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## Relationships between International Investment Agreements

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## **Relationships between International Investment Agreements**

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International, bilateral and regional agreements have proliferated in the last ten years to twenty years and new ones are still being negotiated. It is thus virtually certain that for some more time to come international investment disciplines will continue to co-exist side by side with different terms and sets of parties, and various degrees of overlap. It is therefore important to understand how these agreements would continue to interact and how their overlaps and differences could be managed in a harmonious way.

The present study, with due regard to the complexity of the issues, seeks to increase the level of understanding of the relationships between international investment disciplines, drawing on an analysis of key international investment agreements (IIAs) and OECD's experience with the relationship between its own instruments and other relevant agreements.<sup>1</sup>

The study is organised as follows. Section 1 broadly states the issues being addressed in the paper. Section 2 takes stock of overlaps and differences among a representative sample of investment agreements (namely the bilateral investment treaties, NAFTA, the OECD investment instruments and the WTO agreements). Section 3 singles out the major areas where compatibility issues may arise, and reviews the basic rules of international law on their mutual compatibility. Section 4 suggests some key summing up points. Annex 1 recalls pertinent discussions during the OECD negotiations on Multilateral Agreement on Investment (the MAI). Annex 2 reproduces relevant provisions of the Vienna Convention on the Law of Treaties. Annex 3 presents a synopsis of main elements and overlapping provisions between IIAs.

## **1. What is at stake?**

After the International Trade Organisation (ITO) of the Havana Charter – which contained a comprehensive multilateral set of investment rules – failed to come into being in 1950, host and home countries sought to protect their respective interests by entering into bilateral, regional and multilateral investment-related agreements. Today there are estimated to be more than 2200 BITs and over 175 regional trade agreements (RTAs).<sup>2</sup> The OECD played a prominent role in developing plurilateral “rules of the game” relating to capital movements, dating back to the post-war reconstruction of Western Europe. More recently, in the mid-1990s, the Uruguay Round introduced an “investment” dimension in multilateral trade rules, in that at least some of the new disciplines had implications for foreign investment. Foreign investment-related issues in this sense can be found in at least five WTO Agreements: the GATS, the TRIMs, the TRIPs, the GPA and the ASCM.<sup>3</sup>

This has resulted in an increasingly complex international setting for international investment in which governments have to ensure consistency between differing sets of obligations. The rules of treaty law and specific clauses inserted in individual agreements have traditionally governed the relationship among these various sets of obligations. It is not always clear, however, whether all the legal implications of overlapping obligations are understood in all cases. Each agreement has its own architecture, objectives and cultural and legal specificity. The growing number of investment-related provisions made it increasingly difficult to assess the global picture.

Quite a large number of investment agreements, notably the BITs, while promoting closely related concepts (national treatment [NT], most-favoured nation [MFN] treatment, fair and equitable treatment, full protection and security), contain legal and/or textual variations, sometimes of a subtle nature. This could result in divergent interpretations of the same general obligation under different agreements.

Other questions have been raised regarding the “co-habitation” of various types of investor-to-state and state-to-state dispute settlement procedures or “forum shopping” where an investor may initiate multiple procedures on the same question in order to take advantage of the potentially more favourable dispute settlement provisions available in different agreements. It should be kept in mind that the level of obligations contracted by individual parties to an agreement cannot be disconnected from the coverage of their exceptions/reservations to the substantive and procedural provisions of the agreement.

## **2. Distinctive features and areas of overlap**

The following section is intended to provide a general indication of the most commonly shared features of existing IIAs and the extent of their mutual compatibility and complementarities.

### **2.1. *Bilateral Investment Treaties (BITs)***

As is usually stated in their title, the general purpose of BITs is the “promotion and protection” of investments from one contracting party in the territory of the other contracting party. Most BITs have been concluded between developed capital exporting countries and developing capital importing countries, but a growing number are being negotiated between developing countries. The community of interests is thus becoming broader and more diversified. Influential developing economies such as China, India and Malaysia have concluded a number of BITs, both with developed and developing countries.

While variations exist, two basic model BITs have emerged so far: (a) the “European model” based on the Abs-Shawcross Draft Convention model endorsed by OECD Ministers in 1962; and (b) the “North American model” developed in the early 1980s.<sup>4</sup> Both models cover the following major areas:<sup>5</sup> admission and treatment; transfers, key personnel, expropriation and dispute settlement. The main distinction between the two models is that the treatment provisions in the first only apply to an investment after establishment, while the treatment provisions in the second concern also the investment at the pre-establishment phase. Each party of both models can nevertheless make or maintain exceptions, normally using a “top down approach” (according to which all non-conforming measures must be notified), under one of the sectors or matters listed in an Annex to the treaty or resulting from laws and regulations applicable at the date the treaty came into force. In addition, the two types of BITs may contain general exemptions to address special situations (such as balance of payments problems, taxation) or concerns (national security or public order). However, the drafting of these commitments varies as the scope of the obligations.

Another major distinction is that the US model disciplines the imposition of a number of performance requirements imposed on investors or their investments and has more elaborated provisions on some matters (such as right of entry and sojourn of aliens) than the European BITs. The two models contain more or less the same concepts for protecting established investments: national treatment and MFN treatment,<sup>6</sup> free transfers of funds, prompt, adequate and effective compensation in the case of expropriation, fair and equitable treatment and full protection and security. They also provide for state-to-state and investor-to-state dispute settlement mechanisms. Investments comprise, in most cases, “all kinds of assets”.<sup>7</sup>

The overlaps that occur most frequently between BITs and other international agreements concern the treatment of investors and their investments after establishment, e.g. non-discriminatory treatment (MFN and/or national treatment), obligations on the protection of assets, namely guarantees against expropriation and nationalisation without compensation, and dispute settlement procedures for

both state-to-state and investor-to-state disputes. As the synopsis table reproduced in Annex 3 shows, there would appear to be potential areas of overlap among several agreements.

