ARTICLES

The Multilateral Agreement on Investment and the Environment

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I Introduction

The next round of trade negotiations in the World Trade Organisation (WTO) will commence in Seattle in October 1999. Most negotiators due to attend the negotiations expect to discuss the formation of an international investment agreement[2]. This article explores the relationship a potential international investment agreement may have with international environmental agreements, and then analyses the effectiveness an 'environmental exceptions' provision could have in such an investment agreement.

It is likely that the discussions in the WTO will be based on the draft Multilateral Agreement on Investment (MAI). This is an international investment treaty negotiated by the OECD nations. Part II of this article briefly explains the history of the MAI. Part III explores the relationship between the MAI and international environmental agreements. Part IV discusses the likely effectiveness of the 'environmental exceptions' provision in the MAI. Part V concludes that an international investment agreement based on the MAI is unlikely to ensure that countries retain the ability to regulate investment if it becomes clear that it is having a negative impact upon their environment, as is therefore unlikely to lead to sustainable development.

II The MAI

In 1995 the countries who are part of the Organisation for Economic Co-operation and Development (OECD)[3] began to negotiate an international agreement on investment known as the Multilateral Agreement on Investment (MAI). OECD nations intended to conclude and sign the MAI during 1997. The negotiations were supported by the developed nation business

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[2] Discussions must be held on the WTO Trade Related Investment Agreement (TRIMs) by 2000. Further, in September 1996 the Singapore Declaration established a working group specifically to look at international investment agreement issues. E..M. Burt "Developing Countries and the Framework for negotiations on Foreign Direct Investment in the World trade Organisation" (1997) 12 Am. U. J. Int'l Pol'y 1015 at 1050 states that this declaration will allow trade ministers to set a course for discussions on an investment agreement in the WTO.

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

community, but criticised by developing countries. These countries believed that they should be involved in the negotiations because of the huge impact the MAI would have upon the global economic system and because they believed they would be pressured into signing the agreement. The negotiations have also been criticised by NGOs, who issued such a powerful protest statement against the MAI in 1997 that it stalled negotiations. The NGOs stated that the MAI would lead to both a breach of international labour standards and to environmental degradation.

As a result of the NGO protest and developing nation's concerns, the OECD countries commenced extensive inquiries into the potential impact of the MAI. The negotiations were stalled again in October 1998 and have not started again. The draft text will probably form a negotiating text for investment agreement talks in the WTO, as it represents the desires of developed nations and is the most comprehensive and liberal multilateral investment framework agreement in existence. This article will analyse some of the MAI provisions which deal with the environment.

III The MAI and International Environmental Agreements

Some commentators and NGOs expressed concern that international environmental agreements may conflict with the MAI. The draft preamble of the MAI states that the agreement 'should be implemented in accordance with international environmental law'. This may permit governments to protect their environment in accordance with environmental treaties regardless of the impact of this upon investment or investors.

There are no direct legal conflicts between the MAI and any existing multilateral environmental agreements (MEAs)[4], primarily because no MEA imposes any investment related sanctions, nor requires any action which would clearly conflict with an MAI obligation. However, several MEAs, such as the ozone treaties[5], and *CITES*[6] have the potential to conflict with the MAI[7]. If government actions under these treaties affect a foreign investor, the government may be in breach of its MAI obligations.

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[4]OECD "Relationships between the MAI and selected MEAs", available at <http://oecd.org/daf/cmis/mai/meanv.htm>at 1.

[5]Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) 26 ILM 1987 and Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) 26 ILM 1987.

[6]Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, March 3 1973) 12 ILM 1973. Also see the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989) 28 ILM 1989 and the United Nations Framework Convention on Climate Change (Rio de Janerio, 4 June 1992) 31 ILM 1992. J. Cameron and Z. Makuch, "Implementation of the United Nations FCCC" in J. Cameron, P. Demaret and D. Geradin (eds.) *Trade and the Environment* (London: Cameron and May, 1994) at 116.

[7]An OECD report states that this potential arises because these treaties contain provision for trade related environmental measures (including TRIMs) which could affect investors - OECD "Relationships between the MAI and selected MEAs", available at http://oecd.org/daf/cmis/mai/meanv.htm at 4. It should be noted that although these treaties contain the potential for conflict, as yet no conflict has occurred between them and the GATT. "WTO cannot be 'Judge, Jury, Police' of global environment issues, Ruggerio says" (1998) 21 International Environment Reporter 308 at 308.

An example of a potential conflict is demonstrated by looking at the *Framework Convention on Climate Change* ('FCCC'). The 1997 *Kyoto Protocol* of the *FCCC*[8] provides in Article 6 (1) (a) that a party[9] or a legal entity acting under the responsibility of a party can transfer or acquire emission reduction units. However Article 6 (1) (c) states that a party (or legal entity) will only be permitted to trade in emission reduction units when they have complied with other Articles of the Kyoto Protocol[10]. Therefore a legal entity from a country who has not complied with the relevant provisions of the Kyoto Protocol and who is also an MAI investor will not be permitted to trade emissions with a country who has complied with the provisions. A country which refuses to trade emission reduction units with an investor on this basis would be in breach of its national treatment[11] and possibly its most favoured nation[12] obligations in the MAI.

Another example of potential conflict comes from the *Montreal Protocol.* The Multilateral Fund set up under the *Montreal Protocol* distinguishes between local and foreign companies. If action which discriminates against a foreign investor is taken by a party in accordance with the Fund rules it could be a breach of national treatment[13]. Action under MEAs which leads to an expropriation of an investor's assets would also be a breach of a party's MAI obligations. Which agreement prevails in case of these conflicts?

Position Under International Law

Generally under the *Vienna Convention*[14], a later treaty will prevail over an earlier treaty[15]. Therefore if any environmental agreements which are signed after the MAI contain provisions which conflict with a provision in the MAI, the provision in the later environmental agreement will prevail.

In regard to environmental agreements which already exist, the MAI states that it should be implemented 'in accordance with international environmental law'. The *Vienna Convention* states that 'when a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'[16] This provision is not applicable however, as the MAI does not specifically refer to other treaties - simply to international environmental law.

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[8]Available at <http://www.unfcc.de/>

[9]Although this Article is specific to Annex 1 parties, most of who are OECD parties, Article 17 states that Annex B developing parties can also trade in emission reduction units.

[10]Parties must comply with Article 5 which requires countries to estimate their emissions and Article 7 which requires parties to provide information.

