An Assessment of the Prospective Impacts of the Multilateral Agreement on Investment on Policies, Law and Programs Relating to the Forest and Fisheries Sectors in British Columbia

Steven Shrybman, LL. B.

Executive Director
West Coast Environmental Law

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Executive Summary

The following offers our assessment of the potential impacts of the Multilateral Agreement on Investment (the MAI) on policies, laws and programs relating to the forest and fisheries sectors of British Columbia. Our primary focus is the environment and related employment and economic development goals. Our assessment intends to illustrate the breadth and range of impacts that the MAI is likely to have on forest and fisheries-related policy, law and programs in this province. It should not be taken as either comprehensive or exhaustive.

We have not within the scope of this review undertaken a constitutional analysis of the MAI, nor have we assessed the authority of the federal government to negotiate this Treaty. Neither have we addressed the prospective impacts of the MAI on provincial land claims or other First Nations issues, except when these are explicitly addressed by forest and fisheries laws. Nevertheless it is clear that serious constitutional questions

arise in this context. These remain to be addressed.

Our method in carrying out this assessment assumes, at first instance, the full application of MAI provisions to policy, law and programs as these concern the forest and fisheries sectors. We then consider how various safeguards, exceptions and reservations may ameliorate the potential impacts and conflicts we identify.

Key Provisions of the MAI

We have narrowed the ambit of this opinion to certain key elements of the MAI. These are:

- Definition of Investment
- National Treatment
- Directors and Senior Managers
- Performance Requirements
- Expropriation
- Dispute Settlement

While precedents for several of these provisions can be found in NAFTA and certain bi-lateral investment agreements that Canada has negotiated in recent years, these are relatively recent innovations in the area of international treaty and trade law and have not yet been given formal or judicial interpretation. Other elements of the MAI are entirely without precedent.

These factors make definitive interpretation difficult, as does the absence in the MAI of definitions for many key phrases and concepts. Moreover, while analogues for most MAI provisions can often be found in NAFTA, the MAI often develops and expands upon this foundation in ways that substantially enlarges the scope of this investment treaty.

Definition of Investment

> Arguably the most important provision of the MAI is its definition of "investment", which is far more expansive than is the case under NAFTA. Of particular relevance to this assessment is the explicit inclusion of "***rights conferred pursuant to law or contract such as concessions, licences, authorizations, and permits;"*** together with commentary that makes clear the intent to treat the allocation of Crown resources, including fishery and forest resources as giving rise to investor rights under the MAI.
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> Because the central reference point of the MAI is "investment" the expanded definition of this term substantially increases the scope and application of most MAI provisions, even where these

precisely trace those in NAFTA. In our view therefore, and notwithstanding the much larger geographic scope of the MAI, the substantive changes accomplished by the MAI will very significantly expand the application of the investment policies and investor protections engendered by NAFTA.

National Treatment

This principle of non-discriminatory treatment, is central to the MAI, and as this assessment will describe, is very difficult to reconcile with a diverse array of Canadian policies, laws and programs that seek to favour Canadian citizens, businesses and communities particularly with respect to the allocation of crown resources.

Directors and Senior Managers

This provision prohibits nationality requirements for directors and senior managers. It expands upon its NAFTA precedent which applied only to senior management.

Performance Requirements

This provision sets out a broadly defined list of government policies, law, and programs which may not be imposed, enforced or maintained as conditions upon investors or investments. Moreover, the application of these constraints is much broader than for other provisions of the MAI because they apply to investors *of a Contracting Party or of a non-Contracting Party,* i.e. to all investors, whatever their country of origin.

Performance Requirements go well beyond the principle of non-discrimination engendered by the *National Treatment* principle, because these broadly worded proscriptions simply prohibit government measures no matter how equitable or even handed their application to foreign investors. While similar language is found in Article 1106 of NAFTA, the more expansive definition of *Investment* under the MAI substantially enlarges the constraints imposed by these prohibitions. Finally by proscribing the maintenance of impugned measures, this raises the additional concern that *Performance Requirement* constraints may be given retroactive application to requirements, commitments and undertakings that predate the Treaty.

Expropriation and Compensation

> In light of the broadly worded character of this prohibition, its impacts may well overshadow those of any other provision of this investment treaty. The far-reaching implications of this provision have only recently been brought to light by claims that have been brought under very similar provisions of NAFTA.

The expansive language of this provision prohibits measures that "directly or indirectly" expropriate or nationalize an investment or that have the "equivalent effect" of expropriation. Until this provision has been tested by dispute resolution, or by the courts, it would not be prudent in our view to discount the expansive interpretations of this provision that are being asserted by corporate claimants under similar provisions in NAFTA.

Moreover, because the MAI includes a more extensive definition of investment than is in place under NAFTA, it is likely to substantially enlarge the domain of proprietary rights that this rule might be invoked to protect.

