THE MULTILATERAL AGREEMENT ON INVESTMENT: HEYDAY OR MAI-DAY FOR ECOLOGICALLY SUSTAINABLE DEVELOPMENT?

JAN MCDONALD*

[The expansion of economic liberalisation policies from international trade to international investment is currently being negotiated in the Organisation for Economic Cooperation and Development. The proposed Multilateral Agreement on Investment ('MAI') aims to remove protectionist obstacles to foreign investment by committing parties to equal treatment for all investors. The MAI also entrenches a range of special disciplines designed to encourage foreign investment in member states. Several of these disciplines have the potential to impair nations' ability to promote ecologically sustainable development patterns, and may result in an overall stagnation of environmental policy development. Recent responses to these concerns within the MAI negotiating forum are inadequate to redress the imbalance between investor rights and member state responsibilities. With substantial amendment, however, including the attachment of a binding code of environmental good practice for multinational corporations, the MAI could provide a framework for ecologically sustainable international investment.]

CONTENTS

* BA, LLB (Hons) (Qld), LLM (Hons) (Northwestern School of Law of Lewis and Clark College); Associate Professor of Law, Bond University. The author wishes to thank Professor Mary Hiscock for discussions and comments on earlier drafts of this article. The law stated is current as at 8 September 1998.

> This is not a charter for corporations to evade environmental laws, to exploit labour or to invade critical areas of national endeavour.[1]

I INTRODUCTION

Global foreign direct investment ('FDI') has increased dramatically over the past 25 years, growing from $AUD29 million to $AUD350 billion.[2] Investment flows now outstrip the value of the international trade in goods and are increasing at a rate of about 10 per cent annually.[3] In Australia, outward investment increased from $AUD170 billion to $AUD199 billion in 1996–97, with more than two-thirds directed towards Organisation for Economic Cooperation and Development ('OECD') member countries.[4] The basic principles underpinning global economic liberalisation are non-discrimination (the 'most favoured nation ('MFN') obligation') and non-protectionism (the 'national treatment obligation'). These concepts have formed the basis of commercial treaties since the 11th century.[5] In modern international economic law, they are articulated in the *General Agreement on Tariffs and Trade* ('*GATT*')[6] and the other liberalisation agreements under the auspices of the World Trade Organisation ('WTO'), as well as the *Treaty Establishing the European Economic Community*,[7] the *North American Free Trade Agreement* ('*NAFTA*')[8] and numerous other regional, bilateral and sector-specific instruments. To date, however, there has been only patchy and inconsistent regulation of investment activities. The approximately $AUD350 billion in annual FDI flows are regulated by about 1630 bilateral investment treaties ('BITs') which incorporate the principles of non-discrimination.[9] Many regard this as a critical gap in international economic law,

1 William Dymond, 'The Main Substantive Provisions of the MAI' (1997) MAI Briefing for Non-OECD Countries, Organisation for Economic Cooperation and Development ('OECD'), <http://www.oecd.org/daf/cmis/mai/dymond.htm> [42]. Copies of all internet sources cited in this article are on file with the author.

2 OECD, *Open Markets Matter: The Benefits of Trade and Investment* (1998) 9, 26.

3 For a more detailed discussion of trends in FDI, see Joan Spero and Jeffrey Hart, *The Politics of International Economic Relations* (5th ed, 1997) 103–8 and the references cited therein.

4 Commonwealth Joint Standing Committee on Treaties, *Public Hearing on the MAI: Official Hansard Report*, 6 May 1998, 6 (Janine Murphy, Assistant Secretary, Foreign Investment Review Branch, Department of Treasury) ('*Public Hearing on the MAI*').

5 Dymond, above n 1, [7].

6 *GATT*, opened for signature 15 April 1994, [1995] ATS No 8, 33 ILM 1154, (entered into force 15 April 1994).

7 *Treaty Establishing the European Economic Community as Amended by Subsequent Treaties*, opened for signature 25 March 1957, 298 UNTS 3 (entered into force 1 January 1958) ('*Treaty of Rome*').

8 *NAFTA*, opened for signature 17 December 1992, Canada–Mexico–USA, 32 ILM 289 (entered into force 1 January 1994).

9 OECD, 'MAI: The Multilateral Agreement on Investment' (1997) OECD Policy Brief, OECD, 2/1997, <http://www.oecd.org/publications/Pol_brief/9702_pol.htm> [11] ('Policy Brief No 2'). See also Spero and Hart, above n 3, 269 and the references cited therein; Editorial, 'Investment Rules, OK', *The Australian Financial Review* (Sydney), 9 March 1998, 16; E V K FitzGerald, R Cubero-Brealey and A Lehmann, 'The Development Implications of the Multilateral Agreement on Investment' (1998) UK Department for International Development, Finance and Trade Policy Research Centre, <http://www.oecd.org/daf/cmis/mai/ukreport.pdf> 30.

arguing that the proliferation of regional and bilateral agreements has made things more complex and less certain for investors.[10]

In this context of significant growth in FDI and the absence of a coherent international investment regime, the member states of the OECD[11] determined in 1995 to develop 'a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures.'[12]

Earlier efforts to negotiate such an agreement within international trade fora had broken down.[13] The OECD was considered the most appropriate negotiating forum because member states had a large stake in the benefits of investment liberalisation: 85 per cent of all FDI outflows originate from OECD countries, and those countries account for about 60 per cent of inflows.[14] Moreover, 487 of the 'Fortune 500' companies — the largest companies in the world — are based in OECD member states.[15]

Proponents of global economic integration regard the proposed Multilateral Agreement on Investment ('MAI')[16] as the next major element in the liberalisation project, supplementing the agreements of the WTO in respect of foreign investment.[17] Proponents argue that these initiatives will accelerate economic growth and spread prosperity through freer flows of information and capital, exert pressure on governments to keep budgetary discipline by maintaining

[10] American Bar Association ('ABA'), Section of International Law and Practice, 'Report to the House of Delegates: Multilateral Agreement on Investment' (1996) 31 *International Lawyer* 205, 205, citing Thomas Brewer and Stephen Young, 'The Multilateral Agenda for Foreign Direct Investment: Problems, Principles, and Priorities for Negotiations at the OECD and WTO' (1995) 18 *World Competition Law and Economic Review* 67–8. For an excellent historical overview of the international patterns of FDI and the relationship between multinational corporations and the developing world, see Spero and Hart, above n 3, ch 8.

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

[12] OECD, 'Ministerial Communiqué' (1995) 194 *OECD Observer* 39, 40.

[13] There was some attempt to develop an international agreement on investment before the Second World War, and a draft article was proposed for inclusion in the *Havana Charter for the International Trade Organisation*, opened for signature 24 March 1948, UN Doc ICITO/1/4/1948; US Department of State Publications 3117, Cmd 7375 ('*Havana Charter*'): see Spero and Hart, above n 3, 138. The *Havana Charter* was never ratified.

[14] OECD, 'Policy Brief No 2', above n 9, [15].

[15] Maude Barlow and Tony Clarke, *MAI: The Multilateral Agreement on Investment and the Threat to American Freedom* (1998) 7.

[16] Directorate for Financial, Fiscal and Enterprise Affairs, 'The Multilateral Agreement on Investment Negotiating Text (as of 24 April 1998)' (1998) MAI Home Page, OECD, <http://www.oecd.org/daf/cmis/mai/maitext.pdf> ('MAI April Draft Text'). References in the text to the provisions of the MAI will refer, unless otherwise specified, to those measures found in the latest draft of the agreement, released on 24 April 1998.

[17] These documents include the *General Agreement on Trade in Services*, opened for signature 15 April 1994, [1995] ATS No 8, 33 ILM 1167, (entered into force 1 January 1995); the *Agreement on Trade-Related Investment Measures*, opened for signature 15 April 1994, [1995] ATS No 8, 33 ILM 1144, (entered into force 1 January 1995) (contained in *Multilateral Agreement on Goods*, Annex 1A to the *Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, [1995] ATS No 8 (entered into force 1 January 1995)); and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* opened for signature 15 April 1994, [1995] ATS No 8, 33 ILM 1197, (entered into force 1 January 1995). See also OECD, 'Policy Brief No 2', above n 9.

international competition for investment capital, and reduce the risk of war by interconnecting the world's economies.[18] They also suggest that such liberalisation can improve environmental quality by promoting a more efficient allocation of resources, removing environmentally damaging subsidies and distortions, and accelerating the transfer, adoption and diffusion of environmental technology and skills.[19]

Critics of economic globalisation[20] have identified the potential conflict between the objectives and principles of free trade and ecologically sustainable development ('ESD').[21] In particular, they fear that the competition between countries for investment may result in a neglect of environmental concerns; that national governments are gradually losing their influence over important domestic issues; and that globalisation undermines the traditional balance of power between rich and poor.[22] Because of the close relationship between economic activity, including FDI, and the environment, some fear that the 'structural failure' to embrace and integrate economic and environmental policy could eventually threaten the long-term sustainability of the international economic regime.[23]

As FDI increases, the international community has highlighted the link between global patterns of production and consumption and environmental degradation in a series of multilateral statements.[24] In articulating the key principles of ESD,[25]

[18] High-Level Advisory Group on the Environment to the Secretary-General of the OECD ('HLAGE'), 'Guiding the Transition to Sustainable Development: A Critical Role for the OECD' (1997) Sustainable Development, OECD, <http://www.oecd.org/subject/sustdev/hlage.htm> [20]. See also the discussion of the benefits of foreign investment in Spero and Hart, above n 3, 114–15, 254–8.

[19] OECD, 'Policy Brief No 2', above n 9, [5]; OECD, *Open Markets Matter*, above n 2, 9–11, 14–16; OECD, 'Foreign Direct Investment and the Environment: An Overview of the Literature'(1998) MAI Home Page, OECD, <http://www.oecd.org/daf/cmis/mai/fdienv.htm> [32]–[40] and the references cited therein.

[20] The OECD defines economic globalisation as 'a process in which the structures of economic markets, technologies, and communications patterns become progressively more international over time': HLAGE, above n 18, [19]. See also OECD, *Economic Globalisation and the Environment* (1997).

[21] Some have actually suggested that foreign investment results in a net outflow of capital from poorer countries: Spero and Hart, above n 3, 256 and the references cited therein; Martin Khor, *The WTO and the Proposed Multilateral Investment Agreement: Implications for Developing Countries and Proposed Positions* (1996) 14.

[22] Spero and Hart, above n 3, 254, 256–60; HLAGE, above n 18, [21]; Michelle Sforza, Scott Nova and Mark Weisbrot, 'Writing the Constitution of a Single Global Economy: A Concise Guide to the Multilateral Agreement on Investment: Supporters' and Opponents' Views' (1997) Guide to the MAI, Preamble Centre, <http://www.preamble.org/mai/maioverv.html> [3].

[23] OECD, 'FDI and the Environment', above n 19, [33], citing Daniel Esty, 'Revitalising Environmental Federalism' (1996) 95 *Michigan Law Review* 570, and citing Daniel Esty and Damien Geradin, 'Market Access, Competitiveness and Harmonisation: Environmental Protection in Regional Trade Agreements' (1997) 21 *Harvard Environmental Law Review* 265. The OECD HLAGE Report refers to the various ways in which degradation of ecosystems can threaten world markets, for example, through desertification, depleted fisheries, deforestation, loss of topsoil and climate change: HLAGE, above n 18, [15].

[24] These include: Declaration of the United Nations Conference on the Human Environment, 11 ILM 1416, UN Doc A/Conf.48/14 and Corr.1 (1972), ('Stockholm Declaration'); World Commission on Environment and Development ('WCED'), *Our Common Future* (1987) (approved by General Resolution of the United Nations General Assembly in 1987: GA Res 187, 42 UN GAOR (96th plen mtg), UN Doc A/42/821Add.5 (1987)); the 1992 Earth Summit Documents: Rio Declaration on Environment and Development, 31 ILM 874, UNCED Doc A/Conf.

each statement has called for the integration of environmental considerations into economic policy instruments to ensure that the pursuit of economic development did not compromise the ability of future generations to develop.

> [T]he integrated and interdependent nature of the new challenges and issues contrasts sharply with the nature of the institutions that exist today. These institutions tend to be independent, fragmented and working to relatively narrow mandates with closed decision processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must.[26]

The OECD itself has a history of rhetorical commitments to the integration of economic and environmental principles throughout its work.[27] Yet, instead of embracing an holistic approach to environmental problems, over the past decade countries have agreed to powerful economic treaties with few environmental safeguards.[28] The continued separation of issues is justified on the basis that international trade and investment liberalisation are not concerned with environmental protection[29] and that the latter is more appropriately dealt with in agreements negotiated in other fora, such as the United Nations Environment Programme.[30] Critics have expressed frustration over this bifurcation, highlighting the failure of international economic law to recognise that environmental goods and services are more valuable than those provided by markets: the economic value of ecosystem services (most of which are outside the market) is estimated to be $US16–54 trillion per year, with an estimated average of $US33 trillion, whereas the annual combined value of gross national products is $US18 trillion.[31]

151/5/Rev.1 (1992) ('Rio Declaration'); Agenda 21: Programme of Action for Sustainable Development, United Nations Conference on Environment and Development ('UNCED'), UNCED Doc A/Conf.151/26 (1992) ('Agenda 21'); and the Programme for the Further Implementation of Agenda 21, A/Res/S-19/2 (1997).

25 ESD is broadly defined as progress that 'meets the needs of the present without compromising the ability of future generations to meet their own needs': WCED, above n 24, 8.

26 Ibid 310.

27 A 1984 OECD International Conference on Economics and the Environment supported the need to make environmental protection initiatives and economic policies mutually reinforcing: HLAGE, above n 18, [1]–[2]. See also Ministerial Statement, *Environmental Strategy of the OECD* (1991); OECD, 'Procedural Guidelines on Trade and the Environment' in OECD, *The Environmental Effects of Trade* (1994).