## **2.2. *OECD investment instruments***

Taken together, the Code of Liberalisation of Capital Movements and the Declaration on International Investment cover the whole spectrum of investment operations: “right of entry” and “establishment” for non-resident investors and related capital transfers under the Code; and “treatment no less favourable” to established foreign-controlled enterprises “in like situations” with domestic enterprises under the National Treatment Instrument (NTI). They both prescribe the progressive removal of discriminatory treatment against non-resident/foreign-controlled investors. This is a legally binding obligation in the Codes and a “political commitment” in the Declaration. In both cases, parties<sup>8</sup> are allowed to formulate reservations or exceptions (based on a “top down” approach). These reservations/exceptions (and related measures) are subject to “peer reviews”, which may result in the formulation of policy recommendations in favour of greater liberalisation. The OECD instruments do not contain legally binding dispute settlement provisions. However, since the Codes contain legal obligations, disputes over them could be brought to other general dispute settlement mechanisms which the parties to the dispute have accepted (e.g. the International Court of Justice) or to an *ad hoc* mechanism the parties decide to accept for a particular dispute.

Unlike the Codes, the NTI does not explicitly call for MFN treatment while, as general rule, BITs call for the better of MFN treatment or national treatment. As noted previously, some BITs address also “market access” issues pertaining to establishment. The OECD approach is based on the promotion of “progressive liberalisation” through the mechanisms of transparency, standstill and roll-back of discriminatory measures. The Investment Incentives and Disincentives instrument encourages parties to the Declaration to make investment incentives as transparent as possible so that their scale and purpose can be easily determined. The BITs rarely take up these issues. On the other hand, BITs and some regional agreements (but not the OECD instruments) provide for restitution or compensation for losses incurred due to war or armed conflict, national emergencies or expropriation. They also include binding settlement mechanisms for disputes arising between contracting parties as well investor-to-state investment disputes while the OECD instruments essentially rely on consensus building and consultation procedures.

The OECD Guidelines for Multinational Enterprises set the Declaration apart from other international investment instruments. These are recommendations addressed to multinational enterprises operating in or from adhering governments; they call for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. In June 2000, the Guidelines’ implementation procedures were reinforced. A network of national contact points promotes their wide dissemination. The national contact points also act as a forum of discussion for problems that may arise in connection of the interpretation or implementation of the Guidelines.

## **2.3. *The North American Free Trade Agreement (NAFTA)***

NAFTA (Chapter 11) is generally considered to be an important recent codification of disciplines and procedures concerning international investment and is increasingly emulated by other agreements.<sup>9</sup> It provides high level standards of protection and liberalisation found in other investment-related agreements and customary international law and offers a dispute settlement mechanism for both state-to-state and investor-to-state disputes. Unlike BITs, which generally use an unqualified illustrative asset list to “define” investment, NAFTA uses a broad enterprise-based, or

business activity related, closed list of assets, with specific exclusions. Covered investors generally include, provided that such investors carry on, or seek to carry on, business activities in the Party, all enterprises organised under the laws of another Party irrespective of the nationality of the ultimate owners. Both investors and their investments are entitled to the better of national treatment and MFN treatment and investments are entitled to “treatment in accordance with international law, including fair and equitable treatment and full protection and security” (NAFTA Art. 1105)<sup>10</sup>; freedom of transfers, and protection against expropriation without compensation. On expropriation compensation, NAFTA contains a more detailed statement of the traditional standard of “prompt, adequate and effective” compensation. Several types of performance requirements are prohibited; some of them (export requirements, technology transfer) are additional to those covered by the TRIMs agreement. These obligations also apply to investments of non-Parties. There are also special provisions prohibiting nationality requirements for senior management but allowing nationality requirements for a majority of the investment’s board of directors.

In addition, NAFTA contains both general exceptions and country-specific liberalisation commitments and exceptions to national treatment, MFN treatment and performance requirement rules, senior management and boards of directors and local presence – all listed according to a top-down approach.

In addition to the investment chapter, the NAFTA contains chapters on temporary entry of business persons, financial services, government procurement, competition policy, monopolies and state enterprises, and intellectual property.

There appears to be both a fair degree of overlap and consistency between the NAFTA provisions on investment and the WTO agreements described below.

#### **2.4. WTO Agreements<sup>11</sup>**

Of all the WTO agreements, the General Agreement on Trade in Services (GATS) deals most directly with investment issues. Mode 3 applies to the supply of trade in services through “commercial presence”, which is in essence an investment activity. Mode 4 may also be regarded as investment-related because it deals, *inter alia*, with the temporary entry of managerial and other key personnel. In accordance with the MFN obligation, parties to the GATS are committed to treating services and service providers from one Member in a no less favourable way than like services and service providers from any other as concerns measures affecting trade in services. This is regarded as an “immediate” and “unconditional” obligation.<sup>12</sup> Member specific exemptions from this obligation, permitted at the entry into force of the Agreement, cannot, *in principle*, last more than ten years.<sup>13</sup> National treatment, however, is not automatically accorded across the board. It applies only to scheduled sectors when parties agree to provide national treatment in the context of specific market access commitments, formulated according to a “hybrid” approach involving both “bottom up” and “top down” elements. The GATS provides recourse to the WTO Dispute Settlement Understanding (DSU).