Dispute Settlement

> A detailed consideration of the MAI dispute resolution regime is beyond the ambit of this assessment. However, in our opinion, there are very significant implications that are raised by these rules, for many areas of public policy including the administration of justice. This is particularly true for *Investor-State Procedures*.
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> While the precedent exists under NAFTA, the MAI would substantially enlarge the application of this adjudicative regime in two obvious ways. The first because of the much larger community of foreign investors that would be accorded access to these extraordinary remedies. The second because the scope of the MAI is much broader than is the case under NAFTA.
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> While investor state procedures are available under NAFTA, they nevertheless represent a relatively recent innovation of Canada's international investment agreements. As such, they represent a clear departure, both from the norms of international commercial arbitration, and as well as from the principles of dispute resolution under international trade agreements.
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> Perhaps the most remarkable feature of this enforcement regime is the notion of binding foreign investment arbitration without privity of contract. Thus under *Investor State Procedures,* Canada would give "its unconditional consent to the submission of a dispute to international arbitration...." Therefore notwithstanding the absence of any contractual relationship,

> and even where no other legal foundation might exist, all foreign investors would have an unqualified right to invoke international arbitration to assert claims arising under the MAI. Nor do investors have any obligation to exhaust domestic remedies before resorting to international dispute resolution because the MAI does not adopt the "local remedies rule" which is a feature of some other Canadian international investment agreements.

Forest Resources

Ninety-two percent of productive forest land in British Columbia is Crown land, and jurisdiction over these lands lies with the provincial government under Section 92 of Canada's Constitution.

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

One of the most succinct encapsulations of BC forest policy can be found in *The Forest Renewal Act of BC* which describes the purpose of the act this way:

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

These same goals are fundamental and inherent to other key forest statutes in the province including the *Forest Act* and *Forest Practices Code*. These are also common themes of such programs as the *Small Business Forest Enterprise Program*, *the Woodlot Licence Program*, the *Community Forest Program* and of *Forest Renewal BC*.

In our view, the environmental, economic development and employment goals of BC forest law and programs would be very difficult to reconcile with the provisions of the MAI. By seeking to optimize the environmental and economic value of BC forests to the benefit of BC residents, businesses and communities - provincial initiatives offend the principle of *national* or non-discriminatory treatment of foreign investors.

Our assessment of BC policies and law for this sector identifies a very substantial and diverse array of legislative, regulatory and programmatic measures that appear to be incompatible with MAI constraints. That there should be so many points of conflict between these respective regimes, is not

surprising given their very disparate objectives.

Moreover, the broad proscriptions that would be established under the headings *Performance Requirements* and *Expropriation and Compensation*, further constrains the scope for provincial initiative. The following briefly describes some of the more important points of departure or areas of conflict that this assessment has identified:

- Several elements of the provinces tenure system explicitly favour Canadian citizens, companies, communities and First Nations. These represent forms of discriminatory resource allocation that are incompatible with *National Treatment*, and rules concerning the nationality of *Senior Managers and Directors*.
- Several elements BC forest law and programs seek to condition access to Crown forest resources by requiring investment in local production and value-added processing. These requirements will often be incompatible with *Performance Requirements* which prohibits a variety of measures that may be needed to achieve economic development and diversification goals.
- Most public forest land in British has been allocated for decades. To ensure that licence holders comply with the terms of their tenure agreements, and to allow opportunity for tenure reallocation, various mechanisms have been established to provide for the replacement of tenure assignments, and in some cases the cancellation or reallocation of tenure commitments. In addition to other MAI constraints, these measures would now be vulnerable to challenge under the *Expropriation and Compensation* provisions. Similarly, efforts to reduce or reallocate Allowable Annual Cuts would also be vulnerable to such challenges.
- The provincial government is committed to conducting land and resource management planning across the province. These planning exercises will often identify areas to be protected under the *Protected Areas Strategy*, or zone forest land according to resource use priorities. *Expropriation and Compensation* rules may now come into play either to bolster current claims by foreign affiliated investors for compensation with respect to the designation of protected areas, or to support claims for compensation for planning related constraints that have not in the past been actionable.
- The *Forest Practices Code of British Columbia Act* regulates forest practices by requiring tenure holders to prepare operational plans, and by specifying certain standard forest practice requirements. Impacts of such regulatory initiatives may reduce allowable annual cuts across the province by as much as 6%. No compensation is payable for this anticipated reduction. Nevertheless such claims could clearly be made under MAI *Expropriation and Compensation* provisions.
- *Forest Renewal BC (FRBC)* is a Crown corporation which was created to invest a portion of the revenues derived from the logging of public lands into the forest economy. FRBC funds are to be allocated in priority to BC forest workers, communities and First Nations. These preferences could not be reconciled with *National Treatment* and other MAI constraints.
- *The Jobs and Timber Accord* is an agreement reached between the provincial government and major forest companies which links certain incentives regarding tenure privileges to job creation. Incentives include priority access to Forest Renewal BC funds; eligibility for exemption from the 5% "take-

back" of the Allowable Annual Cut allocations upon tenure transfer, and eligibility to carry forward undercut volumes where job creation or maintenance can be demonstrated. For the reasons noted above with respect to similar objectives framed by provincial forest policy and law, much of the substance of this Accord would be incompatible with MAI provisions.

Fishery Resources

Both the federal and provincial governments have significant constitutional authority with respect to Canadian fisheries and there is considerable overlap and duplication of powers in this area. Under the *Constitution Act,* the federal government has exclusive legislative power over Sea Coast and Inland Fisheries. The provinces have authority over "property and civil rights" and the "management of public lands," which includes the beds of rivers and lakes, i.e. the habitat on which inland fisheries depend. Once fish are lawfully caught they become the property of the fisher and are subject to provincial control over buying, processing and selling of fish.