28 HLAGE, above n 18, [29].

29 '[T]he MAI is a set of rules about international investment and investors, and thus cannot be judged in terms of its effectiveness as a vehicle for international norms on other issues such as human rights, labour standards or environmental safeguards — although it certainly should not conflict with international agreements in these topics': FitzGerald, Cubero-Brealey and Lehmann, above n 9, 14.

30 See the comments of the Department of Treasury Representative, Janine Murphy, and those of the Chief Executive, Australian Chamber of Commerce and Industry, Mark Paterson: *Public Hearing on the MAI*, above n 4, 37, 97.

31 Robert Costanza et al, 'The Value of the World's Ecosystem Services and Natural Capital' (1997) 387 *Nature* 253, 259.

The MAI largely follows these past trends in economic treaty negotiation. It was leaked and published on the internet in 1997.[32] Since then, the document has generated controversy among environmental, human rights and trade union groups. Some of that controversy has verged on misleading hysteria[33] and has been exacerbated by nationalistic fears.[34] This article seeks to identify those aspects of the MAI that genuinely compromise the furtherance of ESD. It examines the key provisions of the MAI and their implications for environmental protection initiatives in Australia. It also considers their impact on the ability of poorer countries to pursue a development path that is both ecologically sustainable and socially just. The general merit of investment liberalisation involves complex questions about competing economic models and assumptions, and will not be challenged here in any comprehensive way.[35] Instead, the focus is on the legal architecture of the current draft of the MAI, which was released in April 1998.[36]

Most concern over the implementation of the MAI in its current form tends to focus on its direct beneficiaries — private investors. It is argued that over 40,000 multinational corporations around the world operate in a 'legal and moral vacuum', having little association with national governments.[37] Critics suggest that multinationals will pressure governments wishing to attract foreign investment to lower or suspend environmental, health and safety and labour standards,

[32] The consumer and environmental interest group, the Council of Canadians, claims to have obtained the first leaked draft of the text in early 1997 and placed it on the US Consumer Group 'Public Citizen' web-site. In Australia, most activity against the agreement has been directed by the Stop-MAI Coalition. See Madelaine Drohan, 'How the Net Killed the MAI: Grassroots Groups Used Their Own Globalisation to Derail Deal', *The Globe and Mail* (Toronto, Canada), 29 April 1998, A1, A12; Madelaine Drohan, 'MAI Talks Shunned as Trade Ministers Assess Options', *The Globe and Mail* (Toronto, Canada), 29 April 1998, B6.

[33] See, eg, Barlow and Clarke, above n 15, who suggest that once the MAI comes into force, local investors will almost always be disadvantaged vis-à-vis foreign investors (at 16–17), *all* domestic regulation will have to be gradually removed (at 87–8), virtually no new regulation can occur (at 43–8), and that the world will be dominated by 'corporate rule' (at 2). In the US, citizens' groups staged an anti-MAI demonstration in front of the Capitol Building, presenting members of Congress with handcuffs that symbolised the MAI's fettering of their law-making powers. See Martin Khor, 'NGOs Mount Protests against MAI' (1998) 1716 *Third World Features* for a discussion of other protests staged worldwide; and the Commonwealth Joint Standing Committee on Treaties, 'Multilateral Agreement on Investment: Interim Report' (1998) Committee Reports of the 38th Parliament, Joint Standing Committee on Treaties, <http://www.aph.gov.au/house/committee/jsct/reports/report14/rept14.pdf> 4.

[34] See, eg, the collection of criticisms of the MAI accessible on the One Nation web-site: <http://www.gwb.com.au/onenation/speeches/nov11.html>.

[35] The arguments for and against are summarised briefly in Sforza, Nova and Weisbrot, above n 22. The impacts of FDI on the environment generally are also surveyed in the 1997 OECD literature review: OECD, 'FDI and the Environment', above n 19. The review examines empirical research on the location of environmentally sensitive industries and concludes that fears of the 'race to the bottom' are generally unfounded, but that there may be case-specific exceptions to this. For the most part, however, the decision to locate is based on a range of issues, including political stability, size and growth of potential market, labour costs, ease of repatriation of profits, transparency and predictability of administrative and legal framework, cultural affinity, infrastructure, quality of life: at 11. These issues are discussed in detail in Part III(C) and (D), below.

[36] Although the negotiators emphasise the draft nature of the MAI, it embodies the key elements of investment liberalisation and is likely to be subject to only minimal alteration.

[37] Robert Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 *Environmental Law* 1, 2.

especially in poorer countries whose standards are already low.[38] The same critics suggest that the MAI entrenches the rights of investors without imposing upon them the responsibilities that might fill the legal and moral vacuum, and that the power imbalance may be worsened when poorer countries are urged to accede.[39] While evidence of the social and environmental impacts of multinationals' activities overseas remains unclear, it seems sensible to ensure that any investment agreement maximises the likelihood that multinationals will act responsibly while reducing the possibility of irresponsible exploitative conduct. Part II examines the key substantive provisions of the MAI from this perspective and argues that in its current form, the MAI threatens to stagnate domestic environmental protection initiatives and to deny poorer nations control over the types of investment they encourage and the terms on which they do so.

Public concern over the implications of the MAI has prompted the OECD to stall negotiations on the form of the treaty until October 1998,[40] so the opportunity now exists to amend the draft text and thereby transform it into a blueprint for ecologically sustainable foreign investment practices.[41] The challenge facing the treaty negotiators is how to strike an appropriate balance between the need to encourage foreign investment that will generate economic wealth and the duty of nations to impose environment protection requirements. Part III of this article assesses the value and efficacy of the social policy safeguards currently included in the MAI, and suggests some amendments that might strike the appropriate balance.

Part IV reviews the status of exceptions to the agreement, including 'roll-back' and 'standstill' provisions, and the breadth of Australia's proposed exceptions. The article concludes that the MAI presents the OECD countries with an ideal opportunity to embrace the principles of sustainability, which have received little attention in the past. With an inclusive negotiating process and an integrated negotiating agenda, the final MAI could contribute to, rather than erode, ecologically sustainable and socially just development around the world.

[38] Sforza, Nova and Weisbrot, above n 22, [17]; Mark Horstman, 'Globalisation Gone Mad' (1998) 26 *Habitat* 22, 22–3; Friends of the Earth (US), 'Ten Reasons to Be Concerned about the MAI' (1998) OECD Multilateral Agreement on Investment (MAI), Friends of the Earth, <http://www.foe.org/ga/ten.html>; Andrea Durbin and Mark Vallianatos, '"Transnational Corporate Bill of Rights": Negotiations for a Multilateral Agreement on Investment (MAI)' (1997) OECD Multilateral Agreement on Investment, Friends of the Earth, <http://www.globalpolicy.org/socecon/bwi-wto/mail.htm>.

[39] Horstman, above n 38; Durbin and Vallianatos, above n 38.

[40] World Wildlife Fund ('WWF'), *OECD Countries Stall Globalization Treaty in the Face of Public Pressure* (1998) WWF International Press Release, WWF International, <http://www.panda.org/news/press/news_195. htm>.

[41] HLAGE, above n 18, [84]. Within the organisational structure of the OECD, some progress may be forthcoming following the recently established Sustainable Development Steering Group. The Group is the OECD's response to a call from HLAGE for sustainable development to be made 'the way of ordering and approaching all other issues on the OECD's agenda', although there is little evidence of OECD members assuming a relatively greater share of the burden in the transition towards economic and ecological harmonisation: cf ibid 10.

II AN ENVIRONMENTAL ANALYSIS OF THE MAI

The basic non-discrimination principles embodied in the MAI reflect the MFN and national treatment obligations common to trade and economic liberalisation instruments. Many provisions of the MAI are phrased in identical terms to the obligations contained in the investment chapter of *NAFTA*[42] between Canada, Mexico and the United States, and the Asia Pacific Economic Cooperation ('APEC') Non-Binding Investment Principles.[43] It also mirrors the *Energy Charter Treaty*, signed by the European nations, Canada, Australia, Japan and the Commonwealth of Independent States, which protects investment in the energy sector.[44] The MAI extends the geographic scope of *NAFTA* to all OECD countries and any other nation which is willing and able to accede. It expands the sectoral scope of the *Energy Charter Treaty* to all aspects of foreign investment. Thus, while most of the MAI provisions are not conceptually new, the breadth of their application makes their potential impact substantial. This part examines the aspects of the MAI that may impact upon environmental protection initiatives in wealthy countries like Australia, and upon sustainable development programs in poorer countries.

A *Definition of Investment*

The definitions of 'investor' and 'investment' are important because of the rights that the MAI confers on investors and investment. The MAI defines both terms broadly.[45] Investment includes direct investment, portfolio investment, real estate investment and rights under statute and contract. Briefing documents evince an intention to cover all economic sectors, all forms of investment, and all stages of investment.[46] A footnote to the definition indicates the need for an interpretive note, which would clarify that 'to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, *or* the assumption of risk.'[47]

On the current definition, an investment could include such preliminary steps as the obtaining of a licence or an approval to undertake an activity or development, whether or not obtaining that licence involved any significant outlay of financial or other resources. Read in conjunction with the right to receive

[42] *NAFTA*, above n 8, ch 11.

[43] APEC Committee on Trade and Investment, 'APEC Non-Binding Investment Principles' in APEC Committee on Trade and Investment, *Guide to the Investment Regimes of the APEC Member Economies* (3rd ed, 1996) 579.

[44] *Energy Charter Treaty*, opened for signature 17 December 1994, 34 ILM 360 (not yet in force). For a comparison of the proposed MAI with the *Energy Charter Treaty*, see generally Mary Hiscock, 'The OECD Proposal for a Multilateral Agreement on Investments' in Attorney-General's Department, *22nd International Trade Law Conference* (1995) 45.

[45] OECD, 'MAI April Draft Text', above n 16, art II: Definitions, [1]–[2].

[46] Xavier Musca, 'Scope of the MAI' (1997) MAI Briefing for Non-OECD Countries, OECD, <http://www.oecd.org/daf/cmis/mai/musca.htm>.

[47] OECD, 'MAI April Draft Text', above n 16, art II, fn 2 (emphasis added).

compensation for the expropriation of an investment,[48] such a broad definition could mean that governments will have to compensate for the full market value of an abandoned development proposal wherever licence conditions are dramatically altered, regardless of whether there has been a substantial monetary outlay. For example, a company wishing to construct and operate a plastics manufacturing facility on industrial-zoned premises may apply and obtain a licence to do so from relevant environmental regulators. For financial reasons, the company may defer construction of the facility and, during that time, environmental imperatives may prompt the regulatory authority to amend the terms of the licence to make pollution control requirements stricter. On the current definition of investment, an alteration to the licence conditions could trigger compensation rights under the MAI, even though the level of monetary expenditure has been minimal. The definition needs to clarify that an investment involves a significant commitment of capital or other resources. The interpretive note must explain that the expectation of gain or profit, without any outlay of resources, is insufficient to be an investment. On another note, there is some concern that the wide definition of investment, which includes portfolio investments, is potentially significant because the pressure for short-term profitability exerted by portfolio managers may drive down environmental and other standards of protection.[49]

B *National Treatment*

The MAI imposes on all member states the obligation to treat foreign investors no less favourably than local investors with respect to the establishment, acquisition, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.[50] This commitment seems to have subsumed the right of national governments to 'regulate and supervise the activities of transnational corporations' in order to serve the basic economic, social and environmental priorities of their countries, as set out in the Charter of Economic Rights and Duties of States.[51] The Charter of Economic Rights and Duties also gives nations the right to 'regulate and exercise authority over foreign investment.'[52] It is not within the purview of this article to debate whether national treatment should be adopted as a general policy that fetters the rights of governments to offer favourable investment conditions to local businesses. There are, however, two issues pertaining to the MAI's national treatment clause that are particularly relevant to environmental protection efforts: its application to de facto as well as de jure discrimination and the application of laws imposed by subnational governments, such as State and local governments.

[48] See below Part II(E).

[49] OECD, 'FDI and the Environment', above n 19, [19].

[50] OECD, 'MAI April Draft Text', above n 16, art III(1): National Treatment and Most Favoured Nation Treatment, [1]–[3].

[51] GA Res 3281, 29 UN GAOR (2315th plen mtg), UN Doc A/Res/3281 (1975); 14 ILM 251 ('Charter of Economic Rights and Duties').

[52] Ibid art 2(2)(a).

1 *De Facto Discrimination*

The MAI explicitly extends the national treatment obligation to de facto as well as de jure discrimination. Problems may arise where environmental controls are imposed on an industry-specific basis, if that industry happens to attract a high proportion of foreign investment. Similar issues have arisen in the context of the WTO but their resolution remains unclear. The WTO Appellate Body took the view in *Japan — Taxes on Alcoholic Beverages*[53] that a tax that has the effect of discriminating against imported products but which purports to apply equally to all products of a certain type, regardless of their place of origin, may nonetheless breach article 3(2) of the *GATT*. If this approach were applied to investment, an argument could be raised that certain regulations, for example environmental impact assessment requirements, that apply to particular types of development, for example large tourism developments, will treat foreign investors unfairly because many tourism projects in Australia are backed by foreign investors. Any focus on the incidence of the regulatory burden, rather than its true intent, creates enormous problems for environmental regulation in respect of large, potentially sensitive projects that happen to attract foreign investment. In addition, non-discriminatory requirements on developers to submit evidence of past environmental performance or undertake ongoing reporting may prove more burdensome for foreign investors and thus be subject to challenge.

In October 1997, the OECD Environment Directorate produced a non-paper entitled 'What Would an MAI with High Environmental Content Look Like?'[54] The non-paper is not publicly available, but a World Wildlife Fund International discussion paper on the OECD's progress on ESD summarises its conclusions.[55] According to the discussion paper, the Directorate emphasises that, given the site-specific nature of environmental regulation, national treatment does not mean identical treatment under the MAI.[56] In April 1998, the Chairman of the MAI Negotiating Group supported inclusion of the currently bracketed clause, which requires 'treatment no less favourable ... *in like circumstances*', in order to address the concern that environmentally-sensitive industries may be subject to more onerous environmental protection conditions.[57] The inclusion of the 'in like circumstances' clause would have to be accompanied by an interpretive note explaining that national treatment is a relative standard, that 'governments may have legitimate policy reasons to accord differential treatment to different types

53 WTO Appellate Body, *Report of the Appellate Body: Japan — Taxes on Alcoholic Beverages* AB-1996-2 (4 October 1996) 33.