This description (and Annex 3) suggests a rather partial overlap between the BITs and the GATS in connection with service sectors. In the European model BIT, this overlap appears to relate essentially to MFN/NT treatment and state-to-state dispute settlement with respect to assets generated through “commercial presence”. In the US model BIT, the overlap may also extend to the establishment of commercial presence. There are also overlaps between the OECD instruments and the GATS.

Building upon existing intellectual property conventions,<sup>14</sup> the Trade Related Aspects of Intellectual Property agreement (TRIPS) provides for national treatment and MFN for the protection of specific categories of intellectual property (copyright, patents, trademarks, etc.). Specific exceptions are provided but no country reservations to this treatment are permitted. In fact, agreement implementation relies a great deal on transparency: member governments are required to publish (or otherwise make available) relevant information pertaining to their intellectual property regime, including “bilateral agreements in the area of intellectual property rights”. The agreement is also subject to the DSU. Private rights holders are entitled, in addition, to benefit from certain standards with respect to the domestic enforcement of intellectual property rights and their rights in terms of access to civil judicial procedures. This description (and Annex 3) suggests a significant overlap between the BITs and the TRIPs agreement with respect to the protection of intangible assets and state-to-state dispute settlement. Although this matter does not seem to have been examined in a systematic way,<sup>15</sup> it would appear that both sets of agreements are compatible.

The Trade Related Investment Matters (TRIMs) agreement prohibits certain investment measures relating to trade in goods. These are measures that are inconsistent with the NT obligation of the GATT (which concerns the treatment of imported goods versus domestic goods) or provisions prohibiting quantitative restrictions (Article XI of the GATT). By now, however, all non-conforming measures should have been eliminated. The least-developed countries had until the end of 2002 to do so.<sup>16</sup> A number of extensions or waivers have nevertheless been granted to some countries.<sup>17</sup>

Disputes arising under the TRIMs are handled through the WTO Dispute Settlement Understanding. The main purpose of the TRIMs agreement is to prohibit discrimination between imported and domestic goods (as opposed to *de jure* discrimination between foreign and domestic firms). Performance requirements are usually covered by US BITs under separate provisions. In either case, there would not appear to be any significant issue of incompatibility with the TRIMs Agreement. The typical language used in US BITs, for example, particularly in their latest version, is normally based on TRIMs language.

While the Agreement on Subsidies and Countervailing Measures (ASCM) includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment.<sup>18</sup> For this reason, and because investment incentives are not an issue usually covered by BITs, even when they include provisions on the making of an investment, there would not appear to be a significant overlap – and thus problems of incompatibility between the ASCM and the BITs.

The “plurilateral” Agreement on Government Procurement deals with the procurement by “entities” specifically covered by the Agreement. It requires both transparency and non-discriminatory treatment in procurement procedures. These requirements not only apply to procurement of foreign products or services but also to goods or services produced by locally established foreign suppliers. The GATS agreement excludes public procurement services and the discussions so far to extend the GATS coverage in this regard has achieved little progress.<sup>19</sup> The OECD National Treatment instrument (NTI), on the other hand, covers discriminatory treatment in regard to government purchasing from established foreign-controlled enterprises. A clarification made by the Committee on International Investment and Multinational Enterprises has established how the relationship between the GPA and the NTI should be understood.<sup>20</sup>

### **3. Legal approaches for addressing investment agreement interfaces**

The following section examines how international law, as well as different types of investment agreements, deals with the issue of overlap. It is not intended, however, to provide a detailed analysis

of the possible implications of overlaps or differences in terms of scope or operation of individual disciplines or specific market access commitments. It also does not address the MFN interface as this issue is the subject of a separate study of this publication.

### **3.1. General principles of international law**

The general rule of interpretation of treaties is given by article 31 of the Convention on the Law of Treaties (Vienna Convention) (see Annex 2). It provides 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”. Thus, a clause of an international agreement must be interpreted according to the ordinary meaning of its wording.

Against this background, the combined reading of Articles 30 and 59 of the Vienna Convention provides the basic rules governing the “application of successive treaties” relating to the same subject matter among some or all of the parties. To simplify the analysis of these provisions, the following two cases are distinguished:

- a) The parties to the earlier and the later treaty are the same: In this case the earlier treaty is terminated either if the parties so decide or if the provisions of the two treaties are incompatible (art. 59.1). If not terminated, the earlier treaty is still applied to the extent that its provisions “are compatible with those of the later treaty” (art. 30.3).
- b) The parties to the earlier and the later treaty are partially different: In this case, two relationships must be distinguished:
  - i) The relations between the parties to both treaties, which are governed by the same rules of case a);
  - ii) The relations between a State party to both treaties and a State party to only one of the treaties: in this case “the treaty to which both States are parties governs their mutual rights and obligations” (art. 30.4.b). If the treaties contain incompatible obligations, issues of international responsibility may arise for the State which is party to both treaties toward the State which is party to the treaty the provisions of which are not respected.

In addition, issues of compatibility between treaties can be solved through wording. Article 30.2 states that “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”.