As is the case for the forest sector, many of the essential objectives of Canadian fisheries policy and law are not compatible with the objectives of the MAI. This is particularly true for resource allocation policies that favour Canadian citizens, companies and communities. In addition, *Performance Requirements* impose further constraints; as do *Expropriation and Compensation* rules.

Among the most important conflicts between Canadian fisheries regime and the provisions of the MAI are the following:

- Both provincial and federal fishing licences, with their full attendant rights, require the fisher to be a Canadian citizen. Licences for foreign fishing vessels have been available, but have not been issued for several years. Licensing requirements linked to citizenship or aboriginal status would be in breach of the MAI *National Treatment* and *Senior Management and Boards of Directors* provisions.
- Quota systems have been established by the federal government under fishery management plans for certain fisheries, transforming fishing rights into a tradable commodity. This would, in our view, make it considerably more difficult to argue that restrictions on the transfer of quotas is a necessary element of a conservation regime, and not simply a constraint on the trade of a commodity, like any other, and for this reason a breach of Canadian obligations under the MAI.
- The community economic development objectives of the *Groundfish Trawl Management Plan* and the Groundfish Development Authority would also likely be found in breach of the *Performance Requirement* constraints of the MAI, particularly where a certain percentage of a catch had to be delivered for processing to certain domestic companies. Such requirements would be very difficult to reconcile with *National Treatment* and *Performance Requirements* prohibitions.
- The federal *Fisheries Act* establishes a regime for habitat protection which

prohibits the destruction of, or damage to, fish habitat. The federal *Oceans Act* allows the government to define and protect threatened marine areas through the development of a *Marine Protected Areas Strategy* an important part of Canada's commitments under the international *Biodiversity Convention*. By limiting the uses to which land may be put, the imposition of habitat protection measures can operate to significantly reduce the development value of property or the profitability of harvesting licences or other permits. It would be prudent in our view to anticipate that challenges will be made to such measures under MAI *Expropriation and Compensation* rules.

- There are a number of federal-provincial agreements and Memoranda of Understanding concerning the fisheries. One such example is the *Canada-British Columbia Agreement on the Management of Pacific Salmon Fishery Issues (April 1997)* which addresses various issues including a framework for allocating salmon among First Nations, commercial and recreational fishing interests; the creation of a *Pacific Fisheries Resource Conservation Council*; the protection of the resource and its habitat; and industry and community development. These agreements often engender the same principles that are ubiquitous to Canadian fishery and forest policies, namely that Crown resources should be developed, or conserved, to the benefit of Canadian companies, workers and communities.
- Several federal and provincial initiatives have been established to promote economic development objectives related to Canadian fisheries. These include such disparate initiatives as *Fisheries Renewal BC. (FsRBC*), the *Salmon Enhancement and Habitat Restoration Programme*, and the *Pacific Salmon Revitalization Strategy (*the *"Mifflin Plan")* March 29, 1996. Whatever their differences, each of these programs represent government interventions in the market for the purposes of accomplishing economic development and conservation goals that are either alien to, or in contradiction with, the principles of MAI.
- The *Law of the Sea Treaty* empowers coastal states, such as Canada, to exercise sovereignty over territorial sea, seabed and subsoil, plus airspace, up to 12 nautical miles. While the sovereign prerogatives of nations in this area are reasonably well established, the MAI is remarkable in failing to adopt the language of many international treaties that clearly assert these sovereign rights.
- The language of the *Pacific Salmon Treaty* on the other hand, clearly asserts that the nation with sovereign rights over waters has the primary interest in the fish resources of those waters and has the inherent right to exploit those resources for the "optimum" benefit to its own citizens. A similar provision can be found in the *Law of the Sea*. While the principles of equity that underlie these treaties are arguably essential to a sustainable approach for managing coastal fishery resources, they are simply not reconcilable with the objective of non-discriminatory treatment that is fundamental to the MAI.

Exceptions and Safeguards

Environmental Safeguards

There are three areas of the MAI where environmental concepts and language

are introduced. The first is in the preamble to the Treaty. While this language in still unsettled, it is unlikely even in its most forceful iteration to have any material effect on the application of MAI disciplines. The use of similar hortatory language in the NAFTA and WTO Agreements has had little bearing on the resolution of disputes which have raised issues of environmental protection and conservation.

Environmental clauses also appear as modifying conditions to *Performance Requirements* prohibitions. With appropriate changes in reference, this language is identical to that used by Article 2102.3 of NAFTA. Similar language can also be found in Article XX of GATT 1994 where however, it is stated as a general exception to the GATT agreement. Under the MAI, these environmental and conservation safeguards would apply only to certain *Performance Requirements*. However, it has become the consistent pattern of international trade dispute resolution to accord such environmental and conservation "safeguards" very narrow application. Therefore, it is unrealistic in our view to expect a different outcome in the present context where these safeguards are given even more limited application than in the trade agreements from which they are borrowed.

