

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

**Revised analysis by the OECD Secretariat  
17 March 1998**

### **I. Introduction**

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). The paper appraises such compatibility both in a strict legal sense and in a broader context.

While there are literally dozens of MEAs, relatively few seem to be directly relevant to the issue<sup>1</sup>. This paper reviews the relationship between the MAI and MEAs by examining five 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<sup>2</sup>. These are the Convention on International Trade of Endangered Species (CITES)<sup>3</sup>; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention)<sup>4</sup>; the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol)<sup>5</sup>; the United Nations Convention on Biological Diversity<sup>6</sup>; and the United

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<sup>1</sup>. 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.

<sup>2</sup>. Information on the activities of the OECD Joint Session of Trade and Environment Experts can be found on the Internet site of OECD <http://www.oecd.org/ech/act/envi.htm>. Additional information can be found on the Internet site of UNEP, <http://www.unep.org>. Useful information can be found on Environmental Treaties and Resource Indicators (ENTRI), <http://sedac.ciesin.org/pidb>.

<sup>3</sup>. 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>.

<sup>4</sup>. 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>.

<sup>5</sup>. 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. One hundred

Nations Framework Convention on Climate Change (UNFCCC). A brief and necessarily preliminary examination of the proposed Kyoto Protocol, adopted at the Third Conference of the Parties of the UNFCCC in December 1997, has also been carried out<sup>7</sup>. The first three MEAs were chosen as they have been studied in the trade and environment context because they contain provisions which interact with the WTO, National Treatment (NT), Most Favoured Nation (MFN) and other provisions. The other two have been included because some of their provisions could possibly lead to preferential treatment of investors in certain countries.

The main conclusion of the paper is that there are no *prima facie* legal incompatibilities between the present MAI text and existing MEAs<sup>8</sup>, 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.<sup>9</sup>

However, 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 dealt with 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

The question of legal compatibility between the MAI and the MEAs raises the general issue of the co-existence of international treaties that could contain 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

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and fifty-seven 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>.

- <sup>6.</sup> Signed in Rio de Janeiro on 5.6.1992 and entering into force on 29.12.1993, the Convention’s objectives are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources. On 1st January 1998, 171 countries, including all OECD Members but one, are parties to the Convention. Additional information can be found on the Internet site of the Convention, <http://www.biodiv.org>.
- <sup>7.</sup> Signed 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. One hundred and sixty-two 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>.
- <sup>8.</sup> 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.
- <sup>9.</sup> It has been suggested that even a total absence of incompatibility with existing MEAs would not necessarily render a clause inappropriate, in view of the current drafting of Section X of the MAI, which explicitly recognises that “nothing in this Agreement shall be regarded as altering the obligations undertaken by a Contracting Party as a Signatory of the Articles of Agreement of the International Monetary Fund”. From a legal point of view the inclusion of such a provision does not appear to be necessary and no conclusions should be drawn from the fact that the MAI refers to this particular agreement, but not to other international treaties.

international law”<sup>10</sup>. This requirement covers the relations between the MAI and other international treaties, including MEAs.

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. A leading author has summarised its regime as follows:

- “(a) If a treaty says it is 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 become 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.”<sup>11</sup>

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 most other authorities, 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”<sup>12</sup>.

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 trading 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.”<sup>13</sup>

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

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

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

12 *ibid*, p. 96 and 98.

13 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.

The same principles would apply with regard to a multilateral investment agreement. In fact there appear to be no legal incompatibilities with existing MEAs, the resolution of which would require recourse to either a specific MAI clause or the doctrine of *lex specialis*<sup>14</sup>. If a future MEA were to contain specific investment measures or require treatment of investors or investments 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 *lex posteriori* principle as set out in the Vienna Convention rule. Moreover, Parties to a future MEA could remove any doubt by addressing the matter explicitly in the MEA. Accordingly, for future MEAs a problem would arise only if the MAI Parties wished the MAI to prevail.