When the intent is not so expressly stated, there is no automatic result. However, a later treaty with less generous provisions may not necessarily be incompatible with a previous more generous one. The Chairman of the Drafting Committee of the Vienna Convention on the Law of Treaties provided the following example: “if a small number of States concluded a consular convention granting wide privileges and immunities, and those same States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted regime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force”.<sup>21</sup>

These are the general rules. How would they apply to the case of IIAs?<sup>22</sup> The issue of successive agreements is likely to become relevant mainly between a later multilateral agreement and previous bilateral agreements, or between multilaterals with overlapping but not fully identical parties. In the

case of the OECD's MAI negotiations, most participants seemed to have been seeking to extend prior protections through a multilateral treaty, but not to create a replacement regime that would generally override any more favourable BITs that parties to the MAI might have between them. If a later investment agreement concluded in that spirit contains less detailed provisions or lower standards than those contained in an earlier agreement, the higher level of treatment of the earlier agreement would not be overridden (see art. 30.2 and 30.3 of the Vienna Convention). There may be cases however, where parties to a later treaty intend to restrict and override an earlier agreement. This may occur, for example, with safeguard provisions, such as a balance of payments provision (BOP) in a multilateral agreement, which can be intended to override an unrestricted transfer clause in an earlier bilateral agreement.<sup>23</sup> In this case, the later treaty would prevail.<sup>24</sup> However, the specific intent of the parties would need to be carefully assessed, in order to ascertain whether they really sought to override in their bilateral (or other multilateral) relationship the previous more generous provisions.

### 3.2. *BITs clauses and other international agreements*

BITs often address the matter of compatibility through a specific provision, the "preservation of rights" clause, which simplifies the assessment of intent.<sup>25, 26</sup> That clause seeks to protect the rights of an investor in cases where the provisions of other international agreements<sup>27</sup> are more favourable than the provisions of the BIT. It is usually stated that other laws or agreements providing investment with more favourable treatment shall prevail. This clause may apply to existing as well as to future obligations.

Preservation of rights clauses may differ, however, in the types of laws or agreements to which they apply: they may apply to provisions of international law; provisions of the host country's domestic law; and agreements between the investor and the host country. Provisions applying to the first two categories can be found in BITs concluded by Finland, Germany, Sweden<sup>28</sup> and the United Kingdom.<sup>29</sup> Some provisions apply only to the third category – agreements between the investor and the host country (e.g. several BITs concluded by Switzerland). The provisions in the BITs concluded by the Netherlands, the United States and some other agreements apply to all three categories.

The treatment of preservation of rights clauses in the IIAs that were discussed above can be summarised thus:

- *OECD Codes.* The OECD Codes of Liberalisation, in article 4, on Obligations in Existing Multilateral International Agreements, provide that "nothing in this Code shall be regarded as altering the obligations undertaken by a Member as a Signatory of the Articles of Agreement of the International Monetary Fund or other existing multilateral international agreements". Article 4 gives precedence only to multilateral international agreements concluded before the adoption of the Codes, in 1961. This interpretation was confirmed in the early 1990s.<sup>30</sup>
- *NAFTA.* Under NAFTA, a general article (Article 103) provides that in the event of any inconsistency between NAFTA and other agreements to which the NAFTA parties are party. NAFTA shall prevail to the extent of the inconsistency, except as otherwise provided by NAFTA. Article 104 does provide otherwise, however, regarding trade obligations set out in environmental and conservation agreements.
- *The Energy Charter Treaty (ECT).* The ECT includes a novel provision from a different perspective: that nothing less favourable in other agreements is to be construed as derogating from the ECT. This formulation addresses a concern which BIT drafters have not felt the need to address in their preservation of rights clauses.

- *GATS*. The *GATS* contains no special preservation of rights provision.

#### **4. Summing up**

The present study has drawn the reader's attention to the proliferation and increased sophistication of the investment agreements concluded by governments around the globe during the last decade. It also points to a significant degree of consistency between these agreements, resulting from substantive areas of overlaps. At the same time, the paper underscores the importance of following the interpretation rules of the Vienna Convention on the Law of Treaties to assess the multiple interfaces between these agreements. These observations are supported by the following key points:

##### **4.1. *Potential overlaps among main types of IIAs***

- Post-establishment MFN treatment and national treatment are, as a general rule, a common denominator of IIAs.
- Pre-establishment and market access provisions, however, are usually found only in "US model" bilateral investment treaties and the investment chapters of some recent bilateral free trade agreements, comprehensive regional agreements (RAs) such as NAFTA, and the *GATS*.
- The promotion and protection of investments remains mainly the realm of BITs and those RAs which aim at a high level of economic integration (such as NAFTA).
- Virtually all IIAs allow for MFN and national treatment exceptions of various sorts and general exceptions covering national security concerns. Some may contain general exceptions based on public order and balance of payments considerations.
- Dispute settlement mechanisms exist in all cases for state-to-state disputes. Investor-to-state dispute settlement mechanisms are found only in BITs and some RAs.

##### **4.2. *International law rules***

The Vienna Convention provides that in the case of successive agreements relating to the same subject matter and involving the same parties:

- The later of the two agreements would apply, if the two agreements are incompatible, i.e. cannot be applied together.
- However, an earlier agreement with higher standards would not necessarily be considered incompatible with a later one with lower standards, particularly if the intent of the later one is to state the parties' minimum obligations, not preclude other, more favourable, treatment. This is essentially a question of wording and intent.
- There may be cases where the parties intend that a later agreement, which contains more detailed and restrictive provisions, should override the earlier one.
- To judge incompatibility or precedence, the various indicators of the intent of the parties in the agreements would need to be carefully analysed.

## ANNEX 1

### THE DISCUSSIONS DURING THE MAI NEGOTIATIONS<sup>31</sup> ON COMPATIBILITY WITH OTHER INTERNATIONAL INVESTMENT AGREEMENTS

The main issues of compatibility between the MAI and other international agreements were discussed during the MAI negotiations. Since they were negotiating a high standards agreement but with anticipated less than universal participation, the members of the MAI negotiating Group focused on three issues: (a) the protection of higher level standards of the MAI *vis-à-vis* other agreements, (b) the extension of the benefits of these norms on a non-reciprocal basis through the MFN obligations of the WTO agreements and c) the protection of the higher level standards existing in other agreements (preservation of rights clause). They addressed “protection” and “liberalisation” issues as well as procedural issues. These issues were left unresolved, however, at the conclusion of the negotiations. The views expressed on them cannot therefore be considered as definitive country positions.