The third example of environmental conditionality is set out in a provision discouraging the practice of lowering environmental standards for the purposes of attracting foreign investment. There are several reasons to doubt the effectiveness of this provision:

- The *Not Lowering Standards* article has narrower application than do the broader proscriptions of *National Treatment* and *Most Favoured Nation* rules and may leave the door open to relax environmental standards for the purposes of encouraging investors to *operate, manage, maintain, use or sell* an investment.
- The fact that parties are not required to establish or maintain even minimal environmental standards creates the potential for this provision to have the perverse effect of actually discouraging environmental regulatory initiatives. While waiving or derogating from existing environmental or conservation measures may be actionable under the MAI, having little or no environmental regulation is not.
- While a particular investor might complain about a concession granted to a competitor, in our view this is more likely to occur in aid of achieving the benefit of a similar concession, rather than with the objective of encouraging the maintenance of tough environmental standards. On the other hand, while environmental or community groups may have an incentive to enforce such a provision, they would not have standing to invoke the MAI dispute resolution. Again, the practical effect of such a provision may be to reduce environmental standards to a lower common denominator, rather than support high standards.

Concessions and Advantages

Relief from some of the constraints set out in the *Performance Requirements*

article is allowed where governments provide investors with an advantage. While a direct grant pursuant to such programs as FRBC or FsRBC may qualify as such an advantage, in our view, the disposition of crown property rights, would not.

General Exceptions

There is no general exception or other "carve out" for measures that governments may wish to adopt for the purposes of achieving environmental or conservation objectives. In this regard the MAI falls substantially short of the very modest benchmark established by international trade regimes including the World Trade Organization.

Reservations

With a modest number of exceptions, Canada's list of reservations to the MAI are very similar to those filed under NAFTA. Apparently little effort was made to revise the list of reserved measures to address the substantial new domain of investor rights and protections engendered by the MAI. We have attempted to highlight key differences between MAI rules and those set out in Chapter 11 of NAFTA. In every case, constraints on public policy prerogatives, for purposes other than investor protection, have been significantly diminished.

Matters With Respect to Which No Reservation has been Listed

Canada has filed a more extensive list of reservations than has been filed by any other party to MAI negotiations. Nevertheless many of the conflicts that we have identified here, are left entirely un-addressed by the present list of draft reservations.

To begin with, unlike the broad reservations listed under the headings "aboriginal affairs" or "social services," there is no draft reservation whatsoever concerning environmental protection or natural resources conservation measures.

Nor have any reservations been taken for measures that might be adopted or implemented by Canada in order to meet its obligations under multilateral environmental agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer, or the Framework Convention on Climate Change. In contrast the priority of certain of these agreements has been explicitly recognized under NAFTA (Article 104).

Conversely, Canada has listed no reservations at all from a number of the provisions of the MAI. The most noteworthy of these omissions is the *Investment Protection* provision concerning *Expropriation and Compensation*. Thus, nothing in Canada's list of draft reservations will in any

way moderate the constraints that these provisions are likely to exert on Canadian policy, law and programs, including the considerable number of conflicts we have identified in this assessment.

Similarly, but with the single exception of the *Investment Canada Act,* no reservation has been put forward concerning the dispute settlement provisions of the MAI, including *Investor-State Procedures*. Therefore, all other matters, including the effect of a listed reservation, are vulnerable to challenge pursuant to these procedures.

The demands of such claims on government resources will often be a significant consideration when issues concerning compliance with MAI constraints are raised in the context of policy development, and law reform. The result is likely to create a great deal of uncertainty about the viability of any current or prospective environmental policy, law or regulation. In our view, that uncertainty is neither conducive to the orderly development of public policy nor supportive of a stable regulatory environment necessary to sound business planning.

Finally, it should be noted that the significant majority of Canadian draft reservations are restricted in their application to "existing non-conforming measures." These are commonly described as "bound" reservations and are subject to "standstill" and "rollback" rules. "Standstill" precludes the development of law and policy that would be more restrictive of the rights established by the treaty. In other words, all future policy, legislative, regulatory and programmatic initiatives, including those in reserved sectors, must conform to MAI disciplines. "Rollback" anticipates the gradual reduction of the protection afforded by particular reservations. Together these principles produce a "ratchet effect" to gradually reduce the ambit of protection afforded even for those existing non-conforming measures specifically identified by listed reservations.

Measures of the Provinces and Territories

Canada has yet to formally list a reservation for measures of the provinces and territories. It is our understanding however, that it is Canada's intention to conclude an agreement subject to a reservation for provincial measures similar to the one currently in place under NAFTA. If Canada succeeds with this negotiated strategy that reservation would provide reservation from:

- *National Treatment*
- *Most-Favoured Nation Treatment*
- *Performance Requirements*
- *Senior Management and Boards of Directors and for:*
- *All existing non-conforming measures of all provinces and territories.*

If Canada succeeds in negotiating such a reservation, three points should

nevertheless be noted. The first is that this reservation is restricted in its application to "existing non-conforming measures" and is therefore "bound" and subject to standstill and rollback provisions.

The second concerns the failure of these proposals to reserve from *Expropriation and Compensation* or *Dispute Settlement* provisions, thus leaving all provincial measures vulnerable to such challenges. Moreover, MAI provisions concerning standing and confidentiality could preclude a province from either being given notice of and/or the right to participate in any claim that might be brought against it, notwithstanding any federal-provincial practice or agreement to the contrary.