54 Jan Adams, 'What Would an MAI with High Environmental Content Look Like?' (Internal Paper prepared for the OECD Environment Directorate, May 1997) (unpublished).

55 Charlie Arden-Clarke and Nick Mabey, 'The OECD, Foreign Investment and Sustainable Development: Reorienting OECD Policy Work and the Multilateral Agreement on Investment' (1998) Sustainability Information Resources, WWF International, <http://www.panda.org/resources/publications/sustainability/oecd/oecdwp.doc>.

56 Ibid [3].

57 OECD, 'MAI April Draft Text', above n 16, Annex 2: Package of Proposals for Text on Environment and Labour, art 2 (emphasis added).

of investments,'[58] and 'that a measure applied by a government has a different effect on an investment or investor of another Party would not in itself render the measure inconsistent with national treatment and [MFN] treatment.'[59]

2 *Differential Treatment within National Borders*

In member nations with a federal system of government, differences in regulation between States within that federation raise questions about the treatment to which foreign investors may be entitled. In Australia, for example, some projects and activities are subject to stricter environmental protection requirements in New South Wales than in other States and Territories. Could an investor in New South Wales demand that they be treated the same as an investor in the Northern Territory, because both are investing in the same country? The result could be a catastrophic decline in the level of environmental protection, since the Northern Territory's environmental impact assessment and pollution control regimes are significantly weaker than those in New South Wales. The explanatory text to the MAI flags this as a topic requiring further consideration, but it proposes no solutions.[60] It is likely that many countries with federal systems of government will include in their accession to the MAI a list of State laws that are exempt from the operation of the MAI.[61] As will be explored in more detail in Part IV, the status of exceptions is unclear, so the MAI should make some other provision to accommodate the application of different environmental laws in different jurisdictions within the same country. In such a case, the inclusion of 'in like circumstances' language may not make it sufficiently clear that laws applicable to State jurisdiction only apply to investments within that jurisdiction.

C *Most Favoured Nation Treatment*

The MAI requires members to treat the investors of one nation no less favourably than it treats the investors of any other country.[62] The biggest problem in relation to environmental protection posed by the MFN obligation is its potential inconsistency with an obligation imposed by a multilateral environmental agreement ('MEA') to deal only with other parties to that MEA in respect of its subject matter. For example, the *Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal* prohibits convention parties from trading in hazardous waste with nations which are not parties to the

[58] Ibid Annex 2: Package of Proposals for Text on Environment and Labour, art 2(3) (Interpretive Note).

[59] Ibid Annex 1: Package of Additional Environmental Proposals, [4] (contribution by one delegation).

[60] OECD, 'The Multilateral Agreement on Investment: Commentary to the MAI Negotiating Text (as of 24 April 1998)' (1998) The Multilateral Agreement on Investment, OECD, <http://www.oecd.org/daf/cmis/mai/maicome.pdf> 12 ('Commentary to the MAI April Draft Text').

[61] See below Part IV

[62] OECD, 'MAI April Draft Text', above n 16, art III: National Treatment and Most Favoured Nation Treatment, [2].

convention.[63] The *Convention on International Trade in Endangered Species of Wild Fauna and Flora* permits some trade in listed species between convention parties and non-parties in extremely limited circumstances.[64] The *Montreal Protocol on Substances That Deplete the Ozone Layer*, the *Convention on Biological Diversity* and the *United Nations Framework Convention on Climate Change* all contain provisions that could confer better treatment on parties than non-parties, or on certain developing countries.[65]

The consistency of MEAs with international trade liberalisation rules continues to be the subject of lengthy analysis within the WTO Committee on Trade and Environment and among scholars and policy makers.[66] The issues in that forum are perhaps more pressing since several MEAs contain discriminatory *trade* mechanisms. The MAI concerns itself with investment, not trade, so its relationship with MEA obligations may be less apparent. There is, however, still some cause for concern.

The OECD examined the relationship between MEAs and the MAI and concluded that there is no essential legal incompatibility between them 'because no MEA to date has sought to impose investment related sanctions or measures, and the obligations established by MEAs to date do not require or call for implementation which would clearly conflict with MAI obligations.'[67] The study examined the status of the emission trading regime currently being developed under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.[68] It is likely that tradable emissions permits, granted under the permit trading scheme, would be regarded as assets for the purposes of the MAI.[69] If the

63 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, [1992] ATS No 7, 28 ILM 657, art 4(5) (entered into force 5 May 1992).

64 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, [1976] ATS No 29, 12 ILM 1088, art IV (entered into force 1 July 1975).

65 *Montreal Protocol on Substances That Deplete the Ozone Layer*, opened for signature 16 September 1987, [1989] ATS No 18, 26 ILM 1550, art 4 (entered into force 1 January 1989) ('*Montreal Protocol*'); *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS No 32, 31 ILM 818, art 15(1) (entered into force 29 December 1993); *United Nations Framework Convention on Climate Change*, opened for signature 9 June 1992, [1994] ATS No 2, 31 ILM 849, art 4 (entered into force 21 March 1994) ('*Framework Convention on Climate Change*').

66 Richard Tarasofsky, 'Ensuring Compatibility between Multilateral Environmental Agreements and the GATT/WTO' (1996) 7 *Yearbook of International Environmental Law* 52; Kelly Hunt, 'International Environmental Agreements in Conflict with GATT: Greening GATT after the Uruguay Round Agreement' (1996) 30 *International Lawyer* 163; James Cameron and Jonathon Robinson, 'The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT' (1991) 2 *Yearbook of International Environmental Law* 3; Rohan Hardcastle, 'Australian GATT-Inconsistent Trade Measures under Multilateral Environmental Agreements' (1998) 15 *Environmental and Planning Law Journal* 199.

67 OECD Secretariat, 'Relationships between the MAI and Selected Multilateral Environmental Agreements (MEAs): Report for the Negotiating Group on the MAI' (1998) The Multilateral Agreement on Investment, OECD, <http://www.oecd.org/daf/cmis/mai/meaenv.htm>. For the same reasons, the report also concluded that there is no clear inconsistency between the WTO/*GATT* regime and MEA obligations.

68 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (not yet in force) ('*Kyoto Protocol*').

69 OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67, [21].

Kyoto Protocol is implemented, it could limit the eligibility to trade in emissions permits to signatories who comply with stipulated conditions. This would breach the MAI's MFN obligation because neither non-parties nor parties who fail to comply with the conditions would be eligible to engage in emissions permits trading. The OECD concludes that the resolution of this potential incompatibility between the *Kyoto Protocol* and the MAI's MFN obligations will depend upon the final drafting of the *Kyoto Protocol* emissions trading scheme. In particular, if permits are acquired by governments, rather than directly by enterprises, there is less risk of contravening MAI provisions protecting individual investors. Furthermore, the scheme under the *Kyoto Protocol* may be designed so that the purchase from country A of a right to pollute in country B is not characterised as an investment in country A but as cross-border trade in permits as 'goods'.[70] Regardless of the final wording of the *Kyoto Protocol*, leaving the status of the Kyoto scheme unresolved pressures its negotiators to adopt measures that will not restrict trade or investment, even if such restrictions are the most efficacious means of fulfilling its objectives.

It is generally understood that, in cases of conflict between the provisions of an MEA and those of the MAI, the relevant interpretive principles of international law are that the later agreement prevails over the earlier,[71] but that specific coverage of an issue prevails over general coverage. The OECD report concludes that 'any future MEA provisions requiring treatment of investment barred by the MAI would prevail, between Parties to the MEA, over such incompatible MAI obligations.'[72]

These principles are of little use in disputes between a party and a non-party to the MEA, both of whom are parties to the MAI. This disparity in membership highlights the weakness of the argument that economic treaties should deal with economics rights and duties only, and environmental issues should be dealt with in more appropriate fora. Such an approach subjugates MEA-enshrined environmental safeguards to the extent that they conflict with the MAI-rights of a non-party to the MEA. The OECD report notes that if the parties consider this a sufficiently serious enough problem, negotiators should make specific provision for it in the MAI.[73] The best mechanism by which to provide specifically for such cases is discussed in Part III below.

D *Prohibition of Performance Requirements*

The MAI prohibits the imposition of performance requirements as a condition for the establishment, expansion or disposition of an investment, regardless of

[70] Ibid.

[71] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 30(3) (entered into force 27 January 1980) ('*Vienna Convention*'); OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67.

[72] OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67, [16].

[73] Ibid [37]. The general principle of treaty interpretation in cases involving signatories, of whom one is a party to another treaty, is that their obligations are governed by the treaty to which they are both members: *Vienna Convention*, above n 71, art 30(4)(b).

whether similar requirements are imposed on domestic investors.[74] The MAI lists performance requirements as:

> (a) trade-related, such as requirements regarding the ratio of exports to total sales, domestic content, and local purchasing;
> (b) technology transfer;
> (c) location of headquarters;
> (d) research and development;
> (e) local hiring quotas; and
> (f) restrictions on minimum or maximum equity levels.[75]

Non-trade-related performance requirements may be imposed as a condition of granting an advantage to an investor, such as tax relief.[76] Trade-related requirements may only be imposed in relation to export processing zones, foreign aid programs, agriculture, trade in services and preferential tariffs and quotas.[77]

The *Agreement on Trade-Related Investment Measures* ('*TRIMs*'), *NAFTA*'s Investment Chapter and most bilateral investment treaties also ban performance requirements,[78] but the MAI's catalogue of unacceptable conditions is wider than any other agreement. The others permit local hiring quotas, requirements for joint ventures and the location of headquarters within the host nation. They also permit trade and non-trade-related performance requirements as conditions for access to incentives and subsidies.

The ban on performance requirements is generally unobjectionable if one assesses its impact on environmental protection initiatives. Such measures should be built into national legislation on a non-discriminatory basis in any case, and should not arise solely from the introduction of foreign investment. There is, however, a potential inconsistency between the ban on performance requirements pertaining to technology transfer and the obligations under both the *Montreal Protocol* and the *Framework Convention on Climate Change* to transfer environmental technology to developing country parties, in order to assist them in meeting their convention obligations.[79] The *Montreal Protocol* and the *Frame-*

74 OECD, 'MAI April Draft Text', above n 16, art III: Performance Requirements, [1].

75 Ibid.

76 Ibid [2].

77 Ibid [5].

78 In a dispute between Canada and the United States in 1982, the *GATT* Dispute Resolution Panel determined that Canada's *Foreign Investment Review Act*, RSC 1973, c 132 amounted to a local content performance requirement that contravened *GATT*'s national treatment obligation: GATT, *Panel Report: Canada — Review of the Foreign Investment Review Act* L/5504–30S/140 (7 February 1984) discussed in Spero and Hart, above n 3, 129–30.

79 *Montreal Protocol*, above n 65, art 10A provides that:

> Each Party shall take every practicable step ... to ensure:
> (a) That the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of article 5; and
> (b) That such transfers ... occur under fair and most favourable conditions.

See also *Framework Convention on Climate Change*, above n 65, art 4(5), which states that:

> [D]eveloped country Parties ... shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the convention. In this process, the developed country Parties shall

work Convention on Climate Change give parties wide discretion over how to implement these obligations, but the MAI may limit this discretion by precluding parties from imposing technology transfer requirements on investors. The extent of any inconsistency with these obligations is still unclear, since both MEAs contemplate technology transfer obligations in respect of the outflow of investment, whereas the MAI bans requirements that regulate the inflow of investment.[80] Given that neither treaty obligation has given rise to extensive transfer regimes to date, it is too early to assess the impact of the MAI, but an exception to the ban on performance requirements may be necessary. This is discussed further in Part III.

It is not within the scope of this article to challenge a prohibition on performance requirements where the investor's home country and the host country are at comparable levels of economic and social development. The ban could, however, seriously impair the ability of developing countries to pursue a development path that minimises resource and labour exploitation and concentrates on long-term capacity-building. The original OECD Ministerial Communiqué on the MAI identified one of the objectives of negotiations as being to formulate 'a free-standing international treaty open to all OECD members and the European Communities, and to accession by non-OECD member countries, which will be consulted as the negotiations progress.'[81]

There seems little doubt that non-OECD nations will be pressured to join the MAI. This is where many OECD countries, including Australia, perceive the main benefits of the MAI to emerge.[82] When MAI negotiations resume in October 1998, the Negotiating Group will include eight non-OECD member countries as full participants in the discussions.[83] The OECD is emphasising the

support the development and enhancement of endogenous capacities and technologies of developing country Parties.

80 OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67, [38].

81 OECD, 'Ministerial Communiqué', above n 12, 39.

82 *Public Hearing on the MAI*, above n 4, 22 (Janine Murphy), 50 (Michael Potts, Assistant Secretary, Trade Policies Issues and Industries Branch, Department of Foreign Affairs and Trade); Eduardo Lachica, 'OECD Nations Ask Outsiders to Join Investment Treaty', *The Wall Street Journal* (New York, USA), 9 November 1995, A19. The net flow of resources from developed to developing countries doubled between 1988 and 1996: FitzGerald, Cubero-Brealey and Lehmann, above n 9, 8–9 (relying upon data from the OECD Development Assistance Committee Statistical Annex, table 1 (1998)). During the 1988–96 period, the portion of private flows doubled, so that it now represents two thirds of the total net flow of resources. FDI in developing countries has experienced a five-fold increase since 1988: at 3–4 (relying upon data from the United Nations Conference on Trade and Development, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (1997) Annex table B1). Most investment funds to developing countries have gone to the wealthiest few: 60 per cent of FDI to developing countries went to Asia, mainly India, China and Indonesia; 27 per cent went to Latin America; and 6 per cent went to each of Africa and Eastern Europe: OECD, 'FDI and the Environment', above n 19. The least developed countries have received less than 1 per cent of flows and growth has been slower: at 5. See also Spero and Hart, above n 3, 249.

