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Negotiating Group on the Multilateral Agreement on Investment (MAI)

RELATIONSHIPS BETWEEN THE MAI AND SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS)

(Note by the Secretariat)

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I. Introduction

1. At its meeting of 29-30 October, the Negotiating Group asked the OECD Secretariat to "examine the relationship between the MAI and existing and proposed multilateral agreements on the environment." [DAFFE/MAI/RD(97)51, p. 2]. The Negotiating Group's main concern is whether there would be any incompatibilities between the MAI and existing or proposed Multilateral Environmental Agreements (MEAs). While there are literally dozens of MEAs, there are relatively few that seem directly relevant to the issue. This paper reviews the relationship between the MAI and MEAs by examining four major MEAs, three of which have already been examined (for their use of trade measures) in the OECD Joint Session of Trade and Environment Experts. The paper appraises such compatibility both in a strict legal sense and in a broader context.

2. The *Register of International Treaties and Other Agreements in the Field of Environment*, established by the United Nations Environment Programme (UNEP), listed 180 international treaties on the state of the environment as at October 1994[1]. The list covers a wide variety of treaties and this paper concentrates on four of the most relevant and representative ones: The Convention on International Trade of Endangered Species (CITES)[2]; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention)[3]; the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol)[4]; and the United Nations Framework Convention on Climate Change (UNFCCC). A brief and necessarily preliminary examination of the proposed Kyoto

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1. Additional information can be found on the internet site of UNEP, *http://www.unep.org*. A lot of useful information can also be found on Environmental Treaties and Resource Indicators (ENTRI), *http://sedac.ciesin.org/pidb*.

2. Signed in Washington on 3.3.1973 and entering into force on 1.7.1975, CITES is intended to prevent over-exploitation of endangered species through the regulation, which can take the form of a total ban, of international trade in them. 133 countries are Parties to CITES, including all but two OECD Members. Additional information can be found on the internet site of the convention, *http://www.unep.ch/cites.*

3. The Basel Convention was signed on 22.3.1989 and entered into force on 5.5.1992. It is intended to reduce the generation and transboundary movement of hazardous wastes, particularly their transportation to and disposal in developing countries. 112 countries and the European Communities are Parties to the Basel Convention. All OECD countries but one are Parties to the Convention. Additional information can be found on the internet site of the convention, *http://www.unep.ch/basel.*

4. Concluded on 16.9.1987, entering into force on 1.1.1989, pursuant to the framework Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol's main objective is to set production and consumption limits for ozone-depleting substances like CFCs in view of their total phase out. 157 countries, including all OECD Members, are Parties to the Montreal Protocol. Additional information can be found on the internet site, *http://www.unep.ch/ozone.*

Protocol adopted at the Third Conference of the Parties of the UNFCCC in December 1997, has also been carried out.[5]. The first three were chosen because they have been studied in the trade environment context, as they contain provisions which interact with the WTO, National Treatment (NT), Most Favoured Nation (MFN) and other provisions. The latter is of interest because of its broad scope and potentially widespread inplications.

3. A number of arguments being raised with respect to non-compatibility of the MAI with the MEAs are based on the criticisms and concerns expressed about the WTO agreements. However, it should be noted in this respect that the vast majority of existing MEAs do not raise any question of compatibility, even in the trade context. Furthermore, while some of the MEAs analysed for the purpose of this paper include or call for trade-related environmental measures, none of these MEAs includes any explicit investment-related environmental measure.

4. It cannot be said with certainty that the MAI text is fully compatible with all existing and proposed MEAs; especially as a number of proposals for the MAI, including some for addressing the protection of the environment, are still on the table. However, the main conclusion of the paper is that there are no *prima facie* legal incompatibilities between the MAI and existing MEAs, primarily because no MEA to date has sought to impose investment related sanctions or measures, and the obligations established by MEAs to date do not require or call for implementation which would clearly conflict with MAI obligations. Provisions included in an MEA are sometimes of an hortatory nature, or, when prescriptive, they often fix a goal or a target but leave the Parties free to choose how to meet such a goal or target. They do not appear to contradict the provisions of the MAI either in the sense of requiring or contemplating conduct which would do so. In addition it can normally be presumed, based on the general principles of international law of *lex posteriori* and *lex specialis,* that any future MEA obligations would prevail over incompatible obligations, if any, under an earlier MAI.