Finally, regarding the relationship among Parties to both the MAI and an MEA, it should be noted that the whole architecture of the Vienna Convention is built on 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).

However, these rules of international law only apply as between the Parties to the successive treaties and, according to the principle *pacta tertiis non nocent*, do not affect the rights of Parties to the earlier treaty not Party to the later. 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 “free rider” problem could not be dealt with through the intent of the Parties to the later MEA and could be considered a type of “incompatibility” with the MAI. If this kind of “incompatibility” is considered sufficiently possible and to be avoided, the MAI itself may need to address it.

### **III. The Issue of Compatibility between the MAI and Selected MEAs**

The compatibility between the MAI and MEAs can be analysed both in a strict legal sense and in a broader context.

#### ***Legal Compatibility***

A number of points being raised with respect to non-compatibility between the MAI and the MEAs are based on the criticisms and concerns expressed about the WTO agreements. However, it should be noted 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 here include, or call for, trade-related environmental measures, none of them include any explicit investment-related environmental measure.

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14. It is interesting to note that, according to Mr. E.U Petersmann, former Legal Adviser of GATT, “during the negotiations on e.g., the 1987 Montreal Protocol and the 1990 London Amendment on the Protection of the Ozone Layer and the negotiations on the 1989 Basel Convention on the Control of Hazardous Wastes and their disposal, the GATT contracting parties participating in these MEAs had been of the view that the trade provisions in these agreements; including restrictions on imports from, and exports to, third countries (e.g., of ozone-depleting substances, hazardous wastes), were consistent with their obligations under GATT law and did not require an amendment or waiver of GATT Rules”. In *International and European Trade and Environmental Law after the Uruguay Round*, Kluwer Law International, 1995, 166 p. It should be noted, however, that the position expressed may be explained in part by considerations of general international law but also in view of the existence of Article XX (in particular b and g) exceptions in the GATT.

The basic legal question is whether MEAs call for, or require, measures that would fall within the scope of the MAI, and if so whether 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.

Since the MAI applies to government measures affecting investments, including the activities of enterprises, any measure that 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, under a broadly construed asset based definition, could constitute an investment under the MAI, in certain circumstances. This, in and of itself, is not an incompatibility.

Prescriptive provisions in MEAs 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*, described above, that any future MEA provisions requiring treatment of investment barred by the MAI would prevail, between Parties to the MEA, over such incompatible MAI obligations.

### ***Compatibility in a Broader Context***

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 an MEA and by the MAI could both operate without interference -- i.e., whether the MAI obligations would be violated by measures or conditions authorised or clearly contemplated by the MEA, but not required by it.

On this basis, the compatibility or the incompatibility between the MAI and the selected MEAs is more difficult to assess and, in certain cases, definitive conclusions cannot be drawn.

## **IV. A Preliminary Analysis of Possible Incompatibilities**

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 are addressed in more detail below.

### ***Definition of Investment***

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

Thus, the Kyoto protocol under the UNFCCC establishing binding emission caps should be associated eventually with a tradable permit system<sup>15</sup>. 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.

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

### ***Non-discrimination (NT and MFN)***

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. *Prima facie*, the most logical case of incompatibility would be nationality-based discrimination against the investor/investment of a non-Party to the MEA (but Party to the MAI). Such discrimination is clearly not required or called for by several operational provisions included in the selected MEAs.

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 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”.

Therefore, measures adopted in pursuance of the above provisions, even if applicable in some way to MAI investors or investments, would not appear to be in violation of the NT and MFN obligations<sup>16</sup>.

However, it should be recognised that in some other instances the situation is less clear cut.