#### 1. MAI and the BITs

A document prepared for those discussions [DAFFE/MAI(96)26] stated that “... The need for a non-derogation clause is questionable. A more generous existing agreement would not be overridden by a less generous MAI provision. A later provision would override an earlier provision to the extent it was incompatible, but incompatibility is essentially a matter of intent. Successive investment instruments share the common objectives of investment liberalisation and protection, and are intended to grant rights to private parties, not curtail them”. Hence, it argued that even if the MAI were to contain less detailed provisions or lower standards than those contained in the existing BITs, this, *per se*, would not create any particular difficulty. The treatment provided to investment under a BIT would not be overridden. This document did not address the instances in which the MAI parties might have wished to override earlier more generous provisions, such as unqualified transfer rights, since these would have been excluded from a non-derogation or preservation of rights clause in any event.

#### 2. MAI and the OECD

During the MAI negotiations there were discussions on the relationship between the MAI and the OECD instruments. A range of interests covered by the existing OECD instruments would have been protected under the MAI. The MAI was to provide for non-discrimination in both the establishment and post-establishment phase. National treatment was at the heart of the MAI where it would have been a legal obligation, while it remains substantively non-binding under the OECD National Treatment Instrument. Liberalisation, rollback and other relevant concepts of the OECD instruments were also part of the negotiations.

In the area of overlap, the terms of the MAI were not identical to those of the OECD Codes and Declaration. If conflict were to occur, the MAI would have prevailed under the normal treaty rules.

If with respect to contents, OECD Members had considered the Codes and Declaration to become to some degree redundant, it would have been for the relevant OECD Committees and the OECD Council, to consider the implications and make the appropriate adjustment in those instruments.<sup>32</sup>

### **3. MAI and the WTO**

With respect to the overlap between the MAI and the WTO agreements, differences in wording and intent might have required different levels of treatment. Negotiators held the tentative view that this would not have created a conflict, since the higher of the two standards would have been available. In cases in which the agreements would have addressed a different subject matter and not overlapped, i.e. the subject of expropriation was addressed by the MAI but by none of the WTO agreements, the agreements would have been complementary.

#### **3.1. MAI and the GATS**

The issue was raised that Article II of the GATS could give rise to a free rider problem.<sup>33</sup> This Article provides that a GATS member must “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country”.

The negotiators examined, for example, the case in which a MAI member might be prepared to subject to MAI disciplines a service sector that it had not listed in the GATS schedule; or the member might have been prepared to offer, in a given service sector, a greater level of national treatment in the MAI negotiations than it offered in the GATS negotiations. It was considered that each country would have to take a policy decision on the acceptability of undertaking a higher level of obligations under the MAI which would then be extended, on an MFN basis to all GATS members.

It was suggested at one point that, to overcome the free-rider concern, the Negotiating Group should explore the option of defining the MAI as an economic integration agreement under Article V of the GATS on “Economic Integration”. This article provides that GATS members may enter into an agreement that liberalises trade in services provided that certain requirements are met. Such agreements may be exempted from the application of the MFN treatment. Serious doubts were expressed as to whether it could be possible to obtain this derogation however.

The Negotiating Group also considered whether Article II of the GATS was to apply to procedural obligations as well as substantive ones. In particular, would Article II oblige MAI members to extend the provisions of the MAI on investor-to-state dispute settlement to investors from non-MAI states? While the WTO Secretariat suggested that they would, the view that seemed to prevail among the negotiators was that the GATS definition was focused on substantive measures that affect trade in services and that GATS rights could be subject only to dispute settlement under the WTO procedures.<sup>34</sup>

#### **3.2. MAI, TRIPs and other intellectual property agreements**

One of the difficulties of analysing the relationship between the proposed MAI provisions and those in the WTO was that, in some cases, it was not clear whether the standards were, or intended to be, higher. The area of intellectual property rights was an illustration of this. The MAI called for the granting of the full range of investment protection to the intellectual property rights of investors: national and MFN treatment, fair and equitable treatment, full and constant protection and security, protection against expropriation and compensation in the event of expropriation. The TRIPs Agreement would appear to cover the same areas, but with a great deal more specificity.

The MAI negotiating group was in agreement that the MAI should not have the effect of extending national treatment/MFN obligations regarding intellectual property beyond those in existing intellectual property agreements. Before the end of the negotiations, further work had been planned to

clarify the relationship of the MAI to other IP agreements.<sup>35</sup> It was noted that both in the NAFTA chapter on Investment and in the European Energy Charter Treaty, provisions addressing these matters were included.<sup>36</sup>

#### **4. Dispute settlement issues – Forum Shopping and Multiple Proceedings**

Inconsistent or differently worded provisions could lead investors to “forum shopping” or to multiple proceedings. The MAI Negotiating Group had begun to consider the dispute settlement issues arising from the relationship between the MAI and other international agreements, including the WTO agreements.<sup>37</sup> The main objectives were focused on the avoidance of forum shopping, multiple procedures and contradictory awards.