5. The absence of any evident legal incompatibility does not necessarily dispose of all concerns about potential inter-relationships between the MAI and MEAs, and the question of if and how they ought to be reflected in the context of the MAI. Based on an examination of the compatibility in a broader sense, the paper indicates some points that the Negotiating Group might wish to consider.

II. Relations amongst Treaties in General International Law

6. The question of legal compatibility of the MAI with the MEAs raises the general issue of the co-existence of international treaties that contain possible conflicting requirements. Indeed, this is implicitly recognised by the current draft which indicates that disputes within the MAI will have to be "decided in accordance with the Agreement interpreted and applied in accordance with the applicable rules of international law"[6]. This requirement covers the examination of the relations between the MAI and the MEAs as well as other treaties.

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5. Signed in on 9.5.1992 and entering into force on 21.3.1994, the UNFCCC is an international agreement to avert the threat of global warming. As its names implies, it is a framework convention that sets forth only general obligations. However, the Kyoto Protocol, adopted in December 1997, includes quantified emission limitation and reduction commitments for a certain number of countries. 162 countries, including all OECD Members but one, are Parties to the UNFCCC. Additional information can be found on the internet site of the convention, *http://www.unfccc.de.*

6 Article V, C, 6 of the MAI, our emphasis.

7. In international law the question is dealt with both in the Vienna Convention on the Law of Treaties (hereafter the Vienna Convention) and in accordance with the general principles of law. Article 30 of the Vienna Convention deals with the application of successive treaties relating to the same subject-matter. Its regime has been summarised as follows by a leading author:

> "(a) If a treaty says it subject to, or it is not to be considered as incompatible with another treaty, that other treaty will prevail;
>
> "(b) as between parties to a treaty who becomes parties to a later, inconsistent, treaty, the earlier treaty will apply only where its provisions are not incompatible with the later treaty;
>
> "(c) as between a party to both treaties and a party to only one of them, the treaty to which both are parties will govern the mutual rights and obligations of the state concerned."[7]

8. The basic rule set out in the Vienna Convention is essentially one of intent. Where the intent of the parties as expressed in a later treaty is incompatible with the intent expressed in an earlier one, the later expression of intent is considered to prevail. When two treaties overlap extensively in subject matter, this intent is fairly evident. More difficult questions of intent arise if the overlap is not extensive, direct or clearly contemplated. In such cases, the same author, and the vast majority of the doctrine, consider that the principle of *lex specialis*, i.e. "the concept that a specific norm of conventional international law may prevail over a general norm," should be applied; "accordingly a general treaty on the reciprocal enforcement of judgements will not affect the continued applicability of particular provisions concerning the enforcement of judgements contained in an earlier treaty dealing with third party liability in the field of nuclear energy".[8]

9. It has been argued, with reason from the general international law perspective, that these principles should be applied with respect to the relations between the multilateral trade system and the MEAs:

> "In general, these principles would suggest that GATT should step aside whenever a GATT member government has signed an international environmental agreement authorising other signatories to impose trade restrictions against it. The general concept is that GATT members who sign such an agreement can quite properly be deemed to have waived their GATT legal rights against such trade restrictions".[9]

(Whether this will occur will only be decided when a case containing such a direct incompatibility is presented within WTO.)

10. The same principles would apply with regard to a multilateral investment agreement. This, however, may be a relatively academic question. For existing MEAs, no incompatibilities seem to exist which would, to be overcome, require recourse to either a specific MAI clause or the doctrine of *lex specialis*. As for future MEAs, they would be both later in time (principle of *lex posteriori*) and more

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7 Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1984, p. 94.

8 *ibid*, p. 96 and 98.

9 R. Hudec, "Gatt Legal Restraints in the Use of Trade Measures against Foreign Environmental Practices", in Bhagawati and Hudec, *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Vol. 2, p. 121, Cambridge, Mass., MIT Press, 1996.

specific, and thus a problem, if any, would seem to arise only if the MAI parties wished to seek to ensure that the MAI would prevail. If a future MEA contains specific investment measures or requires treatment of investors or investment which would violate the MAI, it would fairly clearly be intended to over-ride incompatible provisions of the earlier MAI -- through the direct application of the Vienna Convention rule. Moreover, Parties to a future MEA could remove any doubt by addressing the matter explicitly in the MEA.