The third concerns the considerable constitutional uncertainty that exists with respect to the demarcation of federal and provincial authority with respect to natural resources. The failure to reserve these matters from the ambit of dispute settlement will accordingly allow these constitutional issues to be litigated in a forum operating outside of the context of Canadian law, judicial institutions and processes. It may be trite to note that there are many constitutional issues with respect to which the federal and provincial governments are not *ad idem*. Yet in the absence of any formal rights to notice or standing, the provinces would be dependent upon the federal government to defend their position.

Natural Resources Related Reservations

Canada has taken no reservations with respect to forest policies, laws or regulations. Therefore the only safeguards available to shelter such measures are those general reservations that may be negotiated with respect to provincial governments, which we have discussed. While these reservations may provide some protection from MAI constraints they would not in our view and for the reasons noted, either be fully effective or durable over time.

With respect to fisheries related measures Canada has taken two specific reservations, which are relevant, these are for certain measures related to *Fish Harvesting and Processing* and *Fish-Related Services*. However, both reservations are taken only with respect to *National Treatment and Most-Favoured Nation Treatment* obligations. Therefore all federal fisheries policies, agreements, laws and regulations will be subject to all other MAI provisions including those concerning *Performance Requirements, Senior Management and Boards of Directors, Expropriation and Compensation* and *Dispute Settlement*. This will leave a considerable range of fisheries related initiatives entirely exposed to challenge under MAI provisions.

Moreover, both reservations are "bound" leaving all future federal fisheries related policy, legal and program initiatives subject to MAI disciplines. Given the enormous pressures on this resource, and the pace and character of public policy changes in this domaine, the failure to reserve future measures will, in

our view, seriously constrain the options available to both federal and provincial governments as they endeavour to meet present challenges.

Furthermore, a diverse array of federal fisheries policy, laws, programs and agreements are not included in Canada's list of proposed reservations. Statutes with respect to which no draft reservation has been listed include: the *Department of Fisheries and Oceans Act;* the *Fish Inspection Act;* the *Canada Oceans Act;* the *Territorial Sea and Fishing Zones Act;* the *Canadian Environmental Assessment Act,* the *Freshwater Fish Marketing Act;* the *Fisheries Development Act;* the *Northern Pacific Halibut Fishery Convention Act;* the *Atlantic Fisheries Restructuring Act;* the *Great Lakes Fisheries Convention Act,* the *Atlantic Fisheries Restructuring Act,* and the *Fisheries Improvement Loans Act*.

While we have not had the opportunity to conduct a detailed review of the substance of these various statutes, nor the regulations and policies that may be attendant to them, the preliminary review we have conducted indicates that significant issues are likely to arise concerning compatibility with the MAI.

Another important omission, concerns the failure to list regulations to the *Fisheries Act*, including those dealing with the establishment of quotas and other license related regimes. In our view, this failure could indirectly undermine Canada's ability to control foreign access to fishery resources within Canada's Exclusive Economic Zone. This may well be the result if Canada compromises its authority to restrict the purchase and trading of quotas by foreign investors, by subjecting such measures to the disciplines of *National Treatment* and/or *Most Favoured Nation Treatment*.

Finally, Canada has failed to explicitly list among its proposed reservations, international agreements (bi-lateral and multi-lateral) concerning fisheries, as is did under Annex IV of NAFTA. Thus measures taken in consequence of Canada's rights, obligations and commitments under the *United Nations Convention on the Law of Sea (UNCLOS)* or the *Canada US Salmon Treaty* are not matters subject to a specific draft reservation. The principle of linking responsible stewardship to harvesting rights is central to both international agreements. However, in our view, this principle is not one that can readily be reconciled with the *National Treatment* and/or *Most Favoured Nation Treatment* rules of the MAI.

The Competence of the Federal Government

Finally on the effectiveness of Canadian reservations, we should note that in the absence of an explicit reservation, it may not be open to the Canadian government to plead a lack of constitutional competence as an excuse for non compliance by a provincial government with MAI obligations. Under international law a state can not plead an excuse arising from incapacity in its

own internal laws in order to avoid responsibility for a breach of a treaty obligation that it has undertaken. Article 27 of the *Vienna Convention on the Law of Treaties* codifies this rule and states that "a party may not invoke the provisions of internal law as justification for its failure to perform a treaty."

The division of powers under the *Constitution Act* creates serious limitations on federal authority to commit the provinces on matters falling well within the provincial sphere of constitutional authority. Should the federal government undertake these commitments in any event, and notwithstanding the absence of agreement with provincial governments, it may nevertheless bind Canada internationally to obligations that it may not have the constitutional authority to undertake.

Conclusion

We have attempted in this assessment to illustrate the diverse character of the potential impacts of the MAI on the policy, legislative and program prerogatives of both federal and provincial governments in the areas of fishery and forest resources management. Arguably, the two most important objectives of Canadian natural resources policy, are to manage Crown resources to promote conservation objectives, and to optimize economic benefits derived from these resources for Canadian citizens, companies and communities. While the contradictions are more apparent for the latter, in our view, both goals are essentially incompatible with the objectives of the MAI.

We have also attempted in surveying various federal and provincial statutes to identify a wide array of measures that would be vulnerable to challenge as offending MAI constraints. It is clear from this assessment that if compliance with MAI rules is to be achieved, the essential tenets of Canadian natural resources policy would have to be revisited and substantially revised.