Although forum shopping is not uncommon in legal systems, MAI negotiators expressed the view that it would be desirable to minimise it. Although multiple proceedings for the same legal dispute are improbable and legally incompatible awards, in a narrow sense, unlikely, a defendant party may find itself faced in several fora with very similar but not legally identical complaints. The dispute settlement framework and the draft articles of the MAI reflected some initial judgements on how to address the issues of choice of forum. A provision was to preserve the MAI Party’s right to take to state-to-state arbitration a dispute which was subject to an investor-state proceeding. The text proposed to accept the possibility that a MAI Party might win a state-to-state award finding its measure was not a treaty violation, while it might lose on that point in an investor-state panel and be held to pay damages to the investor. MAI negotiators had treated this as acceptable and had insisted that the state-to-state award did not affect the validity of the investor to state award.

In order to limit the parties' discretion and therefore dual proceedings, the Negotiating Group had examined two choices: a) to require an investor to make an exclusive choice when essentially the same rights (e.g. MFN or national treatment) regarding the same investment were in dispute; or b) to require the investor to make that choice when the same economic interest or investment is being litigated, even under different core rights. On this issue, NAFTA presents one possible response: under Article 2005 of the Agreement, a NAFTA party must elect whether to proceed under the NAFTA or in the WTO in any case where the dispute concerns “any matter arising under both agreements”. Failure to comply with this obligation would itself constitute a violation of the NAFTA.<sup>38</sup> The Negotiating Group had not taken any decision on whether the MAI might have also contained a provision requiring or encouraging Parties to proceed under the MAI rather than another agreement.

## ANNEX 2

### VIENNA CONVENTION ON THE LAW OF TREATIES<sup>39</sup>

#### **Article 30. Application of Successive Treaties Relating to the Same Subject Matter**

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

- as between States parties to both treaties the same rule applies as in paragraph 3;
- as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41,<sup>40</sup> or to any question of the termination or suspension of the operation of a treaty under article 60<sup>41</sup> or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

#### **Article 31. General Rule of Interpretation**

1. 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 light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- any agreement relating to the treaty which was made by one or more parties in connexion with the conclusion of the treaty;
- Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - any relevant rules of international law applicable in the relations between the parties;
4. A special meaning shall be given to a term if it is established that the parties so intended.

#### **Article 32. Supplementary Means of Interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to determine the meaning when the interpretation according to article 31, or to determine the meaning when the interpretation according to article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable.

#### **Article 59. Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty**

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

- i) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- ii) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

ANNEX 3.

MAIN ELEMENTS/OVERLAPPING PROVISIONS BETWEEN INTERNATIONAL INVESTMENT AGREEMENTS<sup>1</sup>

Element	Bilateral agreements		Inter-regional agreements		Regional/Economic integration agreements		Multilateral agreements				
	US model	European model	OECD CCM <sup>2</sup>	OECD Declaration <sup>3</sup>	Energy Charter Treaty	NAFTA	GATS <sup>4</sup>	TRIMS <sup>5</sup>	TRIPS <sup>6</sup>	GPA <sup>7</sup>	ASCM <sup>8</sup>
Legally binding	x	x	x	Only decisions	x	x	x	x	x	x	X
Definition of FDI: a) Investment	Every kind of investment	Every kind of asset	All capital movement operations which give the possibility of exercising an effective influence on the management (OECD FDI benchmark definition)	Foreign-controlled enterprises	Every kind of asset owned or controlled directly or indirectly by an investor <sup>9</sup>	Every kind of asset except debt securities of State enterprise	Any service in any sector except services supplied in the exercise of governmental authority	All categories of intellectual property referred in the Agreement			
b) Investor	A national or company	A national or company	A non-resident	Foreign-controlled enterprises	A national or company	A national or company	Service supplier (a national or a company)		Natural or legal persons		
Entry and establishment	x		x	x	x	x	x				
Standards of treatment											
a) National Treatment	x	Most, not all		x	x	x	x (scheduled)		x		
b) Most favoured nation treatment (MFN)	x	x	x	x	x	x	x	x	x		

Element	Bilateral agreements		Inter-regional agreements		Regional/Economic integration agreements		Multilateral agreements					
	US model	European model	OECD CCM <sup>2</sup>	OECD Declaration <sup>3</sup>	Energy Charter Treaty	NAFTA	GATS <sup>4</sup>	TRIMS <sup>5</sup>	TRIPS <sup>6</sup>	GPA <sup>7</sup>	ASCM <sup>8</sup>	
Exceptions to MFN												
- Econ. Integration	x (not all)	x	x <sup>10</sup>				x					
- Reciprocity		x	x (Annex E)	x								
- International agreements	x	x	x			x		x				
- Country exceptions	x	x	x			x						
- Exemptions to MFN			X				x					
c) Fair and equitable treatment	x	x	x	x	x	x						
Transfer of funds	x	x	x						x			
Protection standards												
a) Minimum international standard of protection	x	x	x	x								
b) Expropriation	x	x										
c) Recourse to international means for settlement of investment disputes	x											
Transparency	Some		x	x	x	x	x	x	x	x	x	x
Incentives												

Notes:

1. This table has been constructed drawing on Table V.3. included in UNCTAD's 1996 World Investment Report: Investment, Trade and International Policy Arrangements.
2. OECD Code of Liberalisation of Capital Movements.
3. OECD Declaration on International Investment and Multinational Enterprises.
4. General Agreement on Trade in Services (GATS).
5. Agreement on Trade-Related Investment Measures (TRIMs).
6. Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).
7. Agreement on Government Procurement (GPA).
8. Agreement on Subsidies and Countervailing Duties (ASCM).
9. It includes any rights conferred by law or contract or by virtue of any licenses and permits granted pursuant law to undertake any Economic Activity in the Energy Sector.
10. Members part of a special customs or monetary system – not necessarily regional.