83 Argentina, Brazil, Chile, the Slovak Republic (which have been observers to negotiations to date), Estonia, Latvia, Lithuania and the Special Administrative Region of Hong Kong: OECD, 'Ministerial Statement on the Multilateral Agreement on Investment (MAI): Annex to Communiqué of the OECD Council Meeting at Ministerial Level', OECD News Release (28 April 1998), <http://www.oecd.org/news_and_events/release/nw98–50a.htm> [8].

benefits that will flow from accession,[84] and a major British report of the development implications of the MAI concludes that, despite some potential problems, the overall benefits of opening investment will be positive.[85]

Critics of the MAI based in developing countries fear that the ban on performance requirements will entrench and, in many cases, exacerbate the existing patterns of unsustainable production and development being imposed upon poor countries by the global economic liberalisation regime governed by the WTO, International Monetary Fund ('IMF') and World Bank.[86] Performance requirements preclude joint ventures that might improve local management skills and expertise; local content minima that stimulate other aspects of local industry; and local workforce and other development safeguards that ensure that the investment offers wider social benefits.[87] The total freedom to repatriate all profits also means that investors need not reinvest any part of their profits locally. The removal of the right to impose performance requirements stunts poor countries' attempts to be more self-reliant and to ensure that investment will yield net benefits for the whole community.

In their book, *The Politics of International Economic Relations*, Spero and Hart argue that developing countries' most powerful tool to address the economic dominance asserted by large multinationals is to restrict foreign investors' access to their territory.[88] They note that 'control over access to resources that the multinational wants — local raw materials, labor, and markets — could be used by developing countries to impose controls on foreign investors.'[89]

The authors note that in practice, investors' control over capital is far more powerful in the bargaining process than countries' control over access to resources. Thus, according to their research, poorer countries rarely impose burdensome controls on investors.[90] Under the MAI, however, the one advantage identified by Spero and Hart as being open to those countries would be foreclosed, leaving the bargaining power entirely in the hands of investors. When the annual income of many corporations is larger than the total gross national products of many developing countries, it is difficult to see why countries should be precluded from insisting on some specific local gains to flow from investment approval.[91]

84 The OECD lists the main benefits of membership for non-OECD countries as being the attractiveness to foreign investment of a reliable investment regime and access to the MAI parties group: OECD, 'The Multilateral Agreement on Investment: Frequently Asked Questions and Answers', 29 August 1997, <http://www.oecd.org/daf/cmis/mai/faqmai.htm> [66].

85 FitzGerald, Cubero-Brealey and Lehmann, above n 9, 4, 38–40.

86 Khor, *The WTO and the Proposed Multilateral Investment Agreement*, above n 21, 6.

87 For a detailed analysis of the economic implications of the MAI for developing countries, see Fowler, above n 37, 10–20; 'Asians Question Global Investment Rules', (1–15 August 1998) 190 *Third World Economics* 2, 3; and see generally FitzGerald, Cubero-Brealey and Lehmann, above n 9.

88 Spero and Hart, above n 3, 252–3.

89 Ibid 253.

90 Ibid.

91 A ranking of countries and corporations by gross domestic product ('GDP') and sales in 1992–93 placed General Motors (US) as the 22nd largest economy in the world; Ford Motor (US), the 29th; Exxon, 32nd; Royal Dutch Shell 33rd; and Toyota 36th. On that ranking, 44 of the world's

E *Investment Protection and the Ban on Uncompensated Expropriation*

Article IV of the MAI requires parties to accord foreign investments fair and equitable treatment and constant protection and security. The second paragraph of the investment protection article provides that '[a] Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect' unless the expropriation is for a public purpose, undertaken in accordance with due process of law, and compensated promptly and effectively.[92]

This is the most concerning aspect of the MAI, especially from the perspective of persons striving for ever higher environmental management, labour, and occupational health and safety standards.[93] The clause is obviously aimed at poorer countries which undertook massive nationalisation programs in the 1970s[94] but the MAI's provisions regarding expropriation go beyond nationalisations. They include any government policy or regulation that *has the effect of* acquiring or expropriating property, and could therefore include measures that affect the profitability of the investment.[95] This might include the imposition of new conditions on a land use approval or the tightening of existing conditions, for example, a reduction in the volume of permitted pollution emissions. It could also include the introduction or enforcement of a strict liability regime for the remediation of contaminated sites, requiring property owners to pay for their land to be cleaned up even where they did not cause or contribute to the contamination. This elevation of property rights over community expectations is consistent with the resurgence in the individualistic view of property rights championed by the influential University of Chicago law professor, Richard Epstein. According to Epstein, '[*a*]*ll* regulations, *all* taxes, and *all* modifications of liability rules are takings of private property prima facie compensable by the state.'[96] While the MAI still permits such laws to be enacted, it imposes on nations the obligation to compensate the investor for that lost value. The fear that the enactment of new regulations might provoke costly compensation claims from current investors will

100 largest economies were corporations: Spero and Hart, above n 3, table 4.1: 'Countries and Corporations: A Ranking by GDP and Sales 1992–1993', 99–101.

92 OECD, 'MAI April Draft Text', above n 16, art IV(2.1).

93 For a brief history of expropriation in South American countries, see Spero and Hart, above n 3, 262–3. The requirement that a host nation compensate an investor for any expropriation of its investment is also directly contrary to the Declaration of the Establishment of a New International Economic Order, GA Res 3201 (S-VI), 6 UN GAOR (2229th plen mtg), Supp No 1, UN Doc A/Res/9559 (1974) and the Charter of Economic Rights and Duties, above n 51, both of which affirmed each nation's full sovereignty over its natural resources and economic activities, including the right to nationalise. The Declaration does not mention a duty to compensate, while the Charter refers only to 'appropriate' compensation: at 262–3.

94 These programs had largely tapered off by the early 1980s: Spero and Hart, above n 3, 263.

95 ABA, above n 10, 212.

96 Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 95 (emphasis in original). Myrl Duncan criticises Epstein's approach as fundamentally inconsistent with the modern scientific understanding of an holistic animate and inanimate world. Epstein has also been criticised for his misreading of John Locke's original works and for its impacts on environmental regulation: Myrl Duncan, 'Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis' (1996) 26 *Environmental Law* 1095, 1099.

inevitably have a chilling effect on regulatory systems, leaving environmental and labour standards in a state of regulatory paralysis or 'stuck in the mud'.[97]

Neither the MAI nor domestic precedents clarify whether regulations reducing the profitability of an investment are an expropriation of all or part of that investment. The United States Supreme Court and the High Court of Australia take differing views on the issue as a matter of constitutional interpretation. The *Constitution of the United States of America* ('*US Constitution*') guarantees 'just terms' compensation for the 'taking' of property.[98] The US Supreme Court has held that regulations cannot constitute a taking unless they deprive the property owner of all economically valuable use of the property.[99] A mere diminution in the value of property does not constitute a taking unless the regulations effectively reduce the property's value to zero.[100] Even where a regulation denies any beneficial use of the land, it can never constitute a taking if it merely crystallises the common law principles of nuisance. This is because those land uses that would create a nuisance cannot be regarded as having been part of the landowner's title to land in the first place.[101] Furthermore, the US Supreme Court has not seen fit to extend its views on regulatory takings to so-called 'partial regulatory takings', acknowledging that this would deter valuable policy interventions: 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[102] It has also been held that the effect of a regulation on the use and value of land must be assessed with respect to the impact of the regulation on the entire parcel of land, rather than merely upon the segment that is the subject of the regulation.[103]

Recent decisions from the US Federal Circuit seem to contradict the Supreme Court's position on partial takings. In *Florida Rock Industries Inc v US*,[104] the court held that a ban on the dredging and filling of wetlands on a section of the plaintiff's land constituted a 'taking' of that section of the land, because it

97 Lyuba Zarsky, 'Stuck in the Mud? Nation-States, Globalisation and the Environment' (1997) OECD Globalisation and Environment Study, OECD Economics Division, <http://www.nautilus.org/aprenet/library/regional/mud.html>. Prior to the passage of the *NAFTA*, a *Wall Street Journal* survey of corporate executives is reported to have shown that 40 per cent anticipated that they would move some of their production to Mexico, while 25 per cent said that they would use the threat of moving as a bargaining chip to keep wages down: Barlow and Clarke, above n 15, 50.

98 *Constitution of the United States of America*, Fifth Amendment.

99 *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992) (prohibition on the construction of any habitable structure on beach front sites zoned residential was equivalent to a physical appropriation because it denied the landowner any productive use of the land). The US-Iran Claims Tribunal has also held as a matter of international law that compensation is only payable where regulation has led to a complete deprivation of the fundamental rights of ownership: *Sola Tiles Inc v Iran* (1987) 14 Iran-US Cl Trib Rep 223, 231–2, quoted in Barry Appleton, 'Municipalities and the MAI' (1998) MAI Home Page, Appleton & Associates International Lawyers, <http://www.appletonlaw.com/MAI/MAI-municipal.html>.

100 *Concrete Pipe & Products Inc v Construction Laborers Pension Trust for South California*, 508 US 808 (1993).

101 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027 (1992).

102 *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (1922) (Holmes J).

103 *Penn Central Transportation Co v City of New York*, 438 US 104 (1978).

104 18 F3d 1560 (Fed Cir, 1994).

deprived the owner of a substantial part, albeit not all of the economic use or value of the property.[105] In *Loveladies Harbor Inc v US*,[106] the court took the view that the parcel of land relevant in determining whether there had been a taking was the area subject to the regulation, not the entire tract.[107]

The High Court of Australia has taken a narrower view of the equivalent provision of the *Australian Constitution*. Section 51(xxxi) provides for compensation for the acquisition of property by the Commonwealth. The High Court has acknowledged that 'property' is a broad concept which encompasses exclusive possession and control of land,[108] and choses in action.[109] Statutory rights, such as rights to extract minerals, emit pollutants, or log public forests, are also property, the acquisition of which entitles the right-holder to compensation.[110] In *Commonwealth v Tasmania*,[111] three justices of the High Court held that a restriction on the use of land that neither conferred a proprietary interest on the Commonwealth or another party, nor vested possession in the Commonwealth could not amount to an acquisition of the property.[112] Deane J was satisfied that comprehensive restrictions on the use of land of the kind imposed by the *World Heritage Properties Conservation Act 1983* (Cth) and the regulations made under the *National Parks and Wildlife Conservation Act 1975* (Cth) amounted to a restrictive covenant because they effectively 'froze' development of the land.[113] The position is still not settled, but it now appears that for a regulation affecting property to amount to an acquisition thereof, the Commonwealth or a third party must derive some proprietary right or privilege from the regulation, and the regulation must do more than merely reduce the value of the property.[114] The

[105] The author of the majority judgment in *Florida Rock Industries Inc v US* relies heavily upon the academic analyses of property rights and takings by Epstein contained in Epstein, *Takings*, above n 96, 57–92, and Richard Epstein, '*Lucas v South Carolina Coastal Council*: A Tangled Web of Expectations' (1993) 45 *Stanford Law Review* 1369, 1377.

[106] 28 F3d 1171 (Fed Cir, 1994).

[107] Ibid Thus, although 80 per cent of a 250 acre parcel of land had already been developed, the plaintiff was entitled to compensation for the denial of a wetland dredge permit in respect of 12.5 of the remaining 50 acres. For a detailed critique of these cases, see Michael Blumm, 'The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit' (1995) 25 *Environmental Law* 171.

[108] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

[109] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297.

[110] *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 (commercial fishing rights granted under statute were property)

[111] (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

[112] Ibid 145 (Mason J), 247–8 (Brennan J), 181 (Murphy J).

[113] Ibid 286.

[114] Ibid 145 (Mason J), 247–8 (Brennan J), 181–2 (Murphy J); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 189–90 (Deane and Gaudron JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (requirement that television broadcast licensees give free airtime to political parties not an acquisition of property of the broadcaster, merely of the services of the broadcaster); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 (reduction in copyright holder's rights not an acquisition because no other party acquired a proprietary right); *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 (reduction in fishing quotas not an acquisition because neither the Commonwealth nor another fishing enterprise derived benefit from the reduction); *Commonwealth v WMC Resources Ltd (formerly Western Mining Corporation Ltd)* (1998) 152 ALR 1 ('*WMC*') (revocation of statutory prospecting permit was not an acquisition either because it is always understood that statutory rights are inherently susceptible of modification: at

Australian Constitution's use of the word 'acquisition' contrasts with the *US Constitution*'s 'taking' clause — the former focuses on the transfer of some proprietary right, while the latter concerns itself only with the removal of that right. It is therefore not surprising that the High Court has taken a more restrictive view of the circumstances in which compensation is called for.

Concerns about the potential scope of the MAI's expropriation clause have been fuelled by two controversial disputes under *NAFTA*. The first involved Ethyl Corporation, a US company with a factory in Canada that manufactured a manganese fuel additive called methylcyclopentadienyl manganese tricarbonyl ('MMT'). Ethyl was the only Canadian producer of MMT, and the additive represented the vast bulk of Ethyl revenues in Canada. The Canadian government banned the importation and inter-provincial transportation of MMT on the basis that it posed a toxic health risk and damaged emissions diagnostics and control equipment in cars, thus increasing fuel emissions generally.[115] Ethyl Corporation brought a suit against the Canadian government under the *NAFTA* investor–state dispute resolution mechanism, claiming $US251 million for expropriation of the MMT factory and loss of Ethyl's good name.[116] Recent media reports indicate that the Canadian government has negotiated with Ethyl to withdraw the action in exchange for the government dropping its MMT ban, paying Ethyl $US10 million to cover legal costs and lost profits and declaring MMT safe to the environment and public health.[117]

The second case involved another American company, Metalclad Corporation, which owned Mexican subsidiaries in the waste treatment and disposal business.