[11]Which requires that each nation accord investors from another country with treatment that is no less favourable that the treatment it accords to its own investors.

[12]Which requires that each nation accord investors from another nation with treatment that is no less favourable tan that it accords an investor from any other nation.

[13]OECD "Relationships between the MAI and selected MEAs", available at <http://oecd.org/daf/cmis/mai/meanv.htm> at 5.

[14]Vienna Convention on the Law of Treaties (1969) 8 ILM 691

[15]Article 30.

[16]Article 30 (2).

International law is traditionally created by treaty or custom. The problem parties may face in being required to act in accordance with international environmental law as evidenced by law and custom is that environmental treaty obligations are usually non specific and customary law simply may not exist.

Custom

Customary law is evidenced by the general practice of states[17]. Birnie and Boyle state that conservationists have attempted to argue that 'sustainable development' and 'inter-generation equity' have become customary international law[18], as many states portend to be seeking these goals[19]. However, developing nations usually refute that these policies are generally *practiced* and have therefore become customary law. This probably has the effect of preventing the crystallisation of the policies into customary law[20].

Another factor which has probably prevented environmental practices becoming customary international law is that international treaties on the environment often contain different obligations for developed, developing and least developed states. Which could be said to be the norm? Customary law has to be evidenced by general practice - if there is no general practice, there is probably no custom. Birnie and Boyle state that 'it is becoming increasingly difficult in a world of over 170 states of diverse cultures, policies, interests and legal systems to identify any universal practice. Their approaches and aims are difficult to reconcile even on questions of general principle, let alone specific details of policy.'[21] Although customary environmental law may evolve at some point in the future, at present it appears that term 'international environmental law' only includes treaties.

Treaties

Treaties are the most common law making tool used in regard to the environment. Countries have made protocols, conventions, covenants and treaties concerning the environment. These are binding on the countries which sign them and not binding on countries which do not sign them[22].

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[17]See Article 38 (1) of the *Statute of the International Court of Justice*.

[18]P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993) at 15.

[19]S. Schmidheiny and B. Gentry, "Privately Financed Sustainable Development" in M.R. Chertow and D.C. Esty., *Thinking Ecologically* (New Haven: Yale University Press, 1997) 118 at 118.

[20]P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993)at 15

[21]*Ibid* at 16.

[22]See Article 34 of the *Vienna Convention* - "A treaty does not create either obligations or rights for a third State without its consent."

Treaties too are problematic to enforce as 'international environmental law'. They do not necessarily lay down clear detailed and specific obligations[23]. Many treaties are frameworks which lay down general requirements and oblige parties to take all practicable measures to implement the treaty. Therefore when one party alleges that another party has breached its obligations under such a treaty, the second party could deny the allegation by stating that the treaty is a mere framework and does not set specific obligations which they can be said to have breached.

Due to the uncertain content of the phrase 'international environmental law' it will be arguable, but not certain, that countries must carry out their obligations to liberalise investment only so long as this is consistent with international environmental treaties. The *Kyoto Protocol* and *Montreal Protocol* measures outlined above may be argued to take precedence over MAI obligations.

To ensure that this argument is not tenable the MAI should express that the parties intend to implement the agreement in accordance with international law as an objective of the parties, rather than incorporate it in the preamble.

IV Environmental Exceptions to Performance Obligations

Article III section 4 of the draft MAI contains a provision which will allow MAI parties to require or continue to require some performance obligations from a foreign investor (contrary to the MAI prohibition on performance obligations) in order to protect the environment. It allows that a party can impose conditions on an investor requiring them to:

> '1. (b) to achieve a given level or percentage of domestic content; or
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from its territory.'

The exceptions provision states that:

> 'Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:....
> (b) necessary to protect human, animal or plant life or health;
> (c) necessary for the conservation of living or non-living exhaustible natural resources.'

Examples of the type of performance obligation that may be exempted under the provision include: a requirement on foreign investors to use a certain level of recycled paper obtained from local suppliers, in order to conserve local and global forests; a requirement that investors use domestic supplies of energy produced from a renewable source, to ensure that investors do not import cheap oil and exacerbate air pollution and greenhouse gas emissions; and a requirement that investors involved in food production include a certain level of local organic produce, so that citizens are not exposed to harmful levels of chemicals and pesticides.

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[23]P.W. Birnie and A.E. Boyle *International Law and the Environment* (Oxford, Clarendon Press, 1993)at 13.

The negotiating group chose the formulation of the exception provision because it was familiar to all OECD parties[24]. It is almost identical to two of the general exceptions in Article XX of the General Agreement on Tariffs and Trade (GATT) 1994, which provide that:

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination... or a disguised restriction on international trade, nothing in this Agreement shall be considered to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'

However, there is one important difference between the MAI and the GATT provisions. The GATT exceptions can exempt a GATT party from complying with any of its GATT obligations. The MAI exceptions are far more limited. They only exempt a party from the MAI prohibition on countries imposing performance obligations on investors requiring them to use a specific level of domestic content or use domestic goods and services - they do not provide a general exception to all MAI obligations. In their competition for foreign investment, countries are imposing fewer and fewer performance obligations upon investors. This means that the MAI environmental exceptions will be of limited and declining use. If countries are to be provided real freedom to pursue environmental aims, the exceptions should be applicable to all of the MAI obligations, including the national treatment and most favoured nation obligations. Given that these are the only environmental exceptions provided by the MAI, this paper will now analyse their potential use and scope.

The GATT/WTO Panel and Appellate Body have interpreted the environmental exception provisions. The interpretation these bodies have given to the GATT provisions provides a useful guide to how the MAI provisions may be interpreted for two reasons.

First, countries negotiated the MAI knowing that the specific words they used had been interpreted in GATT in a certain way. For example, Article XX (g) of GATT permits measures which are '*related to* conservation', whereas the MAI only permits those which are '*necessary* for conservation'. This indicates the parties considered the way in which 'related to' had been interpreted, and preferred the term 'necessary' and its interpretative background. Under GATT, the term 'necessary' sets a much harder test for parties trying to prove the validity of environmental measures than the term 'related to'. This indicates the intention of the parties to create a high threshold test for environmental exceptions, a fact which can be taken into account when the provisions are interpreted[25].

Second, the *Vienna Convention* Article 31 (1) states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Given the similar object and purpose of the MAI and GATT it is likely that they will be interpreted in the same way. The preambles of both refer to the

[24]MAI Commentary at 27.