## NOTES

1. The European Union provisions are not covered by the present study.
2. See “The Relationship between Trade and Foreign Direct Investment, A Survey”, [TD/TC/WP(2002)14/FINAL and “The Investment Architecture of the WTO”, TD/TC/WP(2002)41/FINAL, both available at <http://www.oecd.org/ech>,] and “Experiences with Bilateral, Regional Approached to Multilateral Co-operation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment”, *UNCTAD/TD/B/COM.2/EM.11/2*.
3. The *General Agreement on Trade in Services* (GATS), the *Agreement on Trade-Related Investment Measures* (TRIMs), the *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPs), the *Agreement on Government Procurement* (GPA) and the *Agreement on Subsidies and Countervailing Measures* (ASCM). These agreements are generally considered to form the “architecture” of the “substantive” investment obligations at the WTO. The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* – which applies to all WTO disciplines – can be considered as the procedural facet of this architecture.
4. The expressions “North American model BIT” or “EU model BIT” essentially refer to the distinctive features originally introduced by Canada or the United States, on the hand, and European countries, on the other, in their bilateral investment treaties agreements. They are not intended to exclude non-Canada/US or non-EU BITs which contain similar features to those found in Canada/US or European agreements. For instance, the investment chapters of Japan’s recent free trade agreements with Korea and Singapore cover the pre-establishment phase. Both Canada and the United States have recently undertaken a review of their model BITs (the latest drafts of these agreements are available at <http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp> and [www.state.gov/e/eb/rls/prsl/28923.htm](http://www.state.gov/e/eb/rls/prsl/28923.htm)).
5. The scope of application is also a function of the definition usually given in a separate article to foreign “investment” and/or foreign “investor”.
6. It should be noted from the start, that as with other international agreements, including those being reviewed in the present study, both the MFN treatment and national treatment are “relative” standards. This means that they do not set a specific standard but instead establish the standard by reference to existing practice toward other investors. The concept of relativity is further reinforced in some agreements by the additional qualification of “in like circumstances” or “like situations”.
7. The United States model uses the following formula whereby a covered investment means every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt and service and related contracts. The German BIT model (which is one of the oldest European models) defines “investments as comprising every kind of asset, in particular (a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) intellectual property rights, in particular copyrights, patent, utility-model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will; and business concessions under public law, including

- concessions to search for, extract and exploit natural resources. See UNCTAD, *Bilateral Investment Treaties in the mid-1990s*, 1998, page 259.
8. The OECD liberalisation Codes are open exclusively to OECD Member countries. But in the case of the Declaration, non-member economies willing and able to meet the requirements of its various components may adhere. Eight non-members, Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia, have already done so. They are entitled to participate in the work related the four constituent elements of the Declaration. On the occasion of their annual meeting in June 2000, OECD Ministers invited the Secretariat to encourage other interested non -members to adhere to the Declaration.
  9. A recent survey conducted by the OECD Trade Directorate entitled "The relationship between regional trade agreements and the multilateral trade system: investment" [TD/TC(2002)8/FINAL] cites the examples of the Canada/Chile Free Trade Agreement (1997) and the draft text for the Free Trade Area of the Americas. The revised Convention establishing the European Free Trade Association (2002) and the Agreement between the Republic of Singapore and Japan for a New-Age Economic Partnership (2001) are also reported to have a structure and content broadly similar to that found in the NAFTA investment provisions.
  - <sup>10</sup> On 31 July 2001, the NAFTA Free Trade Commission adopted a binding interpretative statement on Article 1105. Paragraph 2 of this statement provides that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that what is required by customary international law minimum standard of treatment. Paragraph 3 states that a determination that there has been a breach of another provision of the NAFTA, or a separate international agreement, does not establish that there has been a breach of Article 1105.
  11. This section, as well as some other observations made in the Note, draws on the analysis being conducted by the Working Party of the OECD Trade Committee (WPTC) on the investment-related provisions in the WTO agreements. ["A multilateral investment framework and WTO architecture: scoping paper", TD/TC/WP(2002)21, and "The Investment Architecture of the WTO", TD/TC/WP(2002)41/FINAL].
  12. Part II "General Obligations and Disciplines", Article II Most-Favoured-Nation Treatment, paragraph 1 reads: "with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country".
  - <sup>13</sup> Article V of the GATS on Economic Integration does not prevent, however, any of its Members from being a party or entering into an agreement liberalising trade in services provided that the conditions of the article are met. Taking into account of paragraph 3 of this article, paragraph 6 provides that an economic integration agreement between developed countries must accord the treatment provided in such agreement to a juridical person constituted under the laws of a party to such agreement and carrying on substantial business in the territory of the parties to such agreement.
  14. Such conventions include the 1971 Berne Convention for the Protection of Literary and Artistic Works, the 1967 Paris Convention for the Protection of Industrial Property, the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961, and the 1989 Washington Convention on Intellectual Property in Respect of Integrated Circuits.
  15. During preparatory consultations on the paper, the WTO Secretariat indicated to the Secretariat that there was apparently no particular study comparing the protection provided by BITs with regard to intellectual property rights and that found under the TRIPs Agreement.