10 (Brennan CJ), 26 (Gaudron J), or because it merely constituted a reduction in the operation of an immunity from criminal prosecution, which was not equivalent to the acquisition of something proprietary in nature: at 27 (Gaudron J), 42 (McHugh J), 55 (Gummow J)). Cf *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42, 47–8 (Brennan CJ), ('*Newcrest Mining*') in which the High Court upheld a claim by Newcrest that an extension of Kakadu National Park that prohibited mining in areas over which Newcrest held mining leases constituted an acquisition requiring compensation. The majority held that the extension of the National Park revoked the Commonwealth's liability to have its land mined, which thereby increased its value. The court in *WMC* distinguished *Newcrest* on the ground that the Commonwealth enjoyed no proprietary interest in the continental shelf: at 12 (Brennan CJ), 26 (Gaudron J) and thereby obtained no benefit from the cancellation of the exploration permits: at 10 (Brennan CJ), 26–7 (Gaudron J). Even if a law does effect a passing of proprietary interests from the property owner to the Commonwealth or a third party, the *Australian Constitution* does not require compensation on just terms where the acquisition can be justified under another placitum of Commonwealth law-making power that is interpreted to fall outside the reach of s 51(xxxi). These powers appear to include bankruptcy and insolvency, defence and taxation: *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155.

115 The Canadian government was unable to ban the use of the additive under its legislative regime, so it banned the import and transport of the substance instead.

116 The case is discussed at length in numerous commentaries and articles. The factual background outlined above is drawn from Michelle Sforza and Mark Vallianatos, '*Ethyl Corporation v Government of Canada*: Chemical Firm Uses Trade Pact to Contest Environmental Law' (1998) Corporate Watch, Preamble Centre, <http://www.corpwatch.org/trac/corner/worldnews/other/other44.html>; Barry Appleton, 'US Company Files Notice to Seek $200 Million in Claim against Government of Canada' (1996) Appleton & Associates International Lawyers, <http://www.appletonlaw.com/articles/dat/A_0003.htm>.

117 Shawn McCarthy, 'Threat of NAFTA Case Kills Canada's MMT Ban', *The Globe and Mail* (Toronto, Canada), 20 July 1998, <www.theglobeandmail.com/docs/news/19980720/GlobeFront/ummttn.html/>.

In 1993, one such subsidiary acquired a controversial facility with a history of pollution problems and conflict with the local community.[118] US government approval to operate the facility was granted in 1995, but the relevant State consistently refused to issue a permit. Metalclad rejected the State government's claim that the environmental impacts of the facility had not been addressed and attributed the government's refusal to issue a permit to State-level corruption.[119] It filed a $US90 million claim against the Mexican government under *NAFTA*'s investor–state dispute resolution mechanism, claiming that the State's refusal to grant the permit constituted a temporary expropriation of its facility.[120]

The success or otherwise of both cases is largely irrelevant; if governments fear that investors will bring suits against them for introducing or enforcing strict new environmental or safety laws, it will reduce their willingness to do so.[121] The result in the Ethyl case is worrying proof of this fear.

The Ethyl and Metalclad cases have brought a storm of protest from environmentalists who fear their chilling effect on new environmental laws:

> [A] precedent will be set whereby the legal right of corporations to be compensated when public health regulations affect a company's bottom line is given the same weight as the public's right not to be harmed by industrial toxins. This could send the message to investors that seeking compensation from the public for the cost of complying with environmental regulations constitutes a legitimate business strategy.[122]

In response to the groundswell of similar criticism,[123] the Chairman of the MAI Negotiating Group has proposed that the compensation provision include an interpretive note to the effect 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 governments. Nor

[118] Steven Shrybman, 'An Environment Guide to the World Trade Organisation' (1997) Common Front on the World Trade Organisation, Sierra Club of Canada, <http://www.sierraclub.ca/national/trade-env/env-guide-wto.html> [278]–[281].

[119] Ibid.

[120] Preamble Centre, 'How Does the Multilateral Agreement on Investment (MAI) Compare to Bilateral Investment Treaties (BITs)?' (1998) The Multilateral Agreement on Investment (MAI), Preamble Centre, <http://www.preamble.org/mai/bits. html>.

[121] 'The more often the government must pay for exercising control over private property, the less control there will be. That is the reality ... Ownership of property carries responsibilities to the community as a whole as well as privileges': *Florida Rock Industries Inc v US*, 18 F3d 1560, 1575, 1580 (Fed Cir, 1994) (Nies CJ, dissenting). Quote extracted from Blumm, above n 107, 171.

[122] Sforza and Vallianatos, above n 116, [9].

[123] At a press seminar in March 1998, the Director of the OECD Directorate for Financial Fiscal and Enterprise Affairs acknowledged that environmentalists' concerns over the MAI came as 'a surprise', because it was always agreed by the negotiators that the MAI should not interfere with normal regulatory powers exercised in a non-discriminatory way: William Witherall, 'Environment and Labour in the MAI: Speaking Notes from the Press Seminar' (1998) Directorate for Financial Fiscal and Enterprise Affairs, OECD, <http://www.oecd.org/daf/cmis/mai/wwpress.htm>. See also *Public Hearing on the MAI*, above n 4, 8 (Janine Murphy).

> would such normal and non-discriminatory government activity contravene the standards in [Annex 2] art 1 (General Treatment).[124]

The Chairman also proposes a clause similar to article 1114(1) of *NAFTA*, which affirms parties' rights to adopt, maintain or enforce any measure that they consider appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with the MAI.[125] The first proposal is troubling for two reasons, firstly because its definition of 'expropriation' does not accord with the legal concept recognised at constitutional law, and secondly because it introduces the notion of 'normal' regulation. Bold, 'abnormal' environmental protection initiatives that embrace the precautionary principle and the other principles of ESD remain subject to dispute resolution actions at the behest of disgruntled investors. The second suggestion is meaningless, because it limits the rights of members to impose environmental protection requirements only to the extent of their consistency with the MAI, yet concerns about inconsistency form the reason why such an exception is needed! This defect could, however, be overcome by stipulating that the measures must be consistent with the principles of non-discrimination only. Negotiators must design a more comprehensive exception from the expropriation clause for legitimate environmental protection initiatives, to prevent the regulatory paralysis that could flow from requiring governments to 'rent back' national sovereignty.[126]

F *Dispute Resolution*

The potential problems that the MAI poses for ESD initiatives are exacerbated by its proposed dispute resolution mechanism. The MAI contemplates a state–state dispute resolution system that prioritises the amicable or consultative resolution of disputes as a first resort, and the reference of disputes to an arbitral tribunal as a final resort.[127] The tribunal will be comprised of three members appointed by the Secretary-General of the International Centre for the Settlement of Investment Disputes ('ICSID') and agreed to by the parties.[128]

Arbitral tribunals are required to decide investment disputes in accordance with the MAI, interpreted and applied in accordance with the applicable rules of international law.[129] The tribunal may declare that an action contravenes the

[124] OECD, 'MAI April Draft Text', above n 16, Annex 2: Package of Proposals for Text on Environment and Labour, art 5 (Interpretive Note).

[125] Ibid Annex 2: Package of Proposals for Text on Environment and Labour, art 3 (Interpretive Note).

[126] Appleton, 'Municipalities', above n 99, [33].

[127] OECD, 'MAI April Draft Text', above n 16, art V; Marino Baldi, 'Dispute Settlement: MAI Briefing for Non-OECD Countries' (1997) Finance, Investment, Taxation and Competition, OECD, <http://www.oecd.org/daf/cmis/mai/baldi3.htm>.

[128] OECD, 'MAI April Draft Text', above n 16, art V(C)(2)(a). Either party can opt for a five-member panel, in which case two additional members are selected, one by each party to the dispute. The expanded panel option is intended to strike a balance between the need for commercial resolution and the need to establish some basis for developing a body of jurisprudence under the multilateral agreement: Baldi, above n 127, 1.

[129] OECD, 'MAI April Draft Text', above n 16, arts V(C)(6)(a) and V(D)(14)(a).

obligations of the MAI, recommend that a party bring its actions into conformity with the MAI, and order the payment of pecuniary compensation to the investor or investment.[130] The proposed dispute resolution mechanism is similar to the WTO regime in that disputes are brought before a panel of trade experts, they are heard in camera, and members of the public are afforded no opportunity to participate. Unlike the WTO, however, the MAI provisions specifically instruct tribunals to consider the operation of the MAI in the wider context of international law.[131]

The WTO's insular focus has been sharply criticised in recent years, although there is some indication that the Appellate Body of the WTO is attempting to articulate the WTO's place in the wider realm of international law, and accord a higher level of 'judicial deference' to the policy decisions and judgments made by sovereign states.[132] The MAI's reference to international law should allay at least the concern that the paradigm within which investment disputes are resolved is skewed in favour of economic rights over other international obligations. The criticism still remains, however, that the arbitral tribunal will consist of international investment experts, rather than international lawyers or, where relevant, international environmental or human rights experts. In some cases, panels in state–state proceedings may include a member with specialist expertise in the subject matter of the dispute.[133] Furthermore, the OECD notes that, like the WTO, the MAI mechanism permits a tribunal to obtain a scientific or technical report on environmental, human health or other scientific issues raised in a dispute.[134] However, even ignoring the fact that the panel selects which experts to consult, and that parties may disapprove the tribunal's consultation with scientific and technical experts,[135] providing for expert input does not address the imbalance in arbiters' philosophical focus on investment rights.

[130] Ibid arts V(C)(6)(c) and V(D)(16).

[131] Article 3(2) of Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes to the *Agreement Establishing the World Trade Organisation*, above n 17, instructs the Dispute Resolution Body to have regard to 'customary rules of interpretation of public international law'. According to the WTO Appellate Body, this 'reflects a measure of recognition that the [*GATT*] is not to be read in clinical isolation from public international law': WTO Appellate Body, *Report of the Appellate Body: United States — Standards for Reformulated and Conventional Gasoline* (1996) 35 ILM 603, 621 ('*Reformulated Gasoline*'). The relevance of substantive principles of wider international law is unclear. On one view, they are not a relevant interpretative tool at all (see GATT, *Report of the Panel: United States — Restrictions on Imports of Tuna* GATT Doc DS29/R (June 1994) (unadopted) 5.19 ('*Tuna Dolphin II*')); on the other, they should not interfere with the clear language of the WTO agreement in question but are otherwise useful to understand that wording: see WTO Appellate Body, *Report of the Appellate Body: European Communities — Measures Concerning Meat and Meat Products (Hormones)* AB-1997-4 (16 January 1998) 18.

[132] John Jackson, 'Emerging Problems of the WTO Constitution: Dispute Settlement and Decision Making in the Jurisprudence of the WTO' (Paper presented at the 2nd Annual World Trade Law Association Conference, London, May 1998) 5–6.

[133] OECD, 'MAI April Draft Text', above n 16, art V(C)(2)(c). The Chairman of the MAI Negotiating Group draws attention to this possibility in his set of proposals on environment and related matters: Annex 2: Chairman's Proposals on Environment and Related Matters and on Labour, fn 2.

[134] Ibid arts V(C)(5) and V(D)(13).

[135] Ibid arts V(C)(5)(a), V(C)(5)(b), V(D)(13)(a) and V(D)(13)(b).

It is regrettable that neither the WTO nor the MAI dispute resolution mechanisms permit interested non-state parties, such as international environmental groups, to participate in, or even witness, dispute resolution proceedings. The exclusionary and secretive nature of the WTO dispute resolution process has been heavily criticised.[136] Some of those concerns have been addressed by making copies of panel and appellate body reports available over the internet, but the process itself is still subject to the same level of confidentiality as under the 1948 *GATT* process. The MAI needs to address this weakness of the WTO Dispute Settlement Body by permitting the submission of amicus briefs and by holding dispute resolution proceedings in open court.[137] While the WTO dispute resolution system is still far from perfect, the introduction in 1995 of an Appellate Body that could correct errors of law made by dispute resolution panels has been a welcome innovation.[138] The absence of any appellate process in the MAI is another serious inadequacy that should be addressed.

Unlike the dispute resolution mechanism of the WTO, the MAI follows the example of *NAFTA* and the *Energy Charter Treaty* by giving private investors the right to bring investment disputes before the tribunal.[139] By adopting the MAI, parties give unconditional consent to the submission of a covered dispute to arbitration under the ICSID rules of arbitration, the United Nations Commission of Trade Law rules or the International Chamber of Commerce Court of Arbitration.[140] This differs from customary international law, which requires the consent of both parties to submit to arbitration.[141] In investor–state disputes, the disputing

136 Steve Charnovitz, 'The WTO Panel on US Clean Air Act Regulations' (1996) 19 *International Environment Reporter* 191, 195; Steve Charnovitz, 'Improving the Trade and Environment Regimes' in Simon Tay and Daniel Esty (eds), *Asian Dragons and Green Trade* (1996) 162–5; Benedict Kingsbury, 'The Tuna-Dolphin Controversy, the WTO and the Liberal Project to Reconceptualise International Law' (1994) 5 *Yearbook of International Environmental Law* 1; John Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?' (1992) 49 *Washington and Lee Law Review* 1227; Hunt, above n 66.

137 Environmental Defenders Office ('EDO'), 'Submission to the Joint Standing Committee on Treaties' (1998) EDO Policy Review, EDO, <http://www.internetnorth.com.au/edonsw/policy/mai.htm> 4–5. The United States has proposed that all WTO hearings be open to the public, that parties' submissions be publicly available, and that interested parties should have the opportunity to submit amicus briefs. Although it recognises that these proposals would require a change to the provisions of the Dispute Resolution Understanding, it has offered to open up panels to which it is a party: 'Clinton at US-EU Summit and WTO/GATT 50th Anniversary' (1998) Daily Digest: Foreign Media Reaction, US Information Agency, <http://www.usia.gov/admin/005/wwwhma20. html>.