[25]Article 32 of the *Vienna Convention* states that recourse may be had to supplementary means of interpretation including the preparatory work of a treaty to confirm the meaning of a treaty where there is an ambiguity or obscurity or another interpretation leads to an unreasonable result.

importance of reducing barriers to trade/investment and reducing discriminatory treatment to raise living standards and create employment.

The phrases 'necessary to', 'protect human, animal and plant life or health', 'exhaustible natural resource', and 'arbitrary and unjustifiable discrimination' have all been the subject of GATT jurisprudence, as have jurisdictional issues. The language of GATT could have been interpreted to accommodate environmental protection, but the jurisprudence has generally restricted environmental protection[26]. By adopting the same language the MAI will probably permit the same restrictive interpretations. This paper will now discuss GATT jurisprudence and its relevance to an investment treaty.

Protection of Human, Animal and Plant Life or Health

Measures under GATT Article XX (b) are permitted if they are necessary to 'protect human, animal or plant life or health'. Measures taken to reduce the incidental kill rate of dolphins in tuna fishing have been found to be a policy aimed at protecting animal life[27]. Measures which relate to the protection of health include those aimed at dissuading people from smoking. For example, in *Thailand - Restrictions on Importation and Internal Taxes on Cigarettes*[28], Thailand prohibited the importation of US cigarettes in order to control smoking levels generally and to protect Thai people from the impact of advertising associated with US cigarettes. The Thai government presented substantial evidence of the adverse effects of smoking, and the World Heath Organisation also made an extensive submission on the matter. Though the ban was not able to be justified under Article XX (b)[29], the panel accepted that smoking constituted a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the range of policies covered by Article XX (b).

The WTO Panel in *United States - Standards for Reformulated and Conventional Gasoline* decision noted that a policy to reduce air pollution and protect clean air was a policy within the range of policies to protect human, animal and plant life or health[30]. It stated that 'air pollution, in particular ground level ozone and toxic substances, presents health risks to humans, animals and plants..... one half of such pollution is caused by vehicle emissions....a policy to reduce air pollution resulting from the consumption of gasoline is a policy within the range of Article XX(b).'

Applying these cases in the context of the MAI, a performance obligation upon foreign investors involved in food manufacture to use locally grown organic produce so citizens are not exposed to harmful chemicals and pesticides by eating non-organic food could be described as a measure to protect human health. So could a performance obligation requiring investors to use local renewable energy sources rather than importing oil which contributes to air pollution.

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[26]M. Swenarchuk, "The MAI and the Environment" in A. Jackson and M. Sanger (eds.) *Dismantling Democracy* (Canada: Canadian Center for Policy Alternatives, 1998) 120 at 130.
[27]The *Tuna II* Panel decision, 5.30.
[28]7 November 1990, BISD 37S / 200.
[29]Because of the restrictive interpretation given to the term "necessary" in Article XX (b).
[30]At 6.21.

A wide range of measures could be described as aimed at protecting human, plant or animal life or health under the GATT and the MAI. Note though that in the cases cited above, the GATT complainants generally agreed that the activities which were being regulated were dangerous. Parties will not always agree on such matters. For example, in a recent case launched under NAFTA[31], Canada and an American company, Ethyl Corporation, disputed whether the petroleum additive methylcyclopentadienyl manganese tricarbonyl (MMT) was dangerous to human health. Canada relied on evidence that MMT had indirect potential effects on human health and concluded that it should ban MMT in the interest of public health[32]. Ethyl however argued that MMT was not a direct risk to health, and that no Canadian studies showed it was[33].

In relation to a performance obligation to use organic produce in food manufacturing, a foreign investor may argue that the pesticides and chemicals used on imported food have not been proven to be harmful. Proving that chemicals are acutely toxic to humans can generally be done by simple tests (such as the Ames test) but proving their chronic toxicity, or that they are harmful either in the long term, in association with other chemicals that many people are exposed to, or indirectly, is far more difficult and can involve years of expensive testing[34]. Data on the toxicity of chemicals is often incomplete, inconclusive, or the subject of industry confidentiality. Some countries are unlikely to have access to sufficient information to show that non organically grown food is harmful to health.

The MAI preamble incorporates the precautionary principle which states that lack of full scientific certainty should not be used as a reason for postponing cost effective measures to protect the environment. If an arbitration panel considers this principle they may not require a state to prove with irrefutable scientific evidence that a particular pesticide is hazardous to human health. However, as the version of the precautionary principle incorporated in the MAI is a relatively weak one and is merely one part of the entire preamble it is conceivable that an arbitration panel may accord little weight to it and require a party to produce extensive evidence of harm that it does not have.

In summary, the GATT/WTO jurisprudence indicates that the MAI could permit a wide range of performance obligations if they are implemented as part of a policy aimed at protecting life or health. If a relatively liberal interpretation is given to the MAI provision, many policies will come within its ambit. However, investors claiming significant damages[35] will be unlikely to concede that an activity they are doing is dangerous. If an arbitrating body gives little weight to the precautionary principle in the MAI preamble parties may be required to provide substantial scientific evidence that an action is directly harmful to life or health. This may mean that some states may choose not to implement a performance obligation in cases where they do not have sufficient proof that an activity is damaging to organism life or health.

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[31] North American Free Trade Agreement (1994) Canada, Mexico, United States.

[32] Canadian Government Statement of Defence 67-70.

[33] Ethyl Corporation Statement of Claim at 14 - 18.

[34] J. I. Kroschwitz (ed.) *Encyclopedia of Chemical Technology* 4th ed. (New York: Wiley, 1991-1998).

[35] For example, Ethyl Corporation was claiming $251 million in damages from the Canadian government.

Living or Non Living Exhaustible Natural Resource

The GATT Article XX (g) provides that parties may act to conserve 'exhaustible natural resources'. GATT parties have attempted to argue that the term exhaustible natural resources only includes finite resources such as minerals and is not meant to include biological or renewable resources[36]. This argument could not be made under the MAI which explicitly incorporates living as well as non living exhaustible natural resources. A performance obligation which requires foreign investors to use a certain level of recycled paper from local suppliers in order to conserve local and global forests would be a measure to conserve a living natural resource. However, it is unclear whether the forests would be considered 'exhaustible'. This paper will now consider the arguments of GATT complainants that some resources are not 'exhaustible'.