16. It should be noted, however, that the Doha Ministerial Decision on implementing Issues and Related Concerns urges the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the TRIMs Agreement or Article IX.3 of the WTO Agreement, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.
17. Extensions have been granted to Argentina, Columbia, Mexico, Malaysia, Pakistan, the Philippines and Romania. Columbia and Thailand also benefit for a waiver. The measures in question were to be lifted by end of 2003 at the latest.
18. Instead subsidies are either prohibited (when they are contingent upon the exportation of goods) or subject to specific disciplines (if they cause “adverse effects on trade”).
19. Article XIII(2) of the GATS anticipated that “there shall be multilateral negotiations on government procurement in services within two years from the date of entry into force of the WTO Agreement”. This is reinforced by the fact that the initial GATS agreement excluded public procurement services.
20. See National Treatment for Foreign-Controlled Enterprises, OECD, 1993, pages 33-35.
21. Quoted in I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1984, p. 97.
22. This discussion in this paragraph may not apply to many IIAs. Many commentators support the view that in the case of treaties with dispute settlement provisions, including the WTO and NAFTA, dispute settlement bodies may be limited to considering only the obligations in the treaty containing the dispute settlement provisions. The possibility of a dispute settlement adjudicating body considering norms other than those of the treaty itself will depend on the treaty's substantive provisions and its rules concerning the jurisdiction of the dispute settlement body.
23. An illustration of the problems that may arise with respect to the application of the above are the following examples. A and B are both parties to two investment treaties – one multilateral and one bilateral. Both treaties have a “free transfer” provision; one also has a BOP clause, i.e. a balance of payments exception to the “free transfer” obligation. If the BOP clause is contained in the first treaty, then customary international law, as reflected in the article 30 of the Vienna Convention, would support the conclusion that the unfettered free transfer provision of the second treaty would prevail on the basis that the transfer provisions of the two treaties are not compatible. However, if the sequence is reversed and the BOP clause is contained in the second treaty, the unfettered free transfer provision, this time in the first treaty, would appear to be incompatible with the possibility of restricting transfer for BOP reasons, now under the second treaty, and the BOP provision in the second treaty would prevail..
24. However, where the parties to the treaties are not identical, even an explicit intent expressed in the earlier agreement will not limit the rights of those states which are party to only the earlier agreement. See article 30(4) of the Vienna Convention.
25. The analysis of BITs is based on Rudolf Dolzer and Margaret Stevens, *Bilateral Investment Treaties*, ICSID, 1995.
26. Some BITs also include an “umbrella” clause seeking to ensure that each party to the treaty will respect specific undertakings towards nationals of the other party. But such undertakings usually refer to contracts between a party and an investor from another party and not to obligations resulting from agreements between governments. One example of such clause is found in the 1933 treaty between the United Kingdom and St. Lucia provides that: “Each Contracting Party shall observe any obligations it

may have entered into with regard to investments of nationals or companies of the other Contracting Party”.

27. The following provision is found in US BITs: "This treaty shall from any of the following that entitle covered investments to treatment more favourable than that accorded by this Treaty: (a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party; (b) international legal obligations; or (c) obligations assumed by a Party, including those contained in an investment authorisation or an investment agreement".
28. For example, the agreement concluded by Sweden with Pakistan (article 9) provide that it will not “prejudice any rights accruing under national or international law to interests of a national or a company of one Contracting State in the territory of the other Contracting State”.
29. Bilateral Investment Treaties in the Mid-1990s, UNCTAD, 1998.
30. This interpretation of Article 4 has been confirmed by the OECD Committee on Capital Movements and Invisible Transactions in 1990 and noted by the OECD Council, in paragraph 27 of the Committee Report to Council C(90)38 on Canada-United States Free Trade Agreement.
31. Most documents prepared during the MAI negotiations are available on the OECD web site: [www.oecd.org/daf/mai](http://www.oecd.org/daf/mai).
32. However, the MAI was not planned to cover completely the matters dealt with in the OECD instruments. For example, the Codes also cover liberalisation of capital outflow operations, and most current invisible transactions, including “non-border” trade in certain services most of which was not to be covered by the MAI. The Capital Movements Code also covers the full range of capital inflow operations, while the breadth of the investment definition in the MAI was not entirely settled. The Codes were thus expected to retain their value as a basis for promoting liberalisation by OECD Members and as a yardstick for gauging the readiness of non-member countries to join the Organisation.
33. “The relationship between the MAI and the WTO Agreements: Note by the Chairman”, DAF/MAI(96)21.
34. GATS Article II requires MFN treatment “with respect to any measure covered by this Agreement”. Article I provides that the GATS apply to “measures by Members affecting trade in services”. Article XXVIII of the GATS states that: “measures by members affecting trade in services” include measures in respect of
  1. the purchase, payment or use of a service;
  2. the access to and use of, in connection with the supply of a service, services which are required by those members to be offered to the public generally;
  3. the presence, including commercial presence, of persons of a member for the supply of a service in the territory of another member.Article II requires a GATS member to accord MFN treatment with respect to beneficial measures that come with the foregoing definition. The definition would appear to be focused on substantive measures that affect trade in services.
35. With respect to National Treatment (NT), MFN treatment and General Treatment no conclusion was reached as to:

- whether there should be a NT/MFN exception through a link to existing IP agreements;
  - whether there should be a NT/MFN exception to MAI obligations for IPRs;
  - whether the eventual solution should also be applied to the General Treatment articles; and
  - the applicability of the MAI obligations with respect to future IPRs.
36. Article 10, paragraph 10, of the Energy Charter Treaty provides:
- “Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties”.
37. “Dispute Settlement issues arising from the relationship between the MAI and other International Agreements, including the WTO agreements DAF/MAI/EG1(96)14.
38. The NAFTA leaves it to the Parties and, if necessary, to a dispute settlement panel, to determine what constitutes a matter arising under both the NAFTA and the WTO agreements.
39. Concluded in Vienna on 23 May 23, 1969. Came into force on January 27, 1990. Ratified by 70 countries.
40. Article 41: Agreements to Modify Multilateral Treaties between certain of the Parties Only.
41. Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach.