
THE INTERFACE BETWEEN WTO LAW AND INTERNATIONAL INVESTMENT AGREEMENTS: HISTORICAL DEVELOPMENTS, LEGAL OVERLAPS, AND FUTURE PROSPECTS

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Abstract:

This article explores the evolving relationship between World Trade Organization (WTO) law and International Investment Agreements (IIAs), particularly Bilateral Investment Treaties (BITs). While both regimes were established with different objectives—trade liberalization and investment protection respectively—their legal provisions increasingly intersect in areas such as national treatment, most-favored-nation treatment, and performance requirements. The paper analyzes the historical trajectory of investment regulation in multilateral trade negotiations, particularly within the OECD and WTO, and critically assesses past efforts to create a unified multilateral investment framework. It also considers the implications of this fragmented legal landscape for future harmonization and proposes potential paths forward for integrating investment disciplines within the multilateral trading system.

Keywords: WTO Law, International Investment Agreements, Bilateral Investment Treaties, Multilateral Agreement on Investment, Investment Regulation, Trade and Investment, TRIMs, GATS, Investment Liberalization, Dispute Settlement.

International economic law has long been divided between two major streams: trade and investment. While the World Trade Organization (WTO) provides the institutional and legal architecture for global trade governance, international investment law has developed primarily through a decentralized network of over 3,000 bilateral investment treaties (BITs) and other forms of IIAs. These two regimes have historically operated in parallel, yet their conceptual and legal intersections have become increasingly apparent. This article investigates the evolution of the relationship between WTO law and IIAs, the attempts to bridge the gap between them through multilateral initiatives, and the continuing challenges to convergence. The proliferation of BITs began in the 1980s, particularly among capital-exporting industrialized nations, which sought to establish legal protections for their investors abroad. Initially focused on post-establishment guarantees such as protection against expropriation and access to investor-state dispute settlement (ISDS), BITs gradually expanded to include pre-

establishment rights, non-discrimination principles, and restrictions on performance requirements.

By contrast, the WTO, through its Agreement on Trade-Related Investment Measures (TRIMs) and General Agreement on Trade in Services (GATS), contains only limited investment-related disciplines. These agreements focus primarily on the trade-distorting effects of investment measures but do not offer the comprehensive protection mechanisms found in BITs. Consequently, WTO members—especially developed countries—considered the WTO’s investment-related rules to be insufficient for safeguarding their expanding global investments.

Recognizing the inefficiencies and inconsistencies of the BIT-based regime, the Organization for Economic Co-operation and Development (OECD)¹ initiated negotiations for a Multilateral Agreement on Investment (MAI) in the mid-1990s. The MAI aimed to consolidate investment disciplines into a single, coherent multilateral framework. However, negotiations collapsed in 1998 due to several political and substantive obstacles:

- **Lack of inclusiveness:** The exclusion of developing countries alienated key stakeholders and undermined the legitimacy of the process.
- **Regulatory overreach:** The agreement's provisions on environmental and social regulation faced significant public opposition.
- **Domestic constitutional constraints:** Countries like the United States expressed concerns over the agreement’s potential encroachment on domestic regulatory authority, particularly at the sub-national level.

The failure of the MAI underscored the political sensitivity of investment liberalization and revealed the difficulty of achieving consensus in this area at the multilateral level.

The topic of investment was formally introduced into the WTO during the 1996 Singapore Ministerial Conference, which led to the establishment of the Working Group on Trade and Investment.² This group was tasked with examining the relationship between trade and investment and assessing the desirability of including investment provisions within the WTO legal framework.

Despite sustained discussion, progress remained limited. At the 1999 Seattle Ministerial Conference, a group of 29 WTO members attempted to launch formal negotiations for a multilateral investment agreement, but the initiative was thwarted by broader institutional deadlock. The 2001 Doha Ministerial Declaration allowed for investment negotiations to begin after the 5th Ministerial Conference, contingent on consensus regarding negotiating

¹ The OECD published documentation on the negotiations, at <<http://www1.oecd.org/daf/mai>>.

² Declaration of the Ministerial Conference in Singapore, 13 December 1996, WT/MIN/(96)/Dec., para. 20.

modalities. However, the failure of the Cancún Ministerial Conference in 2003 led the General Council to remove investment from the Doha Round agenda in 2004, effectively shelving multilateral investment negotiations under the WTO.³

Despite the lack of a unified multilateral investment agreement, significant legal and conceptual overlaps exist between WTO law and IIAs:

- **National Treatment (NT) and Most-Favored-Nation (MFN):** Both regimes incorporate these non-discrimination principles. However, BITs typically extend them to both pre- and post-establishment phases, whereas WTO rules apply primarily to trade in goods and services.

- **Performance Requirements:** The TRIMs Agreement prohibits certain investment measures linked to trade (e.g., local content requirements), aligning partially with restrictions found in modern IIAs.

- **Dispute Settlement Mechanisms:** The WTO's state-to-state dispute settlement contrasts with the ISDS mechanisms in BITs, yet both systems have been critiqued for inconsistency, legitimacy concerns, and limited avenues for non-state stakeholder participation.

These overlaps have led to jurisdictional conflicts and forum shopping in investment-related disputes, underscoring the need for greater coherence between trade and investment governance.

One persistent obstacle to investment liberalization under multilateral frameworks concerns state financial investment incentives, such as subsidies and tax breaks. These measures can distort competition, yet remain politically sensitive. For instance, during the MAI negotiations, the United States opposed binding restrictions on such incentives, citing constitutional limits on federal authority over states.

Moving forward, any effort to incorporate investment rules into the WTO framework must transcend mere replication of BIT provisions. It should:

- Provide **pre- and post-establishment protection** for investors.
- Allow for **exceptions** akin to those under GATS (e.g., public policy, national security).
- Incorporate **development flexibilities**, including **transitional periods** for developing countries.
- Address **regulatory space** concerns to preserve legitimate public interest measures.

The historical and institutional divergence between WTO law and IIAs reflects both differing mandates and political realities. Yet, the increasingly blurred boundaries between trade and investment necessitate a rethinking of their relationship. While the failed attempts at multilateral investment agreements underscore the challenges of integration, the growing

³ See the Report on the Meeting held on 10 and 11 June 2003, WT/WTGI/M/22, 17 June 2003.

fragmentation of investment law highlights the cost of inaction. A harmonized, inclusive, and development-sensitive investment framework under the WTO could serve as a long-term goal, contributing to a more coherent and equitable global economic governance architecture.

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