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THE MULTILATERAL AGREEMENT ON INVESTMENT AND ENVIRONMENTAL REGULATORY POWERS

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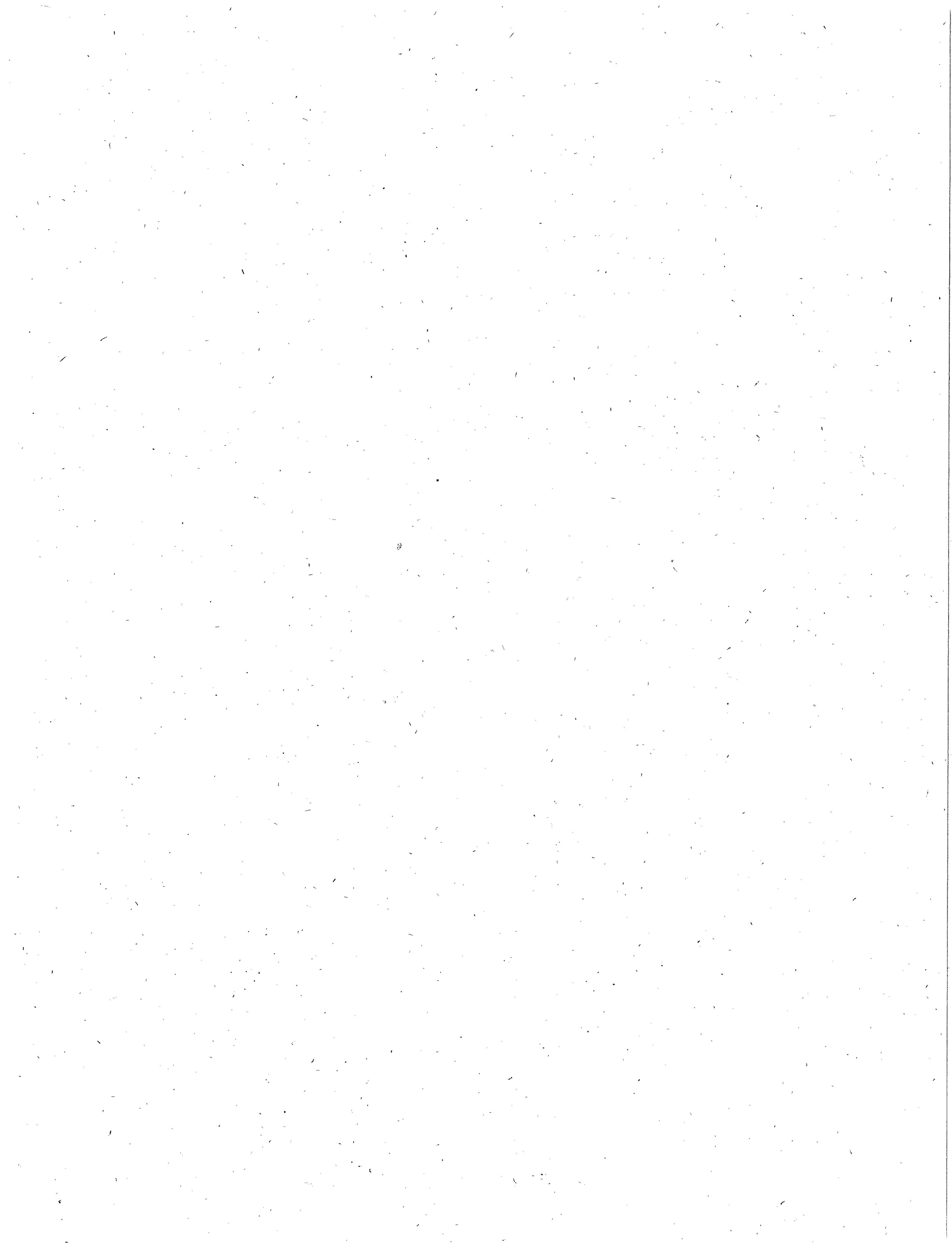

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1. CANADIAN ENVIRONMENTAL LAW ASSOCIATION (CELA)

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. CELA is located in Toronto.

2. 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.[1]

Given this new international de-regulation initiative, the MAI, it is important to review how it may affect environmental regulation in Canada. 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.

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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 the failure to keep 1993 Red Book commitments on the Canadian Environmental Protection Act and an Endangered Species Act as well as a sorry performance on climate change,. Both levels of government hae implemented large cuts in budget and staff on the environmental ministries.

2.1 National Treatment

The MAI includes very broad definitions of investor and investment and extends national treatment and most favoured nation treatment to foreign investors. Investors include human and corporate persons, no-profit and for-profit private and public organizations. Investment covers "every kind of property, claims to money or performance, contracts, concessions, licenses, permits, etc. These provisions not only eliminate arbitrary interference with foreign investors' rights, but also interfere efforts to negotiate and enforce local and national economic benefits. The requirement for national treatment for investment incentives (subsidies) appears to require payment of the same subsidies to large foreign corporations as may now be provided to small, local of non-profit community-based health, social service, educational organizations, and to the health and medical sector overall.

2.2 Performance requirements

The MAI will ban or restrict requirements for: domestic content levels; domestic purchasing requirements; technology transfer; joint ventures with local investors; local investment levels; local employment levels; local research and development.

The MAI includes extensive prohibitions against performance requirements for linking approvals or providing subsidies or other advantages to investors regardless whether they are foreign or domestic. It exceeds the NAFTA provisions in the types that are prohibited and the breadth of scope and application. These provisions will particularly affect provincial and federal rights to require job creation and other benefits for local communities from foreign investment including foreign corporate exploitation of natural resources.

2.3 Impacts on international environmental treaties

The MAI may conflict with existing international environmental agreements such as those which use trade sanctions to enforce agreed international environmental goals. Such treaties include the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

For example, the Basel Convention seeks to restrict the movement of some wastes across borders. However, the MAI contains no exemption to protect government regulations that comply with Basel, if they constrain corporate plans to transport such wastes. Failure by a government to comply with the MAI, in such a circumstance, and regardless of environmental problems that result, could make the government liable to an investor-state claim by the affected corporation.

2.4 Standstill and Rollback

These provisions to prevent further laws that are not in accordance with the MAI provisions will halt further environmental initiatives and gradually reduce those that now exist. These terms are the put us on the road in the opposite direction to where we should be going, namely to international agreements that foster rapid, new, and innovative measures to protect the planet.

3. "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 <u>any</u> 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 profits from a piece of land, is not at law compensable expropriation. CELA has previously written on this subject:[2]

> ...the term"expropriation" traditionally refers to a landowner's loss of use, title or benefit of property <u>and</u> 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 property been taken, but that the taking has also benefited the expropriating authority.
>
> 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.
>
> The distinction between expropriation and land use regulation has been noted by the Supreme Court of Canada on several occasions. For example in <u>Soo Mill & Lumber Co. Ltd.</u> v. <u>City of Sault Ste. Marie,</u> the Supreme Court of Canada rejected arguments that

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[2]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: <u>Manitoba Fisheries Limited v. R.</u> (1978) 6. WWR 496 (SCC); <u>The Queen in Right of British Columbia v. Tener et al</u> (1985) 17 DLR (4th) 1 (SCC); <u>Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie,</u> (1975) 47 DLR (3rd)l; <u>Sanbay Developments Ltd. v. City of London,</u> (1975) 45 DLR (3rd) 403; <u>Hartel Holdings Co. Ltd v. Council of the City of Calgary,</u> (1984) 8 DLR (4th) 321.

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 municipality 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.

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:

"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 the public interest." (emphasis added).

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":

"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:

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[3] and the MAI extend the concept of expropriation, with a requirement of compensation, so broadly that virtually any governmental regulatory

[3]NAFTA Chapter 11, especially Article 1110.

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. Rather than defend the case against the claim, the Canadian government settled the matter this summer. Paid $13 million US in "compensation" to Ethyl, and is now it's international advertiser, assuring the world that MET is gasoline is not an environmental or public health threat.

A second case has been commenced against Canada by S.D. Myers of the US, for "compensation" for profits lost during a period when PCB exports from Canada were banned. The claim in that case was leaked and published in the US. Without a leak, it would not be available to citizens in Canada.

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 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 favoured 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...
>
> 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.[4]

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[4]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.

There is at least one other current case, Robert Azinian et al v. Mexico, which also relates to waste disposal.[5]

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.[6]

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 and health law frameworks in place, 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 and in Spain, this is not a positive result.

serious ethical issues 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.

4. 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 and investment processes.

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

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

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. They also extract large sums of public funds for improper private appropriation.

5. PURPORTED ENVIRONMENTAL PROTECTIONS

In the context of the MAI, a number of approaches to environmental protection have been discussed with environmentalists by Environment Canada. We will review each of these proposals in turn..

5.1 Wording on the environment in the preamble:

As NAFTA negotiators readily admitted, wording in a preamble is not enforceable. Both NAFTA and GATT now contain such wording in their preambles, but it has provided no protection for environmental measures when challenged under the agreements.

5.2 Interpretive note on National Treatment and Most favoured nation treatment

A proposal has been made that these sections should state that investors and their investments should be treated no less favourably than investors "in like circumstances," wording that would protect environmental measures in different circumstances. However, the negotiators have not agreed to this wording. An "Interpretive note" on this section is also being discussed; in my view, it does not protect the right of government to use local industries for legitimate public goals, including local development and employment.

5.3 An affirmation of the right to regulate

The Chairman has proposed a provision stating that a Party may adopt any measures that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns provided such measures are consistent with an MAI. This proposal is similar to the wording of Article 1114(1) of NAFTA. Given that the measures must be consistent with the MAI (similar to the requirement in NAFTA 1114 that measures be consistent with NAFTA), it actually adds no protection.

Alternatively, the Chairman suggests an affirmation of the right to regulate in the preamble. As noted above, wording in a preamble is not enforceable.

5.4 A provision on not waiving environmental measures to attract an investment

A non-binding provision with similar wording exists in NAFTA[7], and has not prevented wholesale environmental de-regulation in Canada, including for the overt purpose of attracting investment, as stated by the Harris government in Ontario. Although the Chairman is apparently proposing a binding commitment, some countries have clearly stated that they will not accept it. Even if it were binding, it is difficult to envision how it could be used effectively to protect environmental regulation, and Environment Canada documents acknowledge this. Specifically, it would be difficult to prove that changes in environmental regulation were made to attract investment unless this was admitted by the responsible government. Even if they were, the MAI provides no remedy to undo the damage.

It appears unlikely that Parties will agree to a binding commitment.

5.5 An interpretive note on expropriation

The Chairman has proposed an interpretive note as follows:

> "Articles ___ on general treatment and ____on Expropriation and compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by government. Nor would such normal and non-discriminatory government activity contravene the standards in Article ___(1) General Treatment."

This note is unacceptable in several respects. First, it affirms that the MAI intends that the decisions of international commercial tribunals on expropriation (existing international legal norms) shall take precedence over domestic law and replace it, so that in Canada, government measures which do not transfer title and would not be compensable will now be considered

[7] Article 114(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.

expropriation. Second, the expropriation wording currently in the MAI is clearly meant to cover regulation, since it specifies that even when done for a public purpose, an action which an international arbitrator considers "tantamount to expropriation" will require the payment of compensation. Since international law on expropriation establishes no controls on what can be considered as expropriation, this note not only doesn't protect regulatory powers; it may further endanger them.

5.6 Environmental exception for certain performance requirements

This proposal would provide an exception for some performance requirements by incorporating into the text wording based on Article XX of GATT, namely:

"Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any contracting Party from adopting or maintaining measures, including environmental measures:

(A) necessary to secure compliance with measures that are not inconsistent with the provisions of this Agreement;

(B) necessary to protect human, animal or plant life or health; or

(C) necessary for the conservation of living or non-living exhaustible natural resources."

This wording is even more limiting than the wording of GATT Article XX and therefore, will be even less effective in protecting environmental or health policies than the GATT. In fact, Article XX of the GATT has been relied upon to defend numerous environmental and health domestic standards over the past ten years, and in every case, the domestic standard has been found unacceptable, despite Article XX. In other words, Article XX wording, which could have provided the means of accommodating domestic health and environmental measures under the GATT, has been shown to provide no protection in the face of trade-based challenges.

It isl therefore not likely to protect performance requirements if incorporated into the MAI.

5.7 Association of the OECD Guidelines for Multinational Enterprises (MNEs) with an MAI.

These guidelines are skeletal and voluntary. They would not compel corporations to do anything. Specifically, in contrast to the MAI which compel governments to comply with strict limits on their activities, the guidelines do not compel MNEs to comply with the domestic laws of the countries in which they operate.

5.8 General Exception for the Environment

There is apparently some discussion about incorporating Article XX of the GATT as a general exception in the MAI. Although this would in theory be an advance over the current structure of the agreement, as noted above, we can have little confidence that is would actually provide protection for domestic health and environmental measures.

6. 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 strategies that involve preferences for local enterprises, performance requirements from multinational corporate investors, and other community-based development approaches.

It requires mandatory compliance by national governments but does not require that corporations comply with public interest laws in the countries in which they operate.

7. RECOMMENDATIONS

We oppose our government's position in promoting and adhering to the MAI, and decry its refusal to abandon it in the face of widespread opposition. If it is to continue it promotion, we recommend much greater frankness about its components, and their relation to other international law. This would include acknowledgement 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. If the government of Canada is serious about these protections, it should propose a wide "carve-out" (exception) for such policies, to exempt them from the requirements of the MAI.

The exemption should be worded, not like Article XX of the GATT which has been rendered essentially useless for environmental and health protection, but rather like the MAI wording for an exemption for financial services, namely:

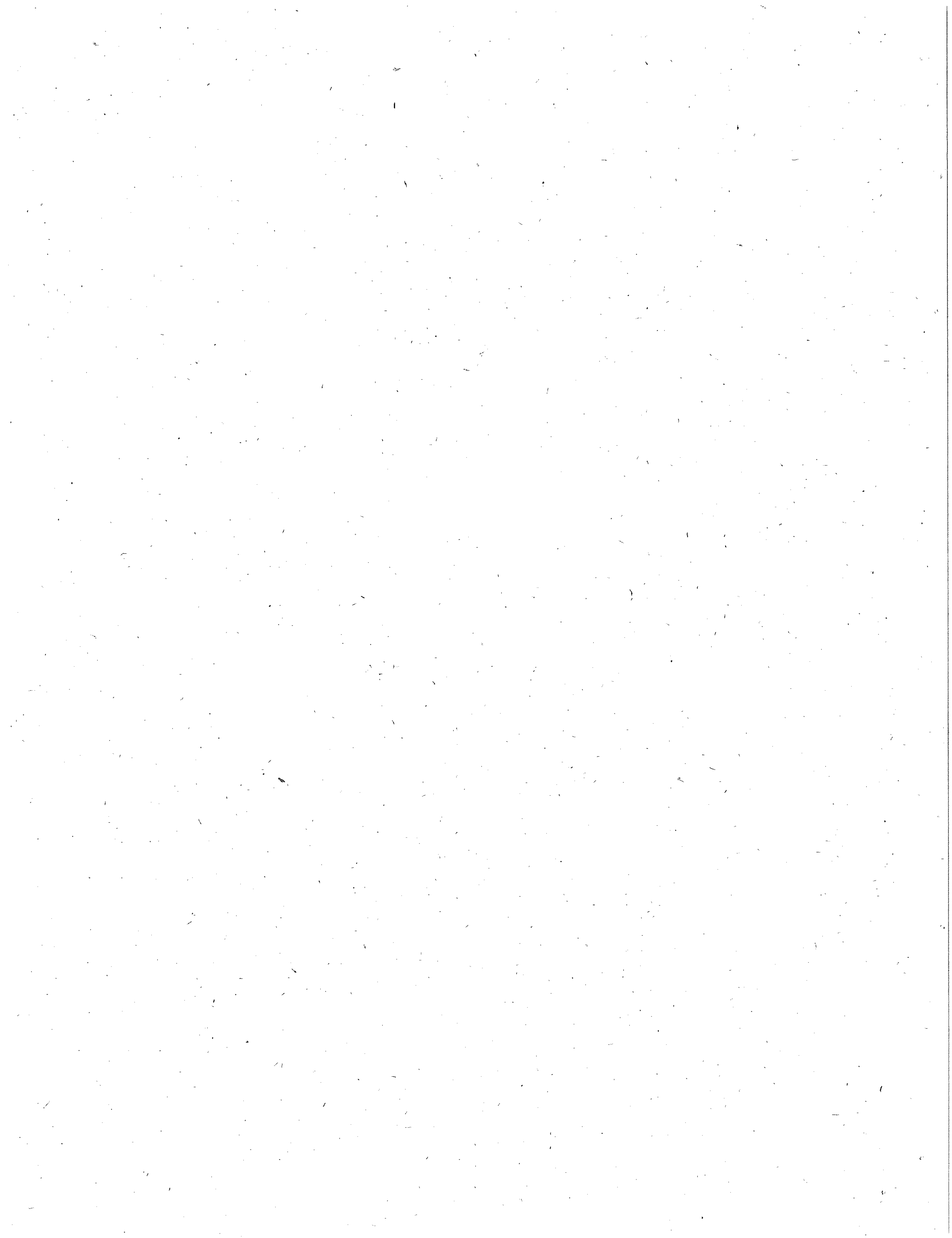
> Notwithstanding any other provisions of the Agreement, a contracting Party shall not be prevented from taking prudential measures with respect to financial services. . .

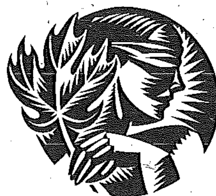
(Art. VII.(1)

Such an exemption would operate regardless of any other provisions, and would permit future innovative and necessary policy making, in contrast to the standstill and rollback provisions which will prevent them. The phrasing "prudential measures" would permit the application of the precautionary principle, so that environmental protection measures could be enacted when a problem is evident, even if conclusive scientific evidence is not yet available.

This is undoubtedly why this wording has been introduced in relation to that apparently-highest of corporate priorities, financial services.

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 health protection.





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