11. Finally, regarding the relationship among parties to both the MAI and the MEA in question, it should be noted that the whole architecture of the Vienna Convention calls for an implicit principle of "co-existence amongst treaties" based on the will of the Parties (as indicated, *inter alia*, by the rules of interpretation set out in Article 31 and by Article 41 on the possibility of modifying multilateral treaties between certain parties only).

12. Another important point, however, is that these rules of international law only apply as between the parties to the successive treaties, according to the principle *pacta tertiis non nocent*, and do not affect the rights of parties to the earlier treaty not party to the later. However, where a treaty system seeks a level playing field, as does the MAI through its MFN provision, there may be a "compatibility" problem if one MAI party does not become party to a later MEA which requires or authorises MAI incompatible conduct; its investors, unlike the investors of other MAI parties who join the later MEA, would retain more favourable rights. This problem could not be dealt with through the intent of the parties to the later MEA. If this kind of "incompatibility" is sufficiently possible and it is considered desirable to avoid it, it may need to be addressed in the MAI itself.

III. Compatibility between the MAI and Selected MEAs

13. The basic question is whether MEAs call for or require measures that would fall within the scope of the MAI, and whether in such a case a measure implementing such MEA provisions could be seen as violating an MAI provision.

14. In one sense, since the MAI applies to the operation of investments, anything which could affect an enterprise which is foreign owned could fall within the scope of the MAI. Further, there may be cases in which an MEA sets up a system, such as tradable emission permits, under which assets are created which qualify as an investment under the MAI.

15. The question of strict legal compatibility would be whether, in such case, the MEA and the MAI require conduct which is mutually exclusive, so that compliance with the legal requirements of one would necessitate violation of the obligations of the other. It is submitted that this is not the case, even though there is one area (performance requirement and transfer of technology) in which an argument could be advanced.

16. However, the Negotiating Group requested the Secretariat to "examine the relationship between the MAI and the existing and proposed multilateral agreements on the environment", which could raise a broader question of "compatibility", i.e., whether the systems reasonably contemplated and authorised by the MEA in question and the MAI could both operate without interference, e.g., whether the MAI obligations would be violated by measures or conditions authorised or clearly contemplated by the MEA, such as the tradable permit system mentioned above. It was also felt that to read the term "proposed" as meaning "under negotiation" would be too restrictive. Accordingly, it was decided to consider certain foreseeable developments as well.

17. The principal provisions which have been raised in connection with the compatibility of MEAs and the MAI are NT, MFN, expropriation and performance requirements. These and other issues (including the definition of investment) concerning the relationship between MEAs and the MAI will be addressed in more detail below.

Definition of Investment

18. The extent under which the existing MEAs cover items which could be considered as investments under the MAI is not entirely clear. Existing MEAs could cover items included in the asset list of the definition of what may constitute an investment under (vii) permits and (viii) movable and immovable property; however for the other items included in the asset list of the MAI this seems much less evident. Whether any such asset is an investment will, of course, depend on whether it is held in circumstances in which it has the characteristics of an investment, as set out in the interpretative note to the MAI definition.

19. Thus, the protocol under the UNFCCC establishing binding emission caps should be associated eventually with a tradable permit system[10], and those permits would be assets within terms of the MAI asset list -- and, like any other asset, might be MAI investments if held as contemplated by the interpretative note to the MAI. Moreover, it could be expected that conditions would be established for permitting the transfer of permits and quotas, e.g., only Parties to the Protocol complying with its provisions would be eligible to trade them.[11]

20. In any case the mere fact that an MEA covers items which fall under the definition of investments under the MAI does not *per se* provide an indication of non-compatibility, as long as the measures that a State would be required or, in a broader sense, reasonably authorised by the MEA to take, do not conflict with an MAI obligation.

Non-discrimination (NT and MFN)

21. The NT and MFN obligations of the MAI require a Contracting Party to grant non-discriminatory treatment to investors and investments from another Contracting Party .

22. It is not clear how these basic obligations under the MAI would conflict with the provisions of an MEA. *Prima facie*, the most logical case would be the investor/investment of a non-Party to the MEA (but Party to the MAI). In such circumstances an MEA provision would conflict with the NT and MFN obligations only if the measure provided for in the MEA were to discriminate amongst investors and investments as defined by the MAI. None of the selected MEAs appear to require or contemplate such a type of measure.

