will constitute the most effective anti-environmental strategy yet devised by corporations and their government allies. No government will take lightly the prospect of a huge financial claim against it for legislation, however high the public support for the measure. This is especially true in this historical moment. The "chilling effect" of the Ethyl case and potential claims under the MAI, after its completion, will make effective environmental protection in this country even more difficult.

In developing countries, many of which do not yet have environmental law frameworks in place,

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[12]Sforza, Michelle, and Nova, Scott, "The Multilateral Agreement on Investment and the Environment," The Preamble Collective/The Preamble Center for Public Policy, Washington D.C., 1997, p.12.

[13]Personal Communication from Michelle Sforza, Preamble Collective, November 19, 1997.

[14]R v. Hydro Quebec, [1997] S.C.J. No. 76.

this corporate strategy will be even more effective in preventing public interest legislation. This will undoubtedly smooth the path for such Canadian interests as mining companies operating abroad. Unfortunately, given significant examples of environmental and community damage caused by certain Canadian mining corporations in developing nations, this is not a positive result.

We urge you to consider the serious ethical issues that arise from the granting, to large Northern-based corporations, of these powers to effectively extract compensation from Canada and from poorer Southern countries seeking to put in place public protection regimes.

5. Reversion to secret dispute processes

The confidential dispute panel process used under the trade agreements and planned for the MAI is another element of these agreements that offends Canadian domestic law principles and the formation of public policy in Canada. That confidential dispute resolution through arbitration is widely used in private commercial disputes is not a justification for their use in trade processes.

In these cases, what is at stake is the authority of governments to use their constitutional powers to enact laws for public protection. The accountability of governments to the electorate for these actions is a cornerstone of democratic society. A legal system with open, visible processes is the corresponding dispute resolution process for democracies. The rights of citizens and corporate "persons" to sue governments in our courts occurs under laws passed by the legislature, while Parliament remains supreme.

In the MAI/trade panel process, corporations have rights equal to that of governments (or arguably, greater than governments); citizens are entirely excluded from participation and information about the proceedings; and the results, compensation claims in favour of corporations, fundamentally thwart Parliament's capacity to legislate for public protection.

We urge Members of Parliament to consider very seriously this diminution of your own role and not to support the expansion of these processes in the MAI.

III. PURPORTED ENVIRONMENTAL PROTECTIONS

In the context of the MAI, a number of approaches to environmental protection have been discussed. These include wording in the Preamble; wording to oppose the lowering of environmental standards in order to attract investment; and further references to GATT Article XX.[15] In addition, the United Kingdom is proposing some form of assessment of environmental

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[15]"Conclusions on Labour and Environment," OECD, DAFFE/MAI/RD/97, paper distributed at the meeting of the Negotiating Group on 29-30 October, 1997.

issues. These proposals are not encouraging.

As NAFTA negotiators readily admitted, wording in a preamble is not enforceable. As noted above, Article XX of the GATT has not been interpreted to maintain environmental or health-related measures. The NAFTA does not actually prohibit the lowering of standards to attract investment;[16] nor does it permit access to binding dispute resolution if a Party does so. The Canadian government did a "review" of NAFTA from the environmental perspective, but it did not meet the standards of credible environmental assessment, and failed to study the political realities of environmental standard setting and resource management, as amended by the trade agreements.[17]

IV. CONCLUSION

Even more than previous international trade agreements, the MAI suffers from a lack of balance between commercial interests and the interests of citizens and the environment.

It does not recognize the "legitimate objectives" of domestic protections of health, labour standards, social policy, culture, or local job creation. However, it includes an extremely broad definition of investment and investors rights, with extraordinary "expropriation" claims.

It includes standstill and rollback provisions, but no protection for future necessary innovative policies for public interest goals.

It provides investor-state legal claims, but no citizen-state or citizen-investor claims; and secret legal processes.

It provides no balancing of Northern industrial interests and Southern needs for poverty alleviation.

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[16]Article 1114(2) of NAFTA reads:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

[17]Government of Canada, North American Free Trade Agreement; Canadian Environmental Review, Ottawa, October 1992.

It requires mandatory compliance by national governments but no requirements that corporations comply with public interest laws in the countries in which they operate.

We have reviewed Minister Marchi's statement to this committee and consider that it actually suggests a very limited attempt by the federal government to protect public legislative powers. He indicated that

> As in the NAFTA [North American Free Trade Agreement], Canada will not accept any general commitment to freeze (the so-called "standstill") or phase-out ("Roll-back") restrictions on foreign investment. Canada will retain the flexibility to carry out public policy in core areas of national interest.[18]

He also referred to the investor-state arbitration system as "transparent." This is a truly mystifying statement.

These statements appear to refer only to direct controls on foreign investment, such as exist in the remains of the Foreign Investment Review Act. Further, one can only wonder what are "core areas of national interest," and why only they are purportedly to be protected. The reference to the NAFTA example gives no assurance that the Government of Canada will seek to protect **all** important policy areas.

V. RECOMMENDATIONS

We oppose our government's position in promoting and adhering to the MAI. At a minimum:

1. Recognizing that the above strategies will not protect the capacities of governments, including Canada, to enact measures for environmental protection and related human health and resource management, Canada should propose a wide "carve-out" (exception) for such policies, to exempt them from the requirements of the MAI.

If such a carve-out is not accepted by other delegations, Canada should submit a comprehensive reservation to ensure that all levels of government in Canada retain the effective capacity for environmental and public protection.

2. As proposed by the Sierra Club, the government should release draft texts of the agreement, country specific proposals and lists of reservations to ensure informed public debate. It should expand these public hearings to allow involvement from more citizens, provincial and municipal governments, and support an extended timeline for negotiation of the MAI.

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[18]"Notes for an Address by The Honourable Sergio Marchi Minister for International Trade to the Standing Committee on Foreign Affairs and International Trade 'The Multilateral Agreement on Investment'", Ottawa, November 4, 1997.

3. The Canadian government should support the United Kingdom proposal for an environmental assessment, but with full public participation, and full consideration of the range of impacts on governmental decision- making likely from the MAI.

4. The Canadian government should not support the extended "expropriation" clause of the agreement.

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