Introduction

You have asked for our assessment of the potential impacts of the Multilateral Agreement on Investment (the MAI) on policies, laws and programs relating to the forest and fisheries sectors of British Columbia. Because of the integration of economic and environmental policies for these sectors, you have also asked that we identify potential MAI impacts on related employment and economic development goals.

We should note that we are not providing a constitutional analysis of the MAI nor of the authority of the federal government to negotiate this Treaty. Neither have we addressed the prospective impacts of the MAI on provincial land claims or other First Nations issues, except when these are explicitly

addressed by forest and fisheries laws.

With respect to both of these resource sectors we begin with an overview of the broad constraints that the MAI may impose on provincial and federal prerogatives. We then identify a number of specific policies and laws which would be vulnerable to challenge under the MAI. We have not attempted to be either comprehensive or exhaustive in our review but rather to illustrate the breadth and range of impacts that the MAI is likely to have on forest and fisheries-related policy, law and programs in this province.

Our methodology in carrying out this assessment has been to assume, at first instance, the full application of MAI provisions to policy, law and programs as these concern the forest and fisheries sectors. Having assessed the full extent of vulnerability under the MAI, we go on to consider how various safeguards, exceptions and reservations may ameliorate the potential impacts we identify.

We have based our assessment on the most recent materials available to us. In the case of the MAI text itself, this document is styled DAFFE/MAI(98)7 which apparently was distributed to the parties on Feb. 13, 1998. We understand that this represents that most complete consolidated text to be compiled to date. In the case of Canada's draft reservations, the document is styled DAFFE/MAI/RES(97)15/REV1, and was apparently distributed on Nov. 19, 1997.

1. The Multilateral Agreement on Investment: Key Provisions

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

1.1 Interpretation (Uncharted terrain)

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

In addition, many key phrases and provisions of the MAI are not defined by the

Agreement. Examples would include such key concepts and phrases as "expropriation," "sustainable development," "advantage," "in like circumstances," and "exhaustible natural resources." Nor is there settled international law that might provide guidance with respect to the meaning that might be assigned to such terms by a dispute panel some years down the road.

A further difficulty arises because the principle of binding precedent (*stare decisis*) does not apply in the area of international commercial arbitration or trade adjudication. This means that dispute panels would not be bound by any previous interpretation of the provision of the MAI. Under the rules of dispute resolution of the World Trade Organization, this problem is in part addressed by the establishment of a permanent Appellate Body which will presumably lend consistency to the interpretation of WTO rules. However, under the MAI no such body is envisaged be established, and it is likely that the precise meaning of any particular term or provision will remain uncertain or unsettled for years to come.

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

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

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

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

Definition of Investment

II. SCOPE AND APPLICATION

DEFINITIONS

2. Investment means:

Every kind of asset owned or controlled, directly or indirectly, by an investor, including:

(i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organization);

(ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

(iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;

(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

(v) ***claims to money and claims to performance****:*

(vi) ***intellectual property rights;***

(vii) ***rights conferred pursuant to law or contract such as concessions, licences, authorizations, and permits;***

(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

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

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

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

We take this commentary to be an accurate interpretation of the intent of the framers of the MAI, namely that its provisions are to apply fully, save for any pertinent reservations or exceptions, to both federal and provincial measures concerning fishery and forest resources.

National Treatment

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

These provisions trace similar provisions found in NAFTA Chapter 11. There is no explanatory note that explains the bracketing around "in like circumstances," a phrase which is a feature of NAFTA Article 1102. This principle of non-discriminatory treatment, is central to the MAI, and as this assessment will

describe, is very difficult to reconcile with a diverse array of Canadian policies, laws and programs that seek to favour Canadian citizens, businesses and communities particularly with respect to the allocation of crown resources.

Directors and Senior Managers

> *SENIOR MANAGEMENT AND MEMBERSHIP ON BOARDS OF DIRECTORS*
>
> *No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions [and membership on boards of directors] individuals of any particular nationality.*

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

Performance Requirements

> *PERFORMANCE REQUIREMENTS*
>
> *1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:*
>
> *(a) to export a given level or percentage of goods or services;*
>
> *(b) to achieve a given level or percentage of domestic content;*
>
> *(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;*
>
> *(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;*
>
> *(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume*

or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement

— is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, or

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

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

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

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

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

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

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

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

Highlights indicate key additions or modifications to similar provisions found in the investment provisions of NAFTA. Paragraph 2 needs also to be compared with analogous NAFTA Articles 1106 (3)(4) and (5). It is also relevant to note the absence from MAI text of an exception similar to that of NAFTA Article 1106 (2). That

Article allows parties to require investors to use a specified technology to meet health safety or environmental standards without offending the proscription against mandating technology transfer as set out in the Performance Requirement article.

It is also important to stress that the application of these constraints is much broader than for other provisions of the MAI because they apply to investors *of a Contracting Party or of a non-Contracting Party*. In other words, the proscriptions set out under this heading apply to all investors, including domestic investors and investors from countries that are not a party to this proposed Treaty.

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

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

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

Expropriation

> *IV. INVESTMENT PROTECTION*
>
> *1. GENERAL TREATMENT*
>
> > *1.1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.*
> >
> > *1.2.* ***A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory] measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of***

another Contracting Party.

2. EXPROPRIATION AND COMPENSATION

2.1. A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or ***measures having equivalent effect*** *(hereinafter referred to as "expropriation") except:*

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

b) on a non-discriminatory basis,

c) in accordance with due process of law, and

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

2.2. Compensation shall be paid without delay.

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

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

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

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

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

Dispute Settlement

These provisions are too lengthy to reproduce here, and a detailed consideration of the MAI dispute resolution regime is beyond the ambit of this assessment. However, in our opinion, there are very significant implications that are raised by these rules, for many areas of public policy including the administration of justice. This is particularly true for *Investor-State Procedures*. Recent litigation initiated pursuant to similar provisions in NAFTA has brought to light some of these issues. As noted, we will briefly discuss these cases in assessing the implications of the MAI provision dealing with expropriation and compensation.

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

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

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

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

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

2. Forest Resource Management

2.1 Forest Policy in British Columbia

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

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

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

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

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

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

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

For example, the essential and overarching goal of provincial forest policy is to

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

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

2.2 Forest Law in British Columbia

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

2.2.1 The Tenure System

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

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

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

examples illustrate.

2.2.1.1. Discriminatory Allocation

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

Woodlot Licence Program

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

BC *Forest Act* Requirements	**Conflicting MAI Provisions**
S.44 (4) An application for a woodlot licence must be made to the district manager or regional manager in a form required by the regional manager and must include: (a) a description of any private **land owned by the applicant contiguous to or in the vicinity** of the area of Crown land described in the advertising, and (b) a declaration by or on behalf of the applicant attesting to the qualifications of the applicant for a woodlot licence. (5) A woodlot licence must be entered into only with (a) **a Canadian citizen or permanent resident of Canada**	**National Treatment – Most Favoured Nation Treatment**: Parties shall accord to foreign investors no less favourable treatment with respect to the right of establishment, acquisition, expansion, operation ….. of investments. **Senior Management and Board of Directors:** No party shall require an investor of another party to appoint as directors individuals of any particular nationality. **Performance Requirement – subparagraph (g)** No party shall require an investor to locate its headquarters … in its territory. **Performance Requirement – subparagraph** (k) No party shall require an investor to establish a joint venture with

who is 19 years of age or older,

(b) **a band as defined in the *Indian Act* (Canada),** or

(c) **a corporation, other than a society, that is controlled by persons who meet the qualifications referred to in paragraph (a)**.

(6)A woodlot licence must not be entered into with a person, corporation or band that:

(a) **owns or leases, or controls a corporation that owns or leases, a timber processing facility in British Columbia, or**

(b) **holds another woodlot licence**.

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

(a) the **place of residence of every applicant** and, if the applicant is a corporation, the place of residence of each of its members,

(b) the location and character of any private land, owned by every applicant, **contiguous to or in the vicinity of the area** of Crown land described in the applications, and

(c) other factors that the regional manager or district manager considers to be **consistent with the goals of the woodlot licence program**.

domestic participation.

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

Commentary

There are several points of contradiction between these statutory requirements and draft MAI proposals. The *proviso* that woodlot licences only may be entered into with Canadian citizens or permanent residents 19 years of age or older, a band as

defined in the *Indian Act (Canada)*, or a corporation that is controlled by persons who meet these qualifications, is clearly incompatible with national treatment. These same requirements would also be in breach of constraints concerning *Senior management and Boards of Directors,* as well as the *Performance Requirements* noted above.

The requirement that an applicant own property adjacent to or in the neighbourhood of the woodlot licence can also be seen as discriminating against foreign investors who would not as often be property owners in the local community. The fact that this particular constraint is indifferent on its face to the nationality or origins of the application would not protect it from the argument that it represents *de facto* discrimination against foreign investors.

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

Community Tenure

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

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

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

following objectives:

sustaining local manufacturing facilities;

creating jobs for their young people;

providing for new ventures such as value-added manufacturing; and

maintaining forest values such as visual quality, recreation

opportunities and environmental integrity.

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

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

2.2.1.2 The Requirement for Value-Added Production

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

BC *Forest Act* Requirements	**Conflicting MAI Provisions**
13. (3) An application for a forest licence must (c) if required in the invitation for applications advertised under subsection (1), include a proposal,	**Performance Requirement-subparagraph (b):** Parties shall not require investors to achieve a given level or percentage of domestic content. **Performance Requirement-**

providing information the minister or a person authorized by the minister requests, for

(i) **continuing, establishing, or expanding a timber processing facility in British Columbia,** and

(ii) meeting the objectives of the government in respect of any of the items referred to in subsection (4), and

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

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

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

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

(e) **contributing to government revenues**

Section 14. **A forest licence**

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

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

(ii) **to carry out specified measures to meet the objectives**

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

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

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

of the government in respect of any of the items referred to in section 13 (4);

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

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

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

diameters less than 28 cm and fence posts,

(vii) Christmas trees, or

(viii) sticks and timbers having diameters less than 15 cm, ties and mining timbers

Commentary

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

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

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

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

2.2.1.3 Tenure Reallocation and Reform

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

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

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

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

specified in the licence is reduced by 5%, and

(b) in respect of an agreement that is a tree farm licence, the government portion of the allowable annual cut available to the licence holder is reduced by 5%. …….

(10) **No compensation is payable under this Act or otherwise in respect of a reduction under subsection (1)**.

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

(a) a disposition of an agreement or an interest in an agreement to a business enterprise, as defined in the *Job Protection Act*, that is a participant in an economic plan under that *Act* and acquires the agreement or interest disposed of in furtherance of the economic plan,

(b) a change in or acquisition of control of a corporation that occurs in furtherance of an economic plan, in which the corporation is a participant, under the *Job Protection Act*, or

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

Section 66 Inadequate Volume

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

Section 71 Reduction of Cut for Mill

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

Expropriation and Compensation: A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect……

(as above)

Closure

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

Commentary

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

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

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

We understand that the other case against Mexico has been brought by California-based investors operating under the company name "Desona." In this instance the claim concerns an investment in a solid-waste landfill project in Naucalpan de Juarez. The company alleges that a decision by a local county government expropriated its investment in violation of NAFTA Chapter 11. The first session of

the tribunal was to be held Sept. 26, 1997. Because of the secretive nature of these proceedings, few details are available

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

The first concerns the significantly different ways in which expropriation is dealt with under the legal regimes of the countries party to MAI negotiations. While we have not canvassed those differences, it is clear that US law concerning expropriation is significantly more protective of private property rights than are our statutory and common law rules. The difference in part springs from the fact that where the protection of private property rights is a feature of the US constitution, it has no similar status in Canada. Moreover it is likely that international legal principles are more closely aligned with US legal traditions than on our own.

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

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

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

Small Business Forest Enterprise Program (SBFEP)

The SBFEP is an example of a policy initiative in the area of forest tenure that was made possible by the reallocation rules noted above. The SBFEP was established in 1981 to foster economic diversity in the forest sector, including value-added production, increased employment, and integrated forest management. Cut allocations necessary to support the program would be made available pursuant to the reallocation provisions noted above. In fact in 1988 the SBFEP was expanded

through a one time take back of 5% of the provinces Annual Allowable Cut from all major tenures. We have already noted the various MAI provisions that may come into play both with respect to the reduction in cut allowances and by reason of the preference that is given to local or community economic development. Authority for this program is found under S.21 of the *Forest Act*.

2.2.2 Forest Planning

The provincial government currently has a policy to conduct land and resource management planning across the province. Three regions of the province have land use plans which were initially generated through the Commission on Resources and Environment but approved by government. These are the Kootenay Boundary Land Use Plan, the Cariboo Chilcotin Land Use Plan, and the Vancouver Island Land Use Plan. Land use planning for the remainder of the province is being conducted through a Land and Resource Management Planning Process (LRMP), which includes involvement by several agencies of government and interested stakeholders.

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

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

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

Commentary

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

2.2.3 Harvest Regulation

The rate of logging in British Columbia is determined by the Chief Forester under section 8 of the *Forest Act*. The Chief Forester sets an allowable annual cut (AAC) at least once every five years for tree farm licence areas, in which the right to harvest timber is more or less exclusive for the tenure holder, subject to obligations to have a specified amount the AAC harvested by contractors. Tree farm licences are considered area-based tenures. The Chief Forester must also determine, at least once every five years, the allowable annual cut for each timber supply area. This AAC is apportioned among licensees holding volume-based tenures. In most parts of the province, the apportionment has already occurred through historic issuance of tenure. The apportioned volume is sometimes referred to as "quota." Any AAC reductions affect licensees proportionally according to their quota.

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

Commentary

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

2.2.4 Forest Practices

In 1994, British Columbia passed legislation governing forest practices, the *Forest Practices Code of British Columbia Act* (the "Code"). The Code took effect on June 15, 1995. The main approach of the Code is to regulate forest practices by requiring tenure holders to prepare operational plans according to content requirements set out in regulations, and secondly by specifying certain standard forest practice

requirements across the province. Eighteen regulations have been promulgated under the Code. Some of these are considered *planning* regulations, while others are considered *practices* regulations. By government direction, the *Forest Practices Code* has been developed to result in no more than a 6% reduction in allowable annual cuts across the province. No compensation is payable for this anticipated reduction.

Commentary

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

2.2.5 Forest Renewal BC.

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

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

Communities: Strengthening the communities that rely on the forests supporting forestry-related community development and adjustment.

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

Under the *Forest Renewal Act,* RSBC 1995, c.160, s.4, the corporation must ensure that its spending is regionally equitable, and it must be responsive to general and special directions made by Cabinet. The general principle behind FRBC is that the programs expenditures are incremental to existing obligations of forest licensees in order to avoid complaints that the industry is being subsidized. FRBC-funded activities are carried out through agreements with individual forest companies, First Nations, labour, government agencies, academic and others comprising the FRBC "partnership."

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

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

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

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

Forest Renewal Act Requirements

4. (1) Forest Renewal BC must:

(a) plan and implement a **regionally-equitable program of expenditures** in order to carry out the purpose of this *Act*;

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

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

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

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

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

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

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

Conflicting MAI Provisions

National Treatment – Most Favoured Nation Treatment: Parties shall accord to foreign investors no less favourable treatment with respect to the right of establishment, acquisition, expansion, operation ….. of investments.

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

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

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

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

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

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

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

Performance Requirement – subparagraph (l) Parties shall not require

investors to achieve a minimum level of local equity participation.

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

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

2.2.6 The Jobs and Timber Accord

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

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

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

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

have made under the Accord.

2.3 Summary

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

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

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

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