138 James Cameron and Ruth MacKenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 142–3; Jackson, above n 132; Jan McDonald, 'The Trade and Environment Debate in the WTO: A Preliminary Report Card' (Paper presented at the 23rd International Trade Law Conference, Canberra, 29 May 1997) 16.

139 OECD, 'MAI April Draft Text', above n 16, art V(D): Disputes between an Investor and a Contracting Party; *NAFTA*, above n 8, arts 1116, 2022; *Energy Charter Treaty*, above n 44, art 26.

140 OECD, 'MAI April Draft Text', above n 16, art V(D); Baldi, above n 127, 2.

141 Diana Padt, 'Dispute Settlement: MAI Briefing for Non-OECD Countries' (1997) Finance, Investment, Taxation and Competition, OECD, <http://www.oecd.org/daf/cmis/mai/padt.htm> [3].

parties each select a tribunal member, and the third member is selected by mutual agreement.[142]

The problems arising from investor–state dispute resolution are best appreciated in the context of the ban on uncompensated expropriation. The requirement that investors be compensated applies regardless of whether the expropriation has resulted from non-discriminatory environmental regulations. Under the MAI, however, foreign investors are accorded preferential access to international arbitration that is likely to be cheaper and faster than domestic tribunals. Consider the situation if a national initiative reduced by half the licensed air pollution emission levels of all factories in the country. The regulation would apply equally to all factory operators — local and foreign — whose air pollution emissions were controlled by licence. As discussed in Part II(E), the foreign investor could argue that this constituted a measure with the effect of taking or expropriating all or part of the asset, because it made the use of the asset less profitable.[143] The local investor would be required to pursue a remedy in a local court, while the foreign investor could access MAI dispute resolution. Not only are the local courts more time consuming and expensive, they also invoke domestic law. In Australia, this may preclude the recovery of compensation for an acquisition because no one has 'acquired' a corresponding property right. In the United States, only a total diminution in the value of the property would constitute a 'taking'.[144] Even the most committed supporter of investment liberalisation would find it difficult to justify why foreign investors should actually be treated *better* than local investors!

Regardless of whether a broad interpretation of expropriation is likely to prevail, some consider the threat of commencing dispute resolution to be the international commercial equivalent of the phenomenon commonly used to stifle public comment on environmentally controversial development proposals — the 'SLAPP suit' (strategic litigation against public participation).[145] Ethyl Corporation notified the Canadian government of its intention to bring an action under the *NAFTA* dispute resolution provisions when it first learned of the government's intention to ban the importation and interprovincial transportation of MMT.[146] Its clear intention was to deter the government from enacting the regulation. The use of SLAPP suits is regarded by environmental groups as an insidious attack on their right to speak out against unsustainable development practices, but at least one US trade official regards the 'ability of investors to use legal threats to influence legislative debate' as 'a healthy innovation that will prevent govern-

142 OECD, 'MAI April Draft Text', above n 16, art V(D)(7)(a).

143 See above Part II(E).

144 See above nn 98–107 and accompanying text.

145 EDO, above n 137; Sforza and Vallianatos, above n 116; Janice Harvey, '*Ethyl Corporation v Government of Canada*', *The Telegraph Journal* (New Brunswick, Canada), 4 June 1997, <http://www.nassist.com/mai/ethylx.html>.

146 Sforza and Vallianatos, above n 116, [2].

ments from passing laws that violate international trade agreements.'[147] The fear that investors will use dispute resolution proceedings aggressively is exacerbated by the extension of investor rights to the pre-establishment phase of the investment cycle, that is, before an investor has actually committed any resources to investing in a particular country. This could mean that a foreign company with no current interest in Australia could bring proceedings against the Australian government for permitting another investment that might limit its future opportunities here. This is the first time that enforceable rights have been conferred on investors before they establish any investment interest in a party's territory.

The MAI's substantive rights and investor–state dispute resolution provisions give foreign investors substantial rights and the power to enforce those rights. This power is not moderated by any countervailing obligations or by giving an equivalent power to ordinary citizens to ensure compliance with domestic legal obligations. While such monitoring and control should fall on the host government, experience in environmental enforcement in Australia and elsewhere demonstrates the powerful role played by citizen suits.[148] National and State governments have a wide range of issues, activities and entities they must regulate and police. When governments have only limited resources to perform their function, a particular investor may escape scrutiny, even if it is breaching its legal obligations. By contrast, an individual investor has only its own interests to promote and is therefore likely to complain to the national government over even the slightest interference with its MAI rights.[149] Moreover, the investor may use two avenues for enforcing its rights (either by suing in its own right or by petitioning its home government to sue on its behalf), whereas the host government is the only party with the legal power to bring the investor in check. These problems would be worse in poor under-resourced countries: 'without skilled lawyers, financial experts, and specialists in the particular businesses that the state seeks to regulate, Third World governments are no match for the multinational corporation.'[150] In light of these deficiencies, the MAI should oblige members to establish a citizen–investor enforcement mechanism for environmental, health and safety legislation, with procedural benefits, such as reduced cost and speedier access, comparable to those conferred on investors under the MAI. Ideally, the mechanism should permit ordinary citizens in *either* the home

147 US Department of Treasury, *Briefing on the MAI and the Financial Services Agreement to the House Committee on Banking, Housing and Urban Affairs* (21 April 1997), cited in Sforza and Vallianatos, above n 116, [13].

148 Justice J S Cripps, 'Administration of Social Justice in Public Interest Litigation' in National Environmental Law Association of Australia ('NELA') and the Law Association for Asia and the Pacific, *Proceedings of the NELA International Conference on Environmental Law, Sydney, 14–18 June 1989* (1989) 87; John Taberner, Nicholas Brunton and Lisa Mather, 'The Development of Public Participation in Environmental Protection and Planning Law in Australia' (1996) 13 *Environmental and Planning Law Journal* 260; David Robinson, 'The Environment Defenders Office NSW 1985–95' (1996) 13 *Environmental and Planning Law Journal* 155.

149 While examining the compatibility of dispute resolution mechanisms under the MAI and MEAs, the OECD itself acknowledges the risk that investor–state dispute resolution increases the chances of environmental measures being challenged: OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67, [45].

150 Spero and Hart, above n 3, 253–4.

or host country to enforce domestic laws, in order to address the disparity in community group expertise and resources from country to country.

The final problem with the proposed dispute resolution mechanism is that it does not indicate how parties should determine the appropriate mechanism in cases where the alleged breach of MAI obligations flows from a party's compliance with another international agreement that has its own dispute settlement process. The issue of compatibility between the substantive obligations of MEAs and the MAI has been discussed elsewhere in this article.[151] The compatibility of WTO dispute resolution mechanisms with those of MEAs has been a major agenda item for the WTO Committee on Trade and Environment for over three years, but no progress has been made towards a resolution of the question.[152] Like the WTO, the OECD is keen to point out that a dispute over the implementation of an MEA with potential MAI implications is unlikely to arise because there exists a consensus between the parties over the value of MEAs.[153] In its report on the relationship between MEAs and the MAI, the OECD notes that:

> [M]ost of the environmental questions raised concerning the MAI and its potential conflict with environmental protection do not deal with measures taken in pursuance of an MEA, but with the power of a future MAI Contracting Party to take national environmental measures in general, with or without an MEA.[154]

Thus, where a dispute emerges between MEA parties, the dispute resolution mechanism stipulated by the MEA should be pursued. But like the question of inconsistency between substantive provisions, this reassurance is cold comfort when the dispute arises between MAI parties, only one of which is party to the MEA. The OECD Report satisfies itself that the MAI tribunal's obligation to consider the application of the MAI in accordance with other international law and the possibility of including environmental experts' advice in the tribunal's deliberations will address these concerns.[155] However, merely interpreting the MAI 'in the context' of international law would not provide a mechanism that gives investors' rights and environmental protection equal prominence or any of the procedural safeguards associated with references to the International Court of Justice and its newly established Chamber of Environmental Specialists. At the very least, the MAI should contain a provision that embeds the status of certain international agreements and, in cases involving measures taken pursuant to obligations imposed by those agreements, should import some aspects of their dispute resolution mechanisms. The style of such a clause is considered in the next Part.

151 See above nn 63–73 and accompanying text.

152 'Report of the WTO Committee on Trade and Environment', *WTO Trade and Environment Bulletin No 14*, Press Release, TE 014 (18 November 1996) 178–9.

153 OECD Secretariat, 'Relationships between the MAI and Selected MEAs', above n 67, [41].

154 Ibid [47].

155 Ibid [43]–[45].

III ENVIRONMENTAL SAFEGUARDS

Many of the concerns outlined in Part II could be addressed by including in the MAI a set of clauses permitting measures that are otherwise inconsistent with MAI provisions where those measures are taken to further the objectives of ecological sustainability. There is, however, strong resistance to the inclusion of environmental safeguards in the MAI, ostensibly because such issues are better raised in other fora. The sentiment is well expressed in this exchange during the Commonwealth Joint Standing Committee on Treaties Public Hearing on the MAI held in May 1998:

> Ms Janine Murphy: Australia's position is that we would not want to see binding commitments on environment in the MAI. We are negotiating on environment through other legitimate fora. We would be happy to have some exhortatory statement at the beginning of the MAI documents on preserving the environment, but we do not want ...
>
> Senator Shayne Murphy: You do not want it to mean anything?
>
> Ms Murphy: Not in the context of the MAI.[156]

This part examines the environmental safeguards that are either currently proposed for inclusion or flagged by the Chairman of the Negotiating Group for possible inclusion in the final MAI. It identifies the strengths of each proposal and concludes that properly worded environmental provisions could offer an opportunity to make the MAI supportive of the principles of sustainability.

A *Preamble*

The Preamble to the MAI provides two alternative formulations for recognising the need for both environmental and economic policies in order to achieve sustainable development: one conditions the use of investment as an engine of economic growth upon the implementation of appropriate environmental policies,[157] while the second notes that environmental policies can help to ensure that economic development (including investment) is sustainable.[158] Of the two, the first formulation is preferable, because it highlights that environmental protection measures are an essential ingredient of economic advancement, while the second implies that such measures are desirable but not essential. The first clause is included in the set of proposals on environment tabled by the Chairman of the MAI Negotiating Committee in April 1998, which adds some weight to the likelihood of its inclusion in the final text.

156 *Public Hearing on the MAI*, above n 4, 37–8.

157 'Recognising that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable if accompanied by appropriate environmental policies to ensure that it takes place in an environmentally sound manner': OECD, 'MAI April Draft Text', above n 16.

158 '(Recognising that appropriate environmental policies can play a key role in ensuring that economic development, to which investment contributes, is sustainable), and resolving to (desiring to) implement this agreement (in accordance with international environmental law) in a manner consistent with sustainable development, as reflected in the Rio Declaration and Agenda 21, (including the protection and preservation of the environment and principles of the polluter pays and precautionary approach)' (footnotes omitted): ibid.

The second element of the preambular language connects implementation of the MAI to the principles of sustainable development as articulated in the Rio Declaration[159] and Agenda 21;[160] either by having the parties *resolve* to implement the MAI in accordance with those principles, or indicating merely a *desire* to do so. Despite the non-binding exhortatory nature of all preambular language, a resolution of parties to commit to ESD principles would carry greater weight in any dispute involving the conflict between investment provisions and environmental measures. It is understood that the restricted OECD Environment Directorate non-paper on a 'green' MAI proposes, among other things, the inclusion in the preamble of a statement that sustainable development is one of the MAI's objectives.[161] This would further elevate the role of ESD principles in interpreting the treaty provisions, although a similar objects clause of the 1995 *Agreement Establishing the World Trade Organisation* has not been used in this way.[162] The Environment Directorate's recommendation has not been embraced in the Chairman's proposals on environment, although the proposed clause does state that the parties *resolve* to implement the MAI consistently with sustainable development, environmental protection and conservation.[163]

B *Environmental Exceptions*

The MAI contains only one proposed exception relating to environmental protection.[164] The exception is expressed in similar terms to articles XX(b) and (g) of the *GATT* and permits exceptions from MAI provisions for performance requirements that are necessary to protect human, animal or plant life or health, or necessary for the conservation of living or non-living exhaustible natural resources.[165] It appears from the footnote to this bracketed text that this

[159] Rio Declaration, above n 24, principle 8.

[160] Agenda 21, above n 24, ch 2.

[161] Arden-Clarke and Mabey, above n 55, [3].

[162] The preamble to the *Agreement Establishing the World Trade Organisation*, above n 17, provides that:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

This language was interpreted narrowly in WTO Panel, *Report of the Panel: US — Import Prohibition of Certain Shrimp and Shrimp Products* (24 March 1998) 7.42 ('*Shrimp-Turtle*'). See Marie Wynter, 'The Use of Market Mechanisms in the Shrimp-Turtle Dispute: The WTO's Response' in Benjamin Richardson (ed), *Environmental Justice and Market Mechanisms* (forthcoming) 9 (copy of manuscript on file with author).

[163] OECD, 'MAI April Draft Text', above n 16, Annex 2: Package of Proposals for Text on Environment and Labour, art 1.

[164] Ibid art III: Performance Requirements [4].

[165] It is interesting to note that the MAI exception is drafted more narrowly than *GATT* art XX. Under *GATT*, measures to protect human, animal or plant life or health must be 'necessary', but measures to conserve an exhaustible natural resource need only 'relate to' conservation. Environment disputes under the *GATT* have interpreted the 'relating to' language far more generously than the 'necessary' test.

exception enjoys only limited support and may be struck from the final text.[166] Even if it were included, the equivalent provision has been interpreted very narrowly under the *GATT*/WTO regime, such that virtually no environment-related trade measure has ever passed muster.[167] Moreover, its limited application to the ban on performance requirements makes it of little value, because it is the MAI's MFN and national treatment obligations and the ban on uncompensated expropriation that are most contentious.