The Kyoto protocol described in paragraph 21 above is one example. Implementation of this Protocol could require that conditions be established for permitting the transfer of permits and quotas, and that only Parties to the Protocol complying with these conditions (or their enterprises) would be eligible to trade them<sup>17</sup>. The extent to which implementation of such a system would raise MAI questions depends on how it is organised. For example:

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15. The recently adopted Kyoto Protocol incorporates, in its Article 16*bis*, the concept of emission trading between Annex I countries (developed countries and countries in transition) and stipulates that the Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, etc. Article 12 of the Protocol establishes a “clean development mechanism” for projects with developing countries, which may involve public or private entities, resulting in certified emission reductions which developed countries can use to meet their target. Some basic rules and criteria are included in Article 12 itself, but many have yet to be established. The next Conference of the Parties, to take place in November 1998 in Buenos Aires, will consider if and how to put the whole system in place.
  16. In any case, if an MAI Party wished to maintain a discriminatory measure it could do so by entering a country specific exception, as provided for in Section IX of the MAI.
  17. 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.

- If the permits or quotas were acquired from a source country by governments of other participating countries, this would not raise a problem under the present text, pursuant to which governments themselves are not within the definition of investor (though publicly owned enterprises are).
- If the permits or quotas were acquired directly from a source country by entities which can be MAI investors, the following questions would arise: Is such a permit or quota acquired or held in circumstances having the characteristics of investment? Is the purchase by an enterprise from country A of a right to pollute in country B an investment in country A, or is it rather cross-border trade? These are questions of the intended scope of the definition of investment and whether that intent is adequately expressed in the present text and proposed interpretative note.
- If quotas or permits are earned by enterprises as a return on participation (investment) in a pollution reducing project in a developing country, the question would arise as to whether the ineligibility for such a quota or permit (return) of enterprises of countries not Party to the system constituted a discriminatory measure of the project host. If the eligibility requirement were established by an international regime, that might be interpreted for MAI purposes to be a measure of each Party to it. However, this would not appear to be the case if the discrimination flowed not from *de jure* ineligibility to acquire the quota from the project host, but from the fact the quota could not be traded by the enterprise under the laws of other participating countries and had no value in pollution control system of the enterprise's non-participating home country.

Reference has also been made to the Convention on Biological Diversity (Biodiversity Convention) and to the fact that Parties to it have the authority to unilaterally define the terms of access to genetic resources<sup>18</sup>. This may lead to investors of MAI Parties (be they Parties or not to the Biodiversity Convention) being treated differently from domestic investors or certain classes of foreign investors. While, as noted by UNEP, the Convention does not require discriminatory treatment between Parties and non Parties<sup>19</sup>, it has been argued that “access arrangements” negotiated in pursuance of the above provisions do indeed discriminate amongst investors on a nationality basis. Such broad incompatibility cannot be dismissed, at least without clarification of the scope of the MAI and a deeper study and examination of specific “access arrangements”<sup>20</sup>.

It has been argued further that some MEAs prescribe differing rights and obligations between Contracting Parties, depending on their level of economic development, and that this has the potential to lead to

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18. Article 15 of the Convention, 31 I.L.M. 818 (1992).

19. “Of course, nothing in the Convention forbids parties from facilitating access on the same terms for Convention parties and non-parties alike”, in *The Use of Trade Measures in Selected Multilateral Environmental Agreements*, UNEP, p. 214.

20. The Secretariat is not in a position to confirm if “access arrangements” do indeed discriminate or to analyse whether the discrimination is excused because the concerned enterprises are not in “like circumstances”. In any circumstances, it should be noted that according to UNEP, “historically, genetic resources have not been traded goods, so there is no established market to serve as a guide. Their value also will be influenced by other factors, such as the potential for smuggling and the existence of large *ex situ* collections of genetic resources. Thus, the value of genetic resources within the access arrangements contemplated by the Convention’s regime is difficult to predict”, UNEP, *supra*, p; 214, footnote 63.

investors from different Parties to the MEA being accorded differing treatment by the “host-country” in violation of the MFN and the NT obligations. No provision in the selected MEAs appears to require such a differential treatment, although some may lead to it in practice.

One example being offered is the Multilateral Fund, set up in pursuance of Article 10 of the Montreal Protocol, which distinguishes between locally-owned and foreign-owned companies and could, thus, discriminate amongst investors and investments as defined by the MAI.