23. Thus, the obligation to have a permit provided for in CITES (Articles III to VI) is applicable whatever the nationality of the ownership or control of the exporting entity, and even in the case of an export/import from a non-Party to CITES. The same is true for Article X of CITES which is explicitly

10. Such a system is foreseen in Article 12 of the Kyoto Protocol. The next Conference of the Parties, to take place in November 1998 in Buenos Aires, will consider if and how to put the system in place.

11. Article 1.8 of the Montreal Protocol also provides for the "transfer of all or a portion of the calculated level of production of one party to another, for the purpose of achieving economic efficiencies or responding to anticipated shortfalls in supply as a result of plant closures" before complete phase out.

drafted in non-discriminatory terms. It provides that "where export or re-export is to, or import from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party".

24. A different form of discrimination problem might arise were a future MEA to contain measures which were incompatible with the MAI. Since the MEA could impose obligations which derogate from rights enjoyed by an MAI investor from a country party to MEA but cannot affect rights enjoyed by an MAI investor from a country not party to the MEA, the investors of the latter country could receive a better treatment than investors from the former one. This would not be a problem of compatibility for MEAs but could be an issue within the MAI itself in view of the objective to ensure an even playing field for all investors and investments. It is also a matter that could not be left to be addressed in the future MEA.

Performance Requirements

25. An analysis of the selected MEAs does not suggest that any of the prohibitions included in the performance requirements article are in clear conflict with the provisions of the MEAs concerned. However, one issue requiring examination concerns point (f).

26. Transfer of technology is contemplated by Article 10a of the Montreal Protocol which states:

> "Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure:
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> that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5, and that such transfers referred to in subparagraph (a) occur under fair and most favourable conditions".

27. Similarly the UNFCCC provides, in its Article 6, that "the developed country Parties (...) shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other parties, particularly developing country parties, to enable them to implement the provisions of the Convention. In this process, the developed country parties shall support the development and enhancement of endogenous capacities and technologies of developing countries". This last sentence of Article 6 could also be construed as raising an issue under paragraphs (c) and (i) and possibly (l) of the performance requirements article.

28. Nevertheless, the language contained in the provisions above is of a more hortatory than prescriptive nature and great flexibility on how to implement those provisions is left to the Parties of the relevant MEAs. Should there be a wish to remove any possible doubt on the compatibility between the MAI and the MEAs on this point, paragraph (f) could admit, as a possible exemption, the fact that a measure was taken in pursuance of an MEA.

29. In any case, if a measure against the performance requirement article was to be taken in pursuance of an MEA, and irrespective of how this fact would be taken into account in case of dispute

under the MAI, the proposed exceptions to the prohibitions against performance requirements[12] could resolve any question of incompatibility.

Expropriation

30. Article IV.2 of the draft MAI provides that "a Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as expropriation)". Such a measure, even taken for a lawful purpose and in a non-discriminatory way will call for compensation.

31. It should be noted at the outset that this is not legally speaking a question of compatibility as the MAI does not totally prohibit expropriation but only submit it to a certain number of conditions and[13] to compensation. Nevertheless, a requirement to compensate an investor for a measure called for by an MEA could be viewed in a more general sense as an incompatibility.

32. The definition of Article IV.2 is very broad and covers "measures having equivalent effect". The question arises whether this could include, for example, a law properly motivated by the preservation of the environment and taken in pursuance of an MEA, but which leads to an important diminution in the value of an immovable property (which is defined as an investment under the definition article of the MAI). If the domestic law does not include a requirement for compensation in these circumstances, the concern is that it might be seen as contrary to MAI requirements that expropriation is permissible only where all the requirements, including compensation, are met.

33. The question of the relationship between an environmental measure called for by an MEA and the MAI requirement of compensating for "a measure having an equivalent effect" to expropriation raises the question of the line between normal regulatory actions adversely affecting the value of investments but not requiring compensation, and actions which constitute a taking requiring compensation. This, however, is not an MEA specific issue and needs to be addressed more generally .

IV. The Co-existence between Dispute Settlement Mechanisms

34. The potential conflicts between the MAI and a measure undertaken in pursuance of an MEA will remain purely hypothetical until the measure in question gives rise to a dispute. The examined MEAs include provisions on the settlement of disputes which are much less sophisticated than those provided for by the MAI and which have not yet been used.

35. The question related to the co-existence (more than the compatibility) of the dispute settlement mechanisms is twofold: and it is recognised that under the MAI the situation would not give rise to the same issues in a State-to-State dispute and in an Investor-to-State dispute proceeding.

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12 "...including environmental measures...(b) necessary to protect...animal or plant life or health; (c) necessary for the conservation of living or non-living exhaustible natural resources." [DAFFE/MAI/NM(97)2].

13. Expropriation is permissible only if the measure is taken for a purpose which is in the public interest, on a non-discriminatory basis and in accordance with due process of law. In any case the expropriation shall be accompanied by payment of prompt, adequate and effective compensation.

State-to-State Dispute

36. It is submitted that the issue of challenge to an MEA measure under MAI State-State proceedings is more hypothetical than real. It is interesting to note in this respect that so far no GATT/WTO Panel has ever been called on to rule on a measure adopted in pursuance of an MEA. The lesson to be drawn from the relationships between the MEAs and the WTO, and taking into account that the questions of compatibility are of a more acute nature, is that the situation is unlikely to occur.

37. As reflected recently in the Report of the WTO Committee on Trade and Environment:

> "In practice, in cases where there is a consensus among Parties to an MEA to apply among themselves specifically mandated trade measures, disputes between them over the use of such measures are unlikely to occur in the WTO."[14]

38. Furthermore the Committee on Trade and Environment (CTE) of the WTO suggested that "While WTO members have the right to bring disputes to the WTO dispute settlement mechanism, if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA."[15]

39. In any case, it should be noted that, in order to take the "environmental" dimension of any MAI dispute, the MAI provides -- in addition to the possibility to call for experts -- that "if arbitration of a dispute is considered by either Contracting Party to the dispute or the Secretary-General to require special expertise on the tribunal, rather than solely through expert advice under the rules governing the arbitration, the appointment of individuals possessing expertise not found on the roster should be considered". In addition,disputes within the MAI will be "decided in accordance with the Agreement interpreted and applied in accordance with the applicable rules of international law"[16]. That broader MAI formula brings in such matters as the relationship among successive treaties covering the same subject matter. [17]

Investor-State Dispute

40. The issue here appears to be different for two reasons.

41. Firstly, none of the selected MEAs contain provisions for Investor-State dispute settlement. Thus, this is not strictly a case of incompatibility between the MAI and an MEA as the latter does not offer any means of redress to the investor. There is therefore no absolute guarantee that investors would not use the MAI Investor-State dispute settlement to challenge actions undertaken in pursuance of an MEA, even in the case where the investor is from an MAI party which is also party to the MEA.

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14. WT/CTE/1, 12 November 1996.

15. WT/CTE/1, 12 November 1996, para. 178. It should be noted that the possibility to insert in the MAI a clause similar to Article XX of the GATT and/or Article 1114/1 of NAFTA is under consideration

16 Article V, C, 6 of the MAI, our emphasis.

17 It can be noted that concerns about the interrelationship between the WTO arrangements and general international law, including the rules concerning the relations amongst treaties, lead the negotiators of the *Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry* to explicitly provide, in Article 8, paragraph 9 of the Agreement, that "a dispute concerning a measure of support (...) shall not be subject to complaint under any other agreement".

Secondly, the lack of a "government filter" means that the argument made in the context of the State-State dispute on the improbability that a Party to an MEA will challenge, under the MAI, an action of another Party to the MEA undertaken pursuant to the MEA is not applicable here.

V. Concluding Remarks

42. The paper indicates no *prima facie* incompatibilities between the MAI and the selected MEAs.

43. Indeed most of the environmental questions concerning the MAI and its potential conflict with environmental protection do not deal with measures taken in pursuance of an MEA, but with the power of a future MAI Contracting Party to take measures based on domestic environmental considerations. However, the paper indicates that some questions could be further explored. The areas which deserve scrutiny are:

- MFN;
- Expropriation (concerns about requiring compensation for MEA authorised measures);
- Performance requirements (in particular transfer of technology);
- Settlement of disputes (in particular Investor-State).