Exhaustible

In the *Shrimp/Turtle* case[37], the United States prohibited imports of shrimp which were caught in countries which did not use turtle excluder devices (TEDs). This was aimed at preventing the incidental killing of endangered sea turtles. It argued the measure was necessary to conserve turtles as an exhaustible natural resource. India, Pakistan and Thailand argued that if all natural resources were considered to be 'exhaustible', the term 'inexhaustible' would be stripped of meaning[38]. Malaysia argued that if the term 'exhaustible natural resources' in XX (g) was meant to cover plants and animals, then the protection given plants and animals in XX (b) would be superfluous[39]. The drafters could not have intended this to be so - they could not have meant either to deprive one exception of meaning or to provide two exceptions to justify one measure. The Appellate Body ignored these interpretative arguments when it determined whether sea turtles were exhaustible[40], stating that they were obviously exhaustible as all of the seven recognised species of sea turtle were listed in *CITES* as threatened with extinction[41].

The *Shrimp/Turtle* case is one where the exhaustibility of a species was relatively apparent. It was not so apparent in *United States - Restrictions on Imports of Tuna* (the 'Tuna I' case)[42]. Here, the United States amended its 1972 *Marine Mammal Protection Act*[43] to ban imports of tuna caught in the Pacific Ocean using technology such as purse seine nets which resulted in the incidental killing of dolphins. Mexico challenged the ban. The United States attempted to show its measure was one which was aimed at conserving an exhaustible natural resource. It stated that dolphin populations were likely to be exhausted if they sustained too high a mortality rate. It noted that the need to conserve dolphins was recognised in a number of international treaties[44]. Mexico replied that a resource could only be considered exhaustible if it could be shown by means of internationally recognised scientific data to be in danger of extinction[45].

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[36]India, Pakistan and Thailand argued this in the *Shrimp/Turtle* decision - see Appellate Body report at 128.

[37]*United States - Import of Prohibition of Certain Shrimps and Shrimp Products*, WTO Appellate Body Decision (1998) WT/DS58/AB/R

[38]Panel report at 3.237.

[39]Panel report at 3.240.

[40]At 128 the Appellate Body stated that it was not convinced that these arguments limited the scope of the term 'natural resource', but did not refer to the arguments in its determination of 'exhaustible' at 132.

[41]Appellate Body report at 132.

[42](1991) 30 ILM 1594.

[43]s 101(a) (2).

[44]Panel report at 3.40. For example, the Inter-American Tropical Tuna Commission and the United Nations Convention on the Law of the Sea (Montego Bay, 1983) 21 ILM 1261 recognise the need to conserve dolphin populations.

[45]Panel report at 3.44.

The Panel did not consider the issue. By the time of the *Tuna II* decision in 1994, all the dolphins concerned were listed on *CITES*[46]. The Panel held that 'dolphin stocks could potentially be exhausted, and the basis of a policy to conserve them did not depend on whether at present their stocks were depleted... (we) accept that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.'[47]

In *Canada- Measures Affecting Exports of Unprocessed Salmon and Herring* ('the Salmon Herring case')[48], Canada implemented measures to conserve salmon and herring stocks. It stated that the fish were vulnerable to depletion, and that in spite of continuing management and conservation efforts, the fish stocks remained at far below optimum production levels[49]. This meant that the fish stocks could be classified as exhaustible. The United States agreed, as it had implemented its own conservation measures to preserve such fish stocks. The Panel did not refute the exhaustibility of salmon and herring stocks[50].

The *Tuna II* and *Salmon Herring* cases are usually interpreted to indicate that 'exhaustibility' will be relatively easy to prove. In *Tuna II*, the Panel held that animals did not have to be near extinction to be considered exhaustible. In *Salmon Herring*, it was the fact that an economic resource (the fish stocks) was exhaustible, rather than the fact that an actual species of fish was near extinction, that was relevant. However, these cases could be interpreted in another way. In each of them the exhaustibility of a living resource was established either by the fact that the animal concerned was listed on *CITES*, or because exhaustibility was admitted. The interpretative arguments of GATT complainants outlined at the beginning of this section have not been addressed in the jurisprudence. For example - what is the purpose of including the word 'exhaustible' if all animals are to be considered under it in any case? Should countries have to show the exhaustibility of a resource by reference to internationally recognised scientific data?

If these interpretative arguments are made before a tribunal and hold any weight, it is foreseeable that a party under an investment agreement who attempts to impose a performance obligation in order to conserve a plant or animal may fail to justify their position if they cannot show, with reference to internationally recognised scientific data, that the plant or animal is in imminent danger or is at least vulnerable and showing signs of exhaustibility. A performance obligation with the general aim of conserving global forest resources will probably not be able to be shown to fit within the exception - a party will need to show that global forest resources are being so over-cut that they are showing signs of exhaustibility, or that its measure is aimed at conserving a particular species of vulnerable tree.

Environmental Measures

Are all the kinds of performance obligations which impose environmental measures upon investors which states may choose to protect the environment able to be classified as aimed at protecting human, animal or plant life or health, or conserving living and non living exhaustible natural resources? In the *United States - Standards for Reformulated and Conventional Gasoline*[51]

[46]Panel report at 3.14.
[47]At 5.13.
[48]Panel report (L/6268) adopted 22 March 1988.
[49]Panel report at 3.6, 3.7.
[50]Panel report at 4.4.
[51]*United Sates - Standards for Reformulated and Conventional Gasoline,* WTO Panel Decision (1996) WTO Doc WT/DS2/AB/R

case, the Panel found that clean air was an exhaustible resource, and that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)[52]. The Appellate Body did not refute this. If policies to protect air, exhaustible natural resources, and human, animal and plant life and health are all legitimate under the MAI - do any measures fall through the gaps?

Patterson states with regard to similar provisions under the GATT: 'Certainly, Article XX does not cover the full range of policies aimed at environmental protection. Because the original drafters in 1947 did not intend the Article to cover environmental protection which was not then an issue, strained arguments are made to include particular policy measures under the exceptions.'[53] Another commentator states that there 'may be a few issues which are not covered'[54]. In relation to similar language in the *EEC Treaty*[55], Kramer states that 'it is obvious that numerous measures which aim at the protection of the environment cannot be considered as protecting the health and life of humans, animals and plants; such measures include environmental taxes, environmental labeling, waste prevention measures, measures to assess the environmental impact and measures on environmental liability.'[56]

The MAI provision states that a party may take *environmental measures* which breach the performance obligations section in order to protect life or health or conserve exhaustible natural resources. This is a departure from GATT which simply states that a party may take *measures* which breach GATT. However, as the environmental measure under the MAI must always be shown to be one which protects life or health or conserves exhaustible natural resources, the inclusion of the word 'environmental' does not increase the range of measures available under the MAI from the range available under GATT. Some performance obligations under the MAI may not come within the scope of the MAI exceptions. For example, if a state requires a foreign investor to label their products 'organic' in conjunction with placing a performance requirement upon that investor to include a certain level of locally grown organic food, that state will not be able to justify the labeling requirement as aimed at protecting life or health or conserving natural resources. If a country imposes a performance obligation upon a foreign investor to conduct an extensive impact assessment of its facilities, it could not justify this under the MAI. This limits states' capacity to regulate foreign investors in order to protect their environment.

Necessary

The MAI negotiating group incorporated the word 'necessary' in both of its environmental exceptions, rather than using the term 'related to' which is found in GATT Article XX (g). The GATT cases show that it is very difficult for a party to argue that a measure it has taken is 'necessary'. Most commentators state that the 'necessary' test is very rigorous and results in most challenged environmental measures being found to violate GATT[57]. If the rigorous GATT interpretation of necessary is adopted in the MAI, it will be difficult for a party to show that their performance obligations come within the environmental exception.

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[52]Panel report at 6.37.

[53]E. Patterson, "GATT and the Environment" (1992) 26 Journal of World Trade 99 at 107.

[54]S. Charnovitz "Exploring the environmental exceptions in GATT Article XX" (1991) 25 (n5) Journal of World Trade 37 at 55.

[55]European Economic Community Treaty (Rome, 1 January 1958).

[56]L. Kramer, "Environmental Protection and Article 30 EEC Treaty" (1993) 30 Common Market Law Review 111 at 117-8.

[57]M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 338.

Rigorous test

In the *Tuna II* case, the United States imposed an import ban on Mexican tuna caught in violation of US fishing standards legislation. The panel concluded that the US import ban was not a necessary measure because the US had not exhausted all GATT consistent options reasonably available to it in pursuing its policy. The test to decide whether a measure is necessary is:

> 'a contracting party cannot justify a measure as 'necessary' under GATT if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.'[58]

The Panel noted that the US could have negotiated an international agreement to protect dolphins which would probably have been more GATT consistent[59]. The Panel was not concerned with and did not discuss whether this would be as effective at protecting dolphins as the import ban.

In *United States - Standards for Reformulated and Conventional Gasoline* Venezuela and Brazil contested the validity of a US Act which aimed to reduce air pollution by setting standards for gasoline quality. The Act provided that foreign producers could only import gasoline which met a statutory baseline standard, whereas domestic gasoline producers were not bound by the statutory baseline and could use an individual baseline. The US stated that it was necessary to have a different method to determine the foreign producers' standards because it could not rely on the data from other countries to develop individual baselines for importers. The Panel held that "although foreign data may be formally less subject to complete control by US authorities, this did not establish that foreign data could not in any circumstances be sufficiently reliable to serve US purposes."[60] The US could have negotiated with other nations to collect data. Therefore the measure they had imposed was not necessary.

In the *Thai cigarettes* case, Thailand banned the importation of US cigarettes. The Panel held that this was not necessary, as there were alternative measures available to Thailand to achieve its objective. It could ban cigarette advertising (though the panel noted that this would also breach GATT)[61]. It could conduct an educational anti-smoking campaign (although this had been unsuccessful in the past)[62]. It could place warnings on cigarette packets and ban smoking in certain public places (which it was already doing)[63]. The Panel ignored the possibility that the alternative measures they suggested might involve high regulatory and compliance costs, or might be impracticable and ineffective[64].

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[58]Panel report at 5.35.

[59]See the Tuna I Panel report at 5.28 and the Tuna II Panel report at 5.38.

[60]Panel report at 6.28.

[61]Panel report at 78. The panel noted that a complete ban on advertising would create unequal conditions of competition between established local producers and new foreign producers.

[62]Panel report at 23.

[63]Panel report at 78.

[64]M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 337.

The *Thai cigarettes* case shows that the current interpretation of 'necessary' is concerned with finding an alternative that is not GATT inconsistent, regardless of whether the alternative is effective or not. Kramer states that an effective system of environmental protection, such as requiring an 80 percent use of returnable bottles, may be acceptable, but that a very effective system, such as one requiring a 100 percent use would not be 'necessary' and therefore unacceptable[65]. Countries are not able to choose the level of environmental protection they wish. A country can always do something that is less effective - should they be required to choose the least effective measure?[66] NAFTA states that when a NAFTA obligation conflicts with an obligation in a listed environmental agreement, the parties should choose the alternative that is least consistent with NAFTA obligations *as long as the alternative is equally effective and reasonably available* (italics added)[67]. The MAI negotiators have chosen not to use this language and have used the potentially restrictive GATT language instead.

International Standards

Considering whether a party's environmental measure is necessary involves the WTO Panel comparing the measure with alternative measures which it considers are available to the party. The GATT jurisprudence indicates that the panel will consider international negotiation as an alternative measure. An international agreement would result in the country adopting international standards. This is problematic for sustainable development. National governments need to be able to enact the level of environmental protection that is appropriate for the desire of their population and the nature of their environment. In some cases, this level may be higher than an international standard. Often international standards will have been negotiated and compromised, and represent a lower standard than an individual country desires. If an MAI arbitration panel determines whether a performance obligation is valid by looking at whether it is necessary to meet an international standard, rather than necessary to meet an individual country's higher standard, the nation's measure is bound to be struck down.

In 1989 the US EPA instituted a ban on asbestos[68] which was aimed at phasing out the manufacture, import and distribution of asbestos. Canada was one of the largest asbestos exporters in the world at that time, and challenged the ban[69]. Canada argued that since none of the other industrial countries, nor the World Health Organisation, nor the International Labour Organisation, banned asbestos, the US should not do so either. Canada argued that the US should instead have a controlled use policy similar to other countries[70] and that the EPA's ban was not necessary in light of the international consensus that asbestos products could be safely regulated[71].

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[65]L. Kramer "Environmental Protection and Article 30 EEC Treaty" (1993) 30 Common Market Law Review 111 at 127.
[66]*Ibid* at 129.
[67]Article 104.
[68]54 Fed Reg 29460 (1989).
[69]*Corrosion Proof Fittings v EPA* No 89-4596.
[70]K.E. McSlarrow, "International Trade and the Environment: Building a Framework for Conflict Resolution" (1991) 21 Environmental Law Reporter 10589 at 10592.
[71]*Ibid* at 10594.

In 1989 the EU prohibited imports of meat and meat products derived from cattle to which certain hormones had been added for growth purposes, in response to public concern about the effect of the hormones on human and particularly small children's health[72]. Canada and the United States both used the hormones, and challenged the ban. The challenge formed the basis of a long running dispute before the GATT/WTO[73]. Canada and the US challenged the ban on the grounds that international food standards set in Codex Alimentarius did not prohibit the hormone, and therefore neither should the EU. This dispute was decided under the Agreement of Sanitary and Phytosanitary Measures, rather than under the GATT 1994. However, a similar argument based upon an international standard to show that a country's environmental measure is not necessary could be presented before an MAI arbitration panel.

In arguing that another party's environmental measure is not necessary, a party could point to an alternative measure which is based upon an international standard and which is less MAI inconsistent. Based on the GATT/WTO jurisprudence, the existence of this alternative measure may be enough for the panel to decide that the original measure is not necessary, and is therefore MAI illegal. However, if sustainable development is to be achieved, the question for the panel should be whether the measure is necessary to achieve the standard of protection that the national government decides is appropriate for its country.

If the GATT interpretation of 'necessary' is followed in the context of an investment agreement, it is unlikely that many of the performance obligations countries wish to impose will be validated under the environmental exceptions provision. Requirements that an investor purchase a certain level of recycled paper from local sources, or that they use domestic renewable supplies of energy or locally grown organic food are all liable to be challenged on the basis that a less MAI inconsistent measure would have been to legislate across the board, rather than to impose requirements upon investors only. An arbitration panel following the GATT interpretation would not consider a party's arguments that it is more effective to target foreign investors through performance obligations. It may indeed be more effective for countries to use performance obligations, as if these are imposed pursuant to a contract they enable a country to sue an investor for breach of contract as well as apply a statutory penalty when an investor breaches the obligation. Requiring investors to use local organic products may also be the most effective measure a country can use as it more easily allows a country to monitor whether the products are actually being produced in a way that is better for the environment. An arbitration panel may not consider these arguments. Foreign investors could also challenge the necessity of performance obligations by arguing that the country should have commenced international negotiations to achieve their environmental aims. Finally, an investor could argue an environmental performance obligation was unnecessary on the basis that it aimed to achieve a level of environmental protection which was higher than the accepted international standard. Each of these arguments may make it very difficult for a country to show that imposing a performance obligation upon a foreign investor to achieve environmental protection is 'necessary'.

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[72]M.W. Dunleavy, "The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA " (1993) 51 University of Toronto Faculty of Law Review 204 at 221.

[73]*EC Measures Concerning Meat and Meat Products (Hormones),* Appellate Body Report, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

Jurisdiction

One delegation wanted to alter the exception which permits performance obligations which are aimed at conserving living or non living exhaustible natural resources, so that a country could only seek to protect living and non living exhaustible natural resources *in its jurisdiction* (alteration in italics). This delegation wanted to make it clear that the provision had no extra-territorial ramifications[74]. This is a common concern among countries who believe that if a state makes legislation which has an extra-jurisdictional application it impinges upon another state's fiscal and political sovereignty[75]. Ironically, the same countries did not express concern that the draft MAI would bind states for at least 20 years to a single economic system and vision and impinge upon their sovereign right to make laws with respect to foreign investors and economic policy generally.

It is important that an investment agreement allow countries to impose performance obligations which aim to protect the environment outside of their jurisdiction, as the environment knows no jurisdictional boundaries[76]. Many actions have transboundary environmental spillover effects and even global effects[77]. A country may seek to protect a part of the environment that is partly, but not solely, in their own country - a shared resource. Many countries are party to international environmental treaties which protect shared resources such as air, the ozone layer, and threatened species. A country which imposes a performance obligation upon an investor to purchase locally produced energy from renewable sources may be doing so in order to protect the shared resources of air and climate. A country who imposes a performance obligation on an investor to use a specific level of recycled paper from local suppliers may not have any significant timber itself and therefore may be acting solely to protect forests in other jurisdictions.

It is therefore important that this exception does not include the jurisdictional limit that one delegate suggested. However, even if does not, it is still not clear whether the MAI as currently drafted will permit countries to protect the environment outside their jurisdiction. The preamble to the MAI does not provide any assistance in this matter. It provides by reference to the Rio Declaration that states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies. This indicates that states should not impose performance obligations with extra-territorial effects. However, the Rio Declaration also provides that states should co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem, which indicates that extra-territorial measures are important. If just one of these principles were included it could be useful for interpretation, but both effectively cancel the effect of the other out in the context of considering jurisdictional issues.

The GATT jurisprudence on this matter is indeterminate. In *Tuna I*, the Panel rejected the notion that a country's environmental measure which affected trade could have an extra-jurisdictional application and remain GATT legal[78]. However in *Tuna II* the Panel held that 'Article XX (b) does not spell out any limitation on the location of the living things to be protected.... The nature and precise scope of the policy area named in the Article.... is not specified in the text to the Article, in particular with respect to the location of the living thing to be protected.'[79].

[74]MAI draft text at note 31.
[75]H.L. Thaggert, "A closer look at the Tuna-Dolphin case" in J. Cameron, P. Demaret and D. Geradin (eds.), *Trade and the Environment* (London: Cameron May, 1994) 69 at 81.
[76]E. Patterson, "GATT and the Environment" (1992) 26 Journal of World Trade 99 at 107.
[77]N. Grimwade, *International Trade Policy* (London: Routledge, 1996) at 346.
[78]Panel report at 5.32.
[79]Panel report at 5.31.

In *Shrimp/Turtle,* India, Pakistan and Malaysia argued that according to customary international law, nations should recognise the sovereignty of others and the principle of non interference in the internal affairs of another state. They stated that in the absence of language to the contrary, GATT should be interpreted so that it does not extend to measures taken by one state to protect the health of organisms or conserve natural resources in another state[80]. The US replied that nothing in the provisions suggested a jurisdictional limit, therefore one should not be implied[81]. The *Shrimp Turtle* Appellate Body did not decide the matter. It noted that in the specific circumstances of the case before them, there was sufficient nexus between the United States and the migratory and endangered turtle populations[82].

While the GATT jurisprudence does not decide the question of whether extra jurisdictional legislation to protect the environment is valid or not, some guidance on the issue may be obtained from the recent *Shrimp/Turtle* case. In this case, the Appellate Body suggests that the validity of a particular law with extra jurisdictional effect will depend upon how that law was made. A country can seek to protect the environment which is outside its jurisdiction by negotiating with the other states concerned and taking multilateral action, or by taking unilateral action. If the country takes multilateral action, a law with extra jurisdictional effect will probably be GATT legal. If it takes unilateral action, the measure will probably be GATT illegal.

Multilateral Action

Many environmental treaties have already been concluded, and many more will probably be concluded, through which countries aim to protect resources, plants and animals which are either partly or completely outside of their territory[83]. In *Shrimp /Turtle* the US noted that:

> 'there has been a long standing practice, continuing through today, of contracting parties maintaining measures to protect and conserve animal and plant life and health outside their jurisdiction. There has never been a historical distinction between the protection of domestic plants and animals and non-domestic plants and animals.'[84]

The fact that states make international environmental agreements indicates that the international practice is to allow states to take action which affects parts of the environment not within their jurisdiction. Such international practice can be used to interpret a treaty document[85] and would indicate that extra - territorial legislation may be permitted as long as it is made pursuant to an international agreement. In support of this contention the Rio Declaration contemplates that states will make international environmental agreements and in fact provides that states should co-operate in a spirit of partnership to protect the environment.

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[80]Panel report at 3.157.

[81]Panel report at 3.159.

[82]Appellate Body report at 133.

[83]Such as *CITES,* the *Basel Convention*, the *Montreal Protocol*, and the *FCCC.*

[84]Panel report at 3.194.

[85]Article 31 (3) (b) of the *Vienna Convention* states that the subsequent practice of parties can be considered when interpreting a treaty.

In *Shrimp/Turtle*, the Appellate Body stated that the US should have engaged in serious, across the board negotiations with the objective of concluding a bilateral or multilateral agreement for the protection and conservation of sea turtles before it took unilateral action[86]. It noted that consensual and multilateral procedures were available and feasible for the establishment of programs for the conservation of sea turtles, and that the US should have availed itself of these[87]. While the Appellate Body did not need to decide whether the US measure would have been valid if the US had conducted multilateral negotiations, it did indicate that the measure would have been looked at more favourably if this had been the case.

However, in some cases the negotiation of an international agreement will not be the best way to protect the environment. Housman and Zaelke state that international agreements take a long time to negotiate, and countries may wish to act quickly when they perceive a developing environmental threat[88]. As noted the standard of protection that an international agreement sets may represent the lowest common denominator and not provide the level of protection a country believes is necessary. Countries may therefore wish to take unilateral action, either to protect the environment themselves, or to force other countries to come to the table and begin to negotiate an international agreement[89]. Are unilateral measures which have an extra-territorial effect GATT legal?

Unilateral Action

In *Tuna I*, the US banned imports of tuna from Mexico because the Mexican government's policy on tuna fishing did not meet the standards the US thought were necessary to protect dolphins. The Panel held that the US could not make unilateral laws which affected Mexico in this way, as that would lead to a situation where 'each contracting party could unilaterally determine the conservation policies from which other parties could not deviate'[90], which was unacceptable. It held that the US measure was in breach of GATT. In *Shrimp/Turtle,* the Appellate Body stated that the unilateralism of the US measure to protect sea turtles was one of the factors which led to its conclusion that the measure was not in compliance with GATT[91].

In summary, the validity of a country's law which imposes performance obligations on foreign investors with the aim of conserving the environment outside of that country's jurisdiction is unclear. The MAI preamble offers no assistance, and the GATT jurisprudence is inconclusive. However, statements of the Appellate Body in the *Shrimp/Turtle* case indicate that measures which have an extra-territorial effect which are taken pursuant to a multilateral treaty will probably be held to be valid. Those which are taken unilaterally will probably be held to be invalid. This means that under the MAI a country will probably have to impose its performance obligations pursuant to an international environmental treaty, or at least show that it made extensive efforts to facilitate an international agreement before it unilaterally imposed the obligations. This may not be the best way to protect the environment.

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[86]Appellate Body report at 166.
[87]Appellate Body report at 170.
[88]R. Housman and D. Zaelke "Trade, Environment and Sustainable Development: A Primer" (1992) 15 Hastings Int'l and Comp. L. Rev. 535 at 548.
[89]*Id.*
[90]Panel Report at 5.32.
[91]Appellate Body report at 172.

Arbitrary and Unjustifiable Discrimination

Under GATT, if a measure can be shown to fit within one of Articles XX (b) or (g) it must then be shown to come within the ambit of the chapeau[92]. A country must show that the measure it has implemented has been applied in a manner which is not arbitrary or unjustifiably discriminatory and is not a disguised restriction on international trade. Similarly under the MAI a performance obligation which aims to protect the environment must not be applied in an arbitrary or unjustifiable manner or constitute a disguised restriction on investment.

The *Shrimp/Turtle* decision is the seminal case on what constitutes arbitrary and unjustifiable discrimination. The Appellate Body held that the standard should be applied on a case by case basis, as the content and contour of the standard varies according to the case[93]. However, the standard is generally one which assesses the good faith of the party invoking the exception[94] and is designed to prevent an abuse of the environmental exceptions[95]. The Appellate Body found that the United States had not met the standard of good faith required by the chapeau for several reasons.

First, section 609 banned shrimp imports into the US from countries whose policies did not require the use of TEDs and which were not identical to the regime of the US. The Appellate Body found that the application of a rigid unbending standard to other countries without considering their environmental or developmental position was unjustifiably discriminatory. So was the practice of the US not to certify countries who had similar, but not identical, turtle protection regimes. It was arbitrary of the US to require certification based on the same policy standard in other countries without giving them a chance to be heard or review the decision. Finally, as noted above, it held the US should have engaged in serious, across the board negotiations with the objective of concluding a multilateral agreement before they acted unilaterally[96]. The US failed to meet the chapeau's requirement that parties use the environmental exceptions in good faith and do not abuse or misuse them[97].

The duty to act in good faith already exists under international law[98]. The *Vienna Convention* Article 26 states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Good faith is also a general principle of international law[99]. It requires that parties to a treaty deal honestly and fairly with each other, represent their motives truthfully, and refrain from taking an unfair advantage. Specifically, it means that a state should not exercise its rights to fictitiously mask an illegal act or evade an obligation[100]. The Appellate Body in *Shrimp Turtle* stated that the customary international law principle of good faith 'prohibits the abusive exercise of a state's rights.... a treaty obligation must be exercised bona fide, that is to

[92]*Shrimp/Turtle* Appellate Body report at 118-119.
[93]Appellate Body report at 120.
[94]Appellate Body report at 158.
[95]Appellate Body report at 151.
[96]Appellate Body report at 166.
[97]Appellate Body report at 156.
[98]*France - Nuclear Tests* ICJ Rep 1974.
[99]I. Brownlie, *Principles of Public International Law* 4th ed. (Oxford: Clarendon Press, 1990) at 19, and American Casebook Series *International Law Cases and Materials* (USA: West Publishing Company, 1980) at 78.
[100]North Holland *Encyclopedia of Public International Law Volume II* (Amsterdam: Elsevier Publishers, 1995) at 599-601.

say, reasonably'[101]. As a general rule of international law, the principle of good faith does not need to be explicitly mentioned in a treaty because it is implicit in all treaties[102]. If this is so, why has the chapeau, which the Appellate Body indicates is aimed at preventing an abuse of the exceptions provisions and requires parties to act in good faith, been included as part of the environmental exceptions provision in the GATT and the MAI?

One reason for the chapeau's inclusion in GATT could be that some developing nations are concerned about environmental measures being use as disguised restrictions on trade which form protectionist barriers. They argue that environmental quality is a luxury good and fear that their growth and development will be truncated by policies targeted at environmental conservation objectives. They talk of 'green' or 'eco' imperialism[103]. They also fear that the environmental exceptions provision could allow certain states to impose their environmental standards upon others in an arbitrary and unjustifiable way by imposing unilateral trade restrictions. They make a strong argument that standards should not be unilaterally imposed based on the fact that the vulnerability of the environment is not the same everywhere, awareness of environmental problems is not the same everywhere and resource availability varies from country to country[104]. India in particular has opposed the inclusion of environmental provisions in economic treaties[105]. The inclusion of the chapeau therefore alleviates some developing country concerns about the GATT.

This response may explain why the WTO, which includes developing countries and is sensitive to their concerns, has included a chapeau which mandates good faith. However, it does not explain why the developed countries of the OECD sought to include it in the MAI. Developing countries were not represented in the MAI. Why then does the MAI environmental exception provision include a chapeau which has been interpreted as preventing parties from abusing the exception and as providing for good faith?

One answer is that the provision in the MAI that a performance obligation not be arbitrary or unjustifiably discriminatory is *not* a test of good faith. The provision is aimed at ensuring that parties consider the principle of investment liberalisation as equivalent to the principle of environmental protection. The MAI is a treaty that is directly aimed at liberalising investment. In so doing, it specifically prohibits parties from requiring investors to achieve a certain level of domestic content or to purchase a certain level of domestic goods or services.

When parties decide to impose these performance obligations to protect the environment, they do so in full awareness that they are deviating from the overall goal of investment liberalisation in order to achieve the alternative goal of environmental protection. Parties consider the principle of investment liberalisation and then decide that in order to protect the environment they must depart from that principle. They are required by international law to do so in good faith, and investors or other countries who doubt that a party acted in good faith can challenge that party's action under the MAI dispute resolution provisions. To require that a party prove that the measure is not arbitrary and is justifiable is actually to make them consider the principle of liberalisation again, giving it a paramount position. This will not lead to sustainable development. Sustainable development requires that environmental and economic considerations be integrated in development decisions, not that economic considerations should be considered as paramount.

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[101]Appellate Body report at 158.

[102]North Holland *Encyclopedia of Public International Law Volume II* (Amsterdam: Elsevier Publishers, 1995) at 599-601.

[103]J. Whalley, *Trade and Environment Beyond Singapore* (USA: National Bureau of Economic Research, 1996) at 39.

[104]W. Lang, "Trade and Environment: progress in the WTO?" (1997) 27 Environmental Policy and Law 275 at 276.

[105]R. Housman and D. Zaelke "Trade, Environment and Sustainable Development: A Primer" (1992) 15 Hastings Int'l and Comp. L. Rev. 535 at 588.

V Conclusion

In the *Shrimp Turtle* case, the complainants argued that in becoming a member of the WTO, the US had agreed to accept imports of shrimp whose harvest and sale in the US market might mean the extinction from the world of sea turtles for all time[106]. The previous interpretation of the GATT environmental exceptions provisions gave the complainants the scope to make such an environmentally insensitive argument. The same argument may be able made under an investment agreement based on the MAI, and it probably will be because the MAI language is so similar to and even more restrictive than the GATT.

The only measures which deliberately or incidentally affect investment that countries could implement under an MAI based agreement in order to protect the environment are foreign investor performance obligations which relate to domestic content or purchasing. Parties could not be excused from implementing environmental measures which breach national treatment or most favoured nation obligations[107].

Many domestic content requirements will be able to be justified if they are applied to protect human, animal or plant life or health, or to conserve an exhaustible natural resource. However, obligations which relate to labeling and environmental impact assessment may not able to be classified under these heads. If the precautionary principle is incorporated in the investment agreement preamble it is arguable that countries may not need substantial proof that life or health is being endangered, or that a resource is exhaustible, before they implement the performance requirement. However, that this will be so is not clear and will depend upon an arbitral body's interpretation of the preamble.

The biggest hurdle countries will face in utilising the environmental exceptions provision will be to show that a performance obligation upon foreign investors is necessary to achieve the overall policy aim of environmental protection. Investors could successfully argue that the country should have enacted across the board legislation or negotiated an international agreement in preference to imposing a performance obligation upon them.

Nations may not be permitted to impose performance obligations which have an extraterritorial effect. This could seriously inhibit a country's ability to protect the environment. Finally, the requirement that the performance obligations be shown to be justifiably discriminatory and not arbitrary could be argued to have been included by the negotiators to ensure that parties give greater weight to considerations of investment liberalisation than to environmental protection. If this is so, it is contrary to the approach that sustainable development requires.

If the environmental exceptions allowed in an MAI based investment agreement are interpreted as similar provisions under GATT have been, they will not allow governments to make many laws which derogate from the principle of free investment to protect the environment.

[106]Panel report at 3.146.

[107]Except to the extent that these relate to performance obligations.