It appears that the Fund itself would not be covered by the MAI, which will establish obligations for the Contracting Parties *vis-à-vis* inward investment to their territories only and will not impose obligations on international institutions. Nonetheless, experience shows that such international assistance is very seldom provided directly to enterprises or projects without host (recipient) government involvement. In most cases the government plays the role of intermediary, either by pre-selecting the enterprises or projects or by allocating the assistance received amongst the various participants. It could be argued that the recipient government intervention is itself a measure covered by the MAI, and possibly in violation of the MFN, NT or General Treatment obligations. This question would seem to deserve further consideration as, in addition to the environmental example mentioned here, there are a number of instances in which international assistance, be it bilateral or multilateral, explicitly or implicitly, favours local enterprises versus foreign ones (e.g., a project aiming at setting up a domestic production of artisanal fishing vessels, or a technical project drawing on local products and/or local expertise).

This raises the general question of whether the MAI should address the potential incompatibility with MEAs in the broader context, i.e., in a case where the MEA does not require or expressly contemplate a measure in violation of the MAI, but where a measure which would otherwise be a legitimate option for implementing a right or an obligation set out in an MEA would violate a MAI obligation. If the answer to this were yes, the question would arise whether it should be addressed by a general provision in the MAI or through a country specific exception upon accession by a concerned developing country.

### ***Performance Requirements***

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, two issues require consideration. One is the possible conflict between the international assistance described in paragraph 32 and the draft performance requirements article. The other issue concerns point (f) of the same draft article<sup>21</sup>.

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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21. “To transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement

- is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, or
- concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the TRIPS Agreement “. [DAFFE/MAI/NM(98)2]

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”.

Similarly the UNFCCC provides, in its Article 4.5, 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”.

Nothing in the MAI will inhibit countries from encouraging their investors to make their technology available. Indeed, by encouraging foreign investment flows, the MAI should encourage this process. To the extent that a recipient government has measures that require investors meet certain obligations consistent with MEA provisions, it is possible that issues could be raised under paragraphs (b), (c) and (i) of the performance requirements article.<sup>22</sup>

Nevertheless, it should be noted that, in both cases, great flexibility on how to implement those provisions is left to the Parties of the relevant MEAs. Moreover, MEAs appear to address technology transfer in terms of obligations of countries as possible sources of investment or technology outflows, while MAI performance requirements only apply to contracting Parties as recipients of investment.

### *Expropriation*

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.

Legally speaking this Article does not raise a question of compatibility as it does not prohibit expropriation, but only submits it to a certain number of conditions and to compensation.<sup>23</sup> No MEA requires or contemplates expropriation and it is difficult to imagine a future one requiring or contemplating it without compensation. Nevertheless, were an MEA to authorise expropriation without addressing compensation, an MAI requirement to compensate for expropriation might be viewed by some as an incompatibility in the broader sense.

The broad wording of Article IV.2, which covers “indirect” expropriation and “measures having equivalent effect” has raised concern. Disquiet has been voiced that 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

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22. Concern has also been expressed about the compatibility between the Convention on Biological Diversity and in particular Articles 15 (paragraphs 6 and 7) and 16 with the performance requirement article. Article 15 deals with access to genetic resources, while Article 16 deals with access to and transfer of technology. However, the draft MAI negotiating text also contains a proposed exception to paragraph (b) and (c) disciplines. Paragraph (i) is not yet agreed.

23. 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.

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.

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 or MAI specific issue but, rather, a question of existing international law and substantive government practice. The negotiating group has agreed to make clear that the normal exercise of regulatory powers of government does not amount to “a measure having equivalent effect to expropriation.” .

## V. The Co-existence between Dispute Settlement Mechanisms

The potential conflicts between the MAI and a measure undertaken in pursuance of an MEA will remain purely hypothetical until such a measure gives rise to a dispute. The MEAs examined include provisions on the settlement of disputes which are less elaborated than those provided for by the MAI and which have not yet been used. This could be because most environmental conventions have emphasised dispute avoidance rather than dispute settlement<sup>24</sup>.

The questions raised in relation to dispute settlement do not go to compatibility, but rather to the co-existence of MEA and MAI dispute settlement mechanisms, which give rise to different considerations depending on whether the dispute is a State-to-State or an Investor-to-State dispute.

### *State-to-State Dispute*

It is perhaps unlikely that an MEA measure would ever be challenged under MAI state-to-state proceedings. So far no GATT/WTO Panel has been called on to rule on a measure adopted in pursuance of an MEA. Moreover, the questions of compatibility between MEAs and the WTO Agreements are of a more acute nature than those in the investment field, given the use of specific trade measure in some MEAs and the absence, to date, of specific investment measures<sup>25</sup>.

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24. *Dispute Settlements in Environmental Conventions and Other Legal Instruments*, OECD/GD(95)138, Paris 1995, 17 p.

25. With respect to the co-existence between the dispute settlement mechanisms provided for in the MEAs and those provided within the WTO, Mr. Petersmann’s opinion is that “special dispute settlement procedures applied among parties to an MEA would prevail as a special inter-se agreement”, *supra*. p. 41. However, the fact that no MEA-related disputes have surfaced in the WTO so far should not necessarily lead to the conclusion that the situation is entirely satisfactory and it should be noted that there has been intense discussion in WTO for some years about the need to achieve legal clarity between WTO rules and MEAs.

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.”<sup>26</sup>

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".<sup>27</sup>

In any case, in order to take into account the “environmental” dimension of any MAI dispute, the MAI provides that “the tribunal may request a written report of a scientific or technical review board, or expert, on any factual issue concerning environmental health, safety or other scientific or technical matters raised by a disputing Contracting Party ...”. Moreover, “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”<sup>28</sup>. That broader MAI formula brings in such matters as the relationship among successive treaties covering the same subject matter<sup>29</sup>.

### ***Investor-to-State Dispute***

The issue here arises from the fact that none of the selected MEAs contain provisions for investor-to-state dispute settlement. This is not strictly a case of incompatibility between the MAI and an MEA.

An investor-to-state system as in the draft MAI means that there may be a greater chance that an environmental measure undertaken in pursuance of an MEA will be challenged, even in the case where the investor is from an MAI Party which is also Party to the MEA, than where only governments can submit questions to dispute settlement or where governments have some ability to control cases submitted by private parties. However, the provisions noted above for the expertise of a panel, and the possibility for any panel to be assisted by environmental and other experts apply in investor-to-state proceedings.

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

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

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

29. The absence of such a provision in the WTO dispute settlement arrangements led 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 trade sanction authorised under the Shipbuilding Agreement “shall not be subject to complaint under any other agreement”.

## VI. Concluding Remarks

The paper indicates no *prima facie* legal incompatibilities between the MAI and the selected MEAs in the sense that none of these has sought to impose investment related sanctions or measures, and the obligations established by MEAs to date do not require, or expressly call for, implementation which would conflict with MAI obligations .

Indeed most of the environmental questions raised concerning the MAI and its potential conflict with environmental protection do not deal with measures taken in pursuance of an MEA, but with the power of a future MAI Contracting Party to take national environmental measures in general, with or without an MEA. However, the paper indicates that some questions of MEA/MAI compatibility in a broad sense could be further explored. The areas which may warrant scrutiny are:

- National Treatment, MFN and General Treatment (concerns about discriminatory environmental development aid funding and discriminatory access to biodiversity or other resources or environmental assets like quotas);
- Expropriation (concerns that the current drafting may require compensation for MEA authorised measures);
- Performance requirements (in particular transfer of technology);
- Settlement of disputes (in particular investor-to-state).

It is hoped that this paper will assist the MAI Negotiating Group as it pursues its examination of these issues.