The MAI contains several proposals for additional environmental provisions. One draft article was tabled by the European Commission, but is currently opposed by several nations, most notably the United States.[168] It proposes that parties undertake environmental impact assessments for any proposed investment that is likely to have a significant adverse impact on health or the environment.[169] It also proposes the inclusion of text identical to *NAFTA* article 1114(1), which permits parties to adopt measures otherwise inconsistent with the MAI if they are considered necessary to ensure that investment activity is undertaken in an environmentally sensitive way. This proposal is now part of the Negotiating Group Chairman's proposals.[170]

The Chairman does not suggest the inclusion of a broad-based environmental exception to MAI provisions, nor is there any proposal to clarify that in cases of inconsistency, the substantive and procedural obligations of specified MEAs should prevail. Such a clause appears in *NAFTA*[171] and was identified by the OECD Directorate in its assessment of what a 'green' MAI would contain.[172]

There is a strong argument that a broad environmental exception is more justifiable in the case of investment liberalisation than it is under the trading regime. In international trade, concern is over one party's (usually the United States') unilateral imposition of its environmental standards on other countries, in the form of bans on certain products that have been produced or processed in a certain manner.[173] For example, the United States has attempted to ban the

166 OECD, 'MAI April Draft Text', above n 16, art III fn 30.

167 GATT, *Report of the Panel: US — Restrictions on Imports of Tuna* GATT Doc DS21/R, (3 September 1991) (1991) 30 ILM 1594 (unadopted) ('*Tuna-Dolphin I*'); GATT, *Tuna-Dolphin II*, above n 131; WTO Appellate Body, *Reformulated Gasoline*, above n 131; WTO Panel, *Shrimp-Turtle*, above n 162.

168 Arden-Clarke and Mabey, above n 55, [3].

169 OECD, 'MAI April Draft Text', above n 16, Annex 1: Package of Additional Environmental Proposals, [3] (contribution by one delegation).

170 OECD, 'MAI April Draft Text', above n 16, Annex 1: Package of Proposals for Text on Environment and Labour, art 3.

171 *NAFTA*, above n 8, arts 1104, 1106(b), 1114.

172 Arden-Clarke and Mabey, above n 55, [3].

173 Agenda 21, above n 24, art 2.22(i) (in ch 2, 'International Cooperation to Accelerate Sustainable Development in Developing Countries, and Related Domestic Policies', Program Area B 'Making Trade and Environment Mutually Supportive') provides that Parties should '[a]void unilateral actions to deal with environmental challenges *outside* the jurisdiction of the importing country' (emphasis added). For detailed discussion of the arguments decrying unilateral actions and linking them with protectionism, see Charles Fletcher, 'Greening World Trade: Reconciling *GATT* and Multilateral Environmental Agreements within the Existing World Trade Regime' (1996) 5 *Journal of Transnational Law and Policy* 341; Robert Reinstein, 'Trade and Environment: The Case for and against Unilateral Actions' in Winfried Lang (ed), *Sustainable Development and International Law* (1995); Renato Ruggiero, 'The Coming Challenge: Global Sus-

importation of tuna and shrimp that have not been harvested using techniques approved by the US administration as safe for dolphins and turtles respectively. The bans, aimed at protecting dolphins and turtles in international and foreign waters, have had wide application. Since the MAI concerns itself with foreign investment *within the territory* of a member, the tension between national sovereignty and unilateralism does not arise; sovereignty arguments are more legitimate and do not threaten or undermine the multilateral framework.

C *Preventing 'Downward Harmonisation'*

Increased competition for foreign investment inflows, combined with the ban on uncompensated expropriation have led to concerns that multinational corporate investors might use their newly-enshrined power to play one nation off against another, driving down environmental, health, safety and labour standards. Very little empirical evidence supports the 'race to the bottom' theory of downward harmonisation.[174] Three reasons are generally advanced in support of investors' establishing a presence in developing countries: access to natural resources; a large domestic market; and a suitable platform for manufacturing exports.[175] On the basis of these priorities, it is asserted that an investor's key indicators are the strength of local institutions, the quality of local infrastructure and work force and the degree of macroeconomic stability.[176] Countries that offer subsidies and lower their standards are not attractive to investors because they do not provide the basis for long-term profitability.[177] Indeed, some studies have shown that multinationals generally have a better environmental record than local or state-owned enterprises in low-standards countries,[178] although there is still a

tainable Development for the 21st Century' (Address by the Director-General of the WTO at the WTO Symposium, Strengthening Complementarities: Trade, Environment and Sustainable Development, Geneva, 17 March 1998) (copy on file with author).

174 OECD, 'FDI and the Environment', above n 19, [46], citing Bradford Gentry et al (eds), *Private Capital Flows and the Environment: Lessons from Latin America* (1996) [94]–[95]. Recent studies have, however, shown that provinces in China compete for foreign capital and provincial leaders may promise preferential treatment to potential investors, including a tacit or express commitment to lax enforcement of environmental standards: OECD, 'FDI and the Environment', above n 19, [43], citing Daniel Esty and Robert Mendelsohn, *Powering China: The Environmental Implications of China's Economic Growth* (1995); Daniel Esty and Bradford Gentry, 'Foreign Investment, Globalisation and Environment' in OECD, *Globalisation and Environment: Preliminary Perspectives* (1997). See also OECD, *Economic Globalisation and the Environment*, above n 20.

175 FitzGerald, Cubero-Brealey and Lehmann, above n 9, 11.

176 Ibid 11–12.

177 Ibid 12.

178 Anne Rappaport and Margaret Flaherty, *Corporate Responses to Environmental Challenges: Initiatives by Multinational Management* (1992); Thomas Gladwin, 'Environment, Development and Multinational Enterprises' in Charles Pearson (ed), *Multinational Corporations, Environment and the Third World: Business Matters* (1987) 18–19; UN Centre for Transnational Corporations ('UNCTC') and the Economic and Social Commission for Asia and the Pacific ('ESCAP'), *Transnational Corporations and Environmental Management in Selected Asian and Pacific Developing Countries*, ESCAP/UNCTC Publications Series B, No 13 (1988) 229; UNCTC and ESCAP, *Environmental Aspects of Transnational Corporation Activities in Pollution-Intensive Industries in Selected Asian and Pacific Developing Countries*, ESCAP/UNCTC Publications Series B, No 15 (1990) v–vi, discussed in Fowler, above n 37, 12.

gap between local and home country performance.[179]

Although lower standards may not be regarded as a major factor in the decision to invest in a particular country

> [a] number of large multinational firms ... continue to take indirect advantage of [low labour and environmental standards] by sourcing from the use of domestic sub-contractors in labour-intensive or environmentally-sensitive sectors; although they cannot be legally called to account for doing so.[180]

Despite the lack of systematic evidence that multinational corporations lower their standards when they invest in the manufacturing industry overseas,[181] studies from the 1970s show that standards relating to worker health and safety and industrial pollution were lower,[182] particularly in hazardous industries such as asbestos, copper, pesticides, lead smelting and vinyl chloride.[183] A 1990 Report by the United Nations Centre for Transnational Corporations and the Economic and Social Commission for Asia and the Pacific found that within the manufacturing sector, most FDI in developing countries has been in chemicals manufacture.[184] There is also evidence of a disproportionately large increase in the presence of 'dirty' industries in developing countries compared with their growth in rich countries.[185] Furthermore, little research has examined multinationals' behaviour in resource extraction industries,[186] and in the developing world, resource extraction such as mining and drilling for oil has historically been controlled by large companies from developed nations.[187]

Environmentalists opposing *NAFTA* in the early 1990s emphasised the risk that the high standards imposed on Canadian and United States' industry would be 'ratcheted down' when forced to compete with cheaper industries operating in Mexico. In order to assuage these fears, a clause was placed in *NAFTA*, discouraging parties from lowering environmental standards in order to induce a specific investor to relocate. A similar clause is included in the APEC Non-Binding

179 UNCTC and ESCAP, *Environmental Aspects*, above n 178, 68; C Foster Knight, 'Effects of National Environmental Regulation on International Trade and Investment: Selected Issues' (1991) 10 *University of California Los Angeles Pacific Basin Law Journal* 212, 218; Fowler, above n 37, 14

180 FitzGerald, Cubero-Brealey and Lehmann, above n 9, 7.

181 Fowler, above n 37, 11–16 and the references cited therein; Roland Mollerus, 'Environmental Standards: Relocation of Production to the SAARC Region' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 69.

182 Fowler, above n 37, 11.

183 The UNCTC/ESCAP studies from 1988 and 1990 suggest that there is a tendency to comply only with lower local environmental standards, but this tendency is anecdotal, rather than systematic. See Fowler, above n 37; FitzGerald, Cubero-Brealey and Lehmann, above n 9, 7.

184 UNCTC and ESCAP, *Environmental Aspects*, above n 178, 21.

185 Patrick Low and Alexander Yeats, 'Do "Dirty" Industries Migrate?' in Patrick Low (ed), *World Bank Discussion Papers, Number 159: International Trade and the Environment* (1992) 98; Fowler, above n 37, 16.

186 Fowler, above n 37, 11. There is some evidence of countries attracting environmentally-sensitive industries by offering the least costly environmental restrictions: John Dunning, *Multinational Enterprises and the Global Economy* (1993) 167.

187 Spero and Hart, above n 3, 251.

Investment Principles.[188] Considerable pressure has been applied to MAI negotiators to add a similar clause, making it clear that MAI parties actively discourage the lowering of standards in order to attract investment.

There are currently four alternative proposals for a clause in the MAI aimed at preventing the 'race to the bottom' in respect of environmental and other standards.[189] The major issues to be resolved are the use of the exhortatory 'should' or the mandatory 'shall' in the statement discouraging the lowering of standards; whether a right to consult or access dispute resolution should be available; whether the clause should be limited to environmental standards; or whether the clause should extend to lowering labour and other human health and safety standards.[190] The Chairman's proposal includes mandatory language, but adds an interpretive note that reinforces the discretionary power of governments to adjust their overall environmental and other standards over time for public policy reasons unrelated to attracting foreign investment.[191]

None of the alternatives refer to the need to ensure that nations do not dismantle their regulatory framework over time in order to create a generally more favourable investment climate, as some would argue is occurring in Australia. Indeed, the Chairman's proposal clearly accommodates such a general lowering of regulatory barriers to investment. The OECD Environment Directorate apparently supports either a discouragement of, or prohibition on, members lowering environmental standards, but the limited report of this restricted document does not make clear whether its suggestion is confined to attracting specific investments.[192] The clause must be expanded to exhort members not to wind back environmental and social policies for the purposes of creating a generally more attractive investment climate.

For some countries, existing environmental standards are so low that the 'not lowering standards' clause is essentially meaningless. The MAI should provide mechanisms for ongoing negotiation aimed at upward harmonisation of standards and encourage parties to raise standards over time. The European Commission proposes inclusion of a clause requiring each party to ensure that

> its laws and regulations provide for high levels of environmental protection and should continue to improve those laws and regulations. Moreover, each Party should effectively enforce its environmental laws and regulations through governmental action.[193]

If such a clause were combined with a legally binding commitment not to lower standards, much of the fear about downward harmonisation could be allayed.

Australia has opposed the inclusion of a legal right to challenge parties who offer concessional environmental obligations in order to attract investment. The

[188] APEC Committee on Trade and Investment, above n 43, 580.
[189] OECD, 'MAI April Draft Text', above n 16, art III: Not Lowering Standards.
[190] Ibid.
[191] Ibid Annex 2: Package of Proposals for Text on Environment and Labour, art 4.
[192] Arden-Clarke and Mabey, above n 55, [3], [13]–[14].
[193] OECD, 'MAI April Draft Text', above n 16, Annex 1: Package of Additional Environmental Proposals, [2] (contribution by one delegation).

Department of Treasury has expressed concern that this could enable a third party to challenge the Australian government's approval of a foreign investment on the basis that the particular proposal could create more pollution than another proposal.[194] Treasury asserts that this would interfere with Australia's sovereign right to decide whether or not to allow a foreign investment proposal to proceed.[195] However, such an assertion ignores the fact that any right would be reciprocal, so that Australia could also challenge the decision of another country to lower environmental standards in order to attract investment that might otherwise have flowed to Australia. It ignores the fact that the decision to lower environmental standards may have transboundary impacts which every nation owes an international law duty to prevent,[196] and it ignores the fact that Australia has already surrendered substantial sovereign rights under hundreds of international agreements, especially international economic treaties.

D *Obligations for Multinational Corporations*

The MAI accords foreign investments considerable substantive and procedural rights. It also imposes duties upon nation states vis-à-vis foreign investors that at least have the potential to constrain their sovereign right to legislate on matters of national interest. I have noted elsewhere in this article the imbalance between investor rights and national duties and made suggestions relating to the dispute resolution mechanism.[197] One of the other tools by which the MAI could be transformed into an 'Agreement for Ecologically Sustainable Investment' is to mandate investor compliance with a stringent set of guidelines for multinational corporations.

There are several mechanisms by which the overseas activities of multinationals might be regulated. Home governments may set environmental conditions on overseas investment by their own companies where an export finance program is involved, such as the Export-Import Bank of the United States. The United States' Overseas Private Investment Corporation ('OPIC') requires environmental impact assessments from US companies seeking political risk insurance for overseas projects, and environmental management systems for all projects in developing countries, including annual reporting.[198] Using these procedures, OPIC cancelled the political risk insurance coverage of the Freeport McMoRan gold and copper mine in Irian Jaya, based partly on environmental shortcomings in its operations. These shortcomings included huge tailing deposits that had degraded a wide area of lowland rainforest.[199] There have been numerous proposals in the US Congress to enact domestic legislation that would regulate

194 *Public Hearing on the MAI*, above n 4, 39 (Janine Murphy).
195 Ibid.
196 Stockholm Declaration, above n 24; *Trail Smelter Arbitration (US v Canada)* (1938 and 1941) 3 RIAA 1905.
197 See above Part II(F).
198 Export-Import Bank of the United States, *Environmental Procedures and Guidelines: 1 February 1995* (1995), cited in OECD, 'FDI and the Environment', above n 19, [52].
199 OECD, 'FDI and the Environment', above n 19, [49].

the activities of American multinationals' activities wherever their location, although none have succeeded.[200] Projects that attract World Bank, Asian Development Bank or IMF funding or the World Bank's Multilateral Investment Guarantee Agency protection are often carried out under the de facto environmental guidelines of those organisations.[201]

There is, however, still no international code of conduct for multinational corporations that commits them to observe acceptable levels of environmental compliance. In 1992, the United Nations abandoned its 15-year project to develop a code of conduct for transnational enterprises following resistance by industrialised countries and industry organisations to the regulatory components of the code.[202] The MAI exhorts multinational enterprises ('MNEs') to observe the 1976 OECD Non-Binding Principles for MNEs, on a voluntary basis.[203] The guidelines' environmental provisions were added in 1991 and require only that MNEs:

- assess environmental and health consequences of operations;
- cooperate with, and provide information to, competent authorities; and
- minimise the risk of accidents and environmental damage and cooperate in mitigating adverse effects, using technological choices, environmental auditing, education and training programs for employees, contingency plans, equipping and assisting component entities and supporting public information programs.[204]

Even if compliance with the guidelines were made mandatory, poor performance would still be largely unenforceable because the duties are so vague and subjective.

Investors strenuously oppose the imposition of any form of cross-border environmental responsibilities:

> We will oppose any and all measures to create or even imply binding obligations for governments or business related to the environment or labor ... [and] resist efforts to impose new 'voluntary' guidelines or codes of conduct on the operations of multinational corporations.[205]

Investors point to the lack of evidence of poor performance and the many reasons why the presence of a large multinational might actually raise standards in developing countries. These include the efficiency gains of running a single set of environmental practices worldwide; the high visibility and susceptibility of

[200] Alan Neff, 'Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act' (1990) 17 *Ecology Law Quarterly* 477.

[201] OECD, 'FDI and the Environment', above n 19, [61].

[202] 'No Consensus on Code of Conduct' (1992) 4 *Transnationals* 1.

[203] OECD, 'MAI April Draft Text', above n 16, art I(16).

[204] OECD, 'OECD Guidelines for Multinational Enterprises' (1998) Finance, Investment, Taxation and Competition, OECD, <http://www.oecd.org/daf/cmis/CIME/mnetext.htm> [19].

[205] Abraham Katz, President of the US Chamber of International Business, letter to Jeffrey Land, Deputy US Trade Representative et al, 21 March 1997, 3 in Preamble Centre, 'The MAI in the Words of Framers, Supporters and Opponents' (1998) The MAI Project Home Page, Preamble Centre, <http://www.preamble.org/mai/quotes.html#breadth>. A similar view is taken by the Australian Chamber of Commerce and Industry: see *Public Hearing on the MAI*, above n 4, 93 (Mark Paterson).

multinationals to international scrutiny; and the fear of liability for catastrophic accidents like Bhopal.[206] The presence of a foreign investor might also result in improved environmental practices by local firms who imitate the multinational's practices and technologies, a process known as 'reverse engineering'.[207] Thus, in the view of investors, the best mechanism is self-regulation based on the principles of functional equivalence or equivalent risk.[208]

The OECD Environment Directorate non-paper, 'What Would an MAI with High Environmental Content Look Like?', suggests that in their activities overseas, investors should be either encouraged or required to adopt 'world's best practice' standards, home country environmental technology, or the practices and standards advocated by the World Bank. They should also be encouraged or required to conduct environmental impact assessments of all offshore projects, regardless of whether host-country legislation requires such an assessment.[209] These suggestions have not been embraced by the MAI Negotiating Group; the Chairman of the MAI Negotiating Group has flagged a review of the environment and labour chapters of the Guidelines to commence in late 1998, but the MAI continues to refer to the Guidelines as purely voluntary.[210]

Since the activities of investors lie at the heart of the MAI, the attachment or incorporation of a binding code of conduct for investors, that is enforceable by ordinary citizens using the same dispute resolution opportunities as are offered to investors, could change the focus of the MAI. The code could follow the suggestions of the OECD Environment Directorate, or it could develop into a detailed charter of responsibility on a sector or industry-specific basis. Ideally, the code would also establish some uniform system of public environmental reporting for which the newly-established OECD Sustainable Development Steering Group could take administrative responsibility. The proposal outlined here is seductively simple and the author acknowledges the difficulty in implementing and enforcing such an ambitious code. However, absent some way of adding substance to the weak obligations of investors under the existing code, the efforts of nations to secure a sustainable future for their citizens will continue to be threatened.

IV EXCEPTIONS TO THE MAI

The MAI contemplates the inclusion of general and country-specific exceptions or reservations. The general exceptions relate to security, taxation, and measures needed to maintain the integrity of the financial system, exchange rate and balance of payments. For the purposes of this analysis, the country-specific exceptions are of most importance. Every party to the MAI will be able to lodge

206 OECD, 'FDI and the Environment', above n 19, [30]–[31].

207 Ibid [32].

208 Harris Gleckman, 'Proposed Requirements for Transnational Corporations to Disclose Information on Product and Process Hazards' (1988) 6 *Boston University International Law Journal* 89, 105–6; Fowler, above n 37, 29.

209 Adams, above n 54, referred to in Arden-Clarke and Mabey, above n 55, [3].

210 OECD, 'MAI April Draft Text', above n 16, Annex 2: Package of Proposals for Text on Environment and Labour, art 7 fn 2.

country-specific exceptions protecting non-conforming laws that are considered essential to national policy. These exceptions are recognised as an essential element to the negotiating process, without which the agreement could not proceed.[211] The Australian government has submitted a long catalogue of laws and policy topics for which it seeks exemption from the MAI,[212] and the list is likely to increase once State laws are added. The breadth of the exceptions currently listed certainly calls into question Australia's commitment to the MAI's liberalisation agenda. Although our current investment regime is quite liberalised already, it seems clear that the Commonwealth does not contemplate any substantial modification of national laws in response to accession to the MAI.[213] Despite the long list, environmental protection laws are not among Australia's current exceptions. This may be because the environment is not part of the Commonwealth's constitutional legislative powers or because the government considers there to be no potential conflict between federal environmental laws and the MAI. It may also be because the federal government does not regard environmental protection as something that should interfere with the pursuit of the national interest, narrowly defined to mean only security and economic growth.[214] There are several Commonwealth laws aimed at environmental protection which may restrict investment, such as the *World Heritage Properties Conservation Act 1983* (Cth), the *Environmental Protection (Impact of Proposals) Act 1974* (Cth) and the *Great Barrier Reef Marine Park Act 1975* (Cth). The Commonwealth has commenced a major overhaul of its environmental laws, but even if the mooted reforms are enacted, the Commonwealth will retain substantial powers with respect to environmental protection.[215] It is therefore essential that a country-specific exception be included in respect of such laws.

Even where exceptions are lodged, however, the status of non-conforming measures will depend upon whether the MAI requires the gradual dismantling of such measures. The MAI proposes two schedules of exceptions. Annex A will list laws and measures that are subject to 'standstill' commitments.[216] These measures are excepted from MAI provisions but must not be increased. Annex B will list sectors, sub-sectors or activities where future non-conforming measures may

[211] Dymond, above n 1, [21].

[212] The list includes foreign investment policy (including media and real estate), acquisitions under the *Foreign Acquisitions and Takeovers Act 1975* (Cth), the role of the Foreign Investment Review Board, fisheries, telecommunications, aviation, immigration policies, government procurement, privatisations, monopolies, foreign aid contracts, government grants and subsidies, social services, professional and industry standards, audio-visual and indigenous persons. The federal government acknowledges that this list is likely to increase and is currently consulting State and local government in order to identify what subnational laws should be incorporated into the Australian list of reservations: *Public Hearing on the MAI*, above n 4, 8, 41 (Janine Murphy).

[213] *Public Hearing on the MAI*, above n 4, 32 (Janine Murphy).

[214] Department of Foreign Affairs and Trade, *In the National Interest: Australia's Foreign and Trade Policy*, White Paper (1997) 1–14.

[215] Robert Hill, Commonwealth Minister for the Environment, *Reform of the Commonwealth Environment Legislation*, Consultation Paper (1998) 3–4

[216] OECD, 'MAI April Draft Text', above n 16, art IX(A) and the citations therein; see also FitzGerald, Cubero-Brealey and Lehmann, above n 9, 27–8.

be adopted.[217] Nothing in the current MAI draft requires a commitment to roll back existing non-conforming measures. The commentary to the MAI defines 'roll-back' as 'the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place.'[218] The commentary identifies several methods by which non-conforming measures may be removed: through rounds of negotiations during which parties exchange liberalisation concessions; using peer pressure through periodic examination of restrictions; by including roll-back commitments in the basic agreement; by excluding certain existing laws from the list of country exceptions; or imposing a sunset clause for the operation of existing measures. The future of exceptions is a thorny issue. The lists currently before the MAI Negotiating Group are so extensive that further liberalisation seems inevitable if the objective of the MAI is to be advanced. At this stage, it seems most likely that roll-back obligations will not be included in the MAI text itself but will instead be the subject of mutual concessions agreed to during rounds of 'peer review'.[219] Whatever the approach, environmental safeguards must be incorporated into the framework of the MAI if they are to endure; it would be foolhardy for any country to accede to the MAI on the basis only of an extensive list of country-specific exceptions.

V CONCLUSIONS

The MAI requires substantial amendment. The MAI should only trigger protection to investments that have involved significant outlays of financial and other resources. The national treatment and MFN obligations must take account of inconsistent obligations contained in MEAs, federal structures of government wherein primary environmental regulatory functions are devolved to subnational governments, and the different environmental protection measures that may be required in different investment sectors. Parties must be given the right to complain against a country which lowers environmental standards in order to attract investment, and a mechanism should be installed by which the continued upward harmonisation of standards can be negotiated. The MAI should contain a broad-ranging exception for environmental protection measures that do not comply with MAI provisions. The exception should automatically exempt measures taken pursuant to MEAs, but should not be limited to multilateral initiatives. In addition, the OECD Guidelines for MNEs should be substantially strengthened, made binding on investors, and subject to enforcement by ordinary citizens.[220] Finally, the dispute resolution mechanism should permit participation by ordinary citizens, through the submission of amicus briefs, and incorporate an

[217] OECD, 'MAI April Draft Text', above n 16, art IX(A); FitzGerald, Cubero-Brealey and Lehmann, above n 9, 28.

[218] OECD, Commentary to the MAI April Draft Text, above n 60, 60.

[219] Department of Treasury, 'Multilateral Agreement on Investment: Questions and Answers' (1998) Multilateral Agreement on Investment, Department of Treasury <http://www.treasury.gov.au/Publications/Mai/QandA.asp> [21]–[22]

[220] The OECD Environment Directorate suggests that MAI parties be encouraged to facilitate pursuit of legal claims for environmental damage caused by their national companies in offshore investments: Arden-Clarke and Mabey, above n 55, [3].

appellate process that will clarify issues of legal interpretation. Special provision may have to be made to accommodate the particular needs of developing countries, particularly in relation to the ban on performance requirements. As a matter of procedure, developing countries should be given a voice in all further negotiations of the multilateral investment liberalisation agreement. Without these safeguards, the MAI is more likely to undermine than advance the principles of ESD to which members have committed in other international instruments.

As a result of the Environment Directorate's non-paper, the OECD commenced an internal environmental review of the MAI. The review did not propose to examine other social issues, such as labour standards, consumer rights and development, that form part of the fabric of ESD, nor did it propose to consider the implications of the MAI for developing nations.[221] Outside experts and stakeholders were not consulted.[222] At the time of writing, the outcome of that review is unknown. Environmental groups and other representatives of international society are certainly applying considerable pressure to transform the MAI. The final stages of the negotiating process and resulting document will be regarded as a litmus test for the OECD's commitment to ESD, especially in light of the report from the High-Level Advisory Group on the Environment, which lays out a clear path for pursuing ESD.[223] If negotiations resume with a clear reference to the different needs of developing countries and the responsibility of wealthy countries to assume a greater burden of the shift to sustainability, some progress will have been made. Only if strong statements supportive of ESD principles are incorporated into the MAI could it be said that the international community has taken real steps towards the full integration of environment and economics, which it recognised as essential over a decade ago.

POSTSCRIPT

When OECD negotiations over the draft MAI text resumed in October, it became clear that opposition to aspects of the agreement had grown. On 22 October 1998, a meeting of the OECD Executive Committee in Special

[221] Ibid [4].

[222] Ibid.

[223] HLAGE, above n 18, [40]. In the context of the MAI, the principal recommendations of the advisory group were (at [4]–[9]):

1. Development of a corporate understanding and acceptance of the need to reorient work;
2. Revision of the OECD Convention to acknowledge that ESD is the basis of its mandate;
3. Initiating economic, environmental and social impact assessment of all OECD policies at the same level as assessment of budgetary impacts;
4. Recognition of the inseparability and importance of social issues to sustainable development;
5. Urging member nations to take steps that will build the confidence of developing countries of their commitment to ESD.

Session agreed to further postpone negotiations. The OECD restated its commitment to the value of non-discrimination for long-term investments and agreed on the value of a multilateral framework for investment. It also recognised, however, the growing concerns pertaining to sovereignty, and the protection of environmental and labour rights and culture. Accordingly, it resolved to devote 'additional time to take stock of these concerns and to assess how to accomplish the goal we all share of developing a multilateral framework of rules for investment.'[†] The statement made clear that any future negotiations would broaden participation to include non-OECD countries and would consider representations from civil society.

It is understood that the OECD negotiating group will re-convene in early December to determine how best to proceed with the process. One possibility is for the negotiations to be transferred to the WTO forum. Whatever the outcome, it appears that the current MAI text will serve only as a reference point for further talks, reopening to new debate some of the more controversial inclusions highlighted in the foregoing discussion.

[†] Stuart Eizenstat, 'Chairman's Statement', (1998) News and Events Home Page, OECD <http://www/oecd.org/news_and_events/release/nw98-101a.htm> [16].