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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**PROTECTING INVESTOR RIGHTS ARISING FROM OTHER AGREEMENTS**

**(Note by the Chairman)**

## PROTECTING INVESTOR RIGHTS ARISING FROM OTHER AGREEMENTS

(Note by the Chairman)

1. Investor rights may arise under other international agreements as well as under specific investment contracts or agreements they have entered into with an MAI party, or under its laws and regulations. There are two general issues. First, what provision should be made for avoiding prejudice to more favourable treatment in these diverse sources? Second, should obligations to investors under other sources be made obligations under the MAI?

### More favourable treatment

2. It is assumed that participants want investors to get the more favourable treatment if MAI provisions for investor rights differ from provisions on the same matters in other international agreements between them, existing or future, or in other international or domestic sources. However, whether an MAI provision is called for and what it should contain need to be examined.

3. "More favourable treatment" provisions are found in a number of investment agreements, e.g., Article 8(1) of the German model BIT, Article 11 of the UK model BIT, Article XI of the US model BIT, Article 3(5) of the Netherlands model BIT, Article 7 of the Swiss model BIT and Article 16 of the Energy Charter Treaty (ECT). (See Selected Articles from Existing Investment Agreements: Protecting Investor Rights arising from other agreements [DAFFE/MAI/RD(95)13]).

4. These model BITs generally provide that any more favourable treatment from any legal source, including international legal obligations, domestic laws and regulations, and investor agreements, takes precedence over the BIT. The ECT article deals only with more favourable treatment from other agreements.

5. BIT provisions do not, generally, address the case of later, less favourable provisions, possibly since this has been viewed as something which could be dealt with in the later agreements. However, Article 16 of the ECT does so. That latter approach would make clear that the MAI prevails over any future less favourable international agreement, unless the latter expressly overrides it.

6. Does the Negotiating Group feel that the MAI should contain a provision stating that any more favourable treatment provided for by other legal sources should prevail? If so:

- i) should it address existing provisions more favourable than the MAI, as well as possible future ones less favourable than the MAI?
- ii) should the provision also cover legal sources other than agreements?

### **Bringing Investor Rights under Other Agreements into the MAI**

7. Some international agreements on investment provide that parties "shall observe obligations" under other agreements, including agreements between parties and investors (e.g., Article 8 of the German model BIT, Article 3(4) of the Netherlands model BIT, Article 10(1) of the ECT). This makes them obligations under the international agreement itself. However, a number of others do not (e.g., model BITs of Australia, Canada, France, U.K, U.S.). There have been divergent views in the preparatory phase on including such a clause in the MAI.

8. One purpose of such a "respect" clause is to make breaches of the other obligations (e.g., other treaties and investor-state agreements, which may not have dispute settlement provisions as adequate as those in the MAI) into breaches of the new treaty and, hence, subject to its investor-to-state and state-to-state dispute settlement mechanisms. However, independently of "respect" clauses, many investment treaties provide investor-to-state dispute settlement for disputes under other agreements<sup>1</sup>. Whether to do so in the MAI is treated in the separate Chairman's paper on Dispute Settlement [DAFFE/MAI(95)9].

9. Another purpose of such a clause is to strengthen the hand of an investor against an assertion of a sovereign right unilaterally to cancel or modify an investment contract in the public interest, or to change the laws and regulations in effect at the time of the investment (which the investor may have protected through a "stabilisation clause").

10. Do participants want an MAI provision to the effect that parties shall observe obligations to investors from other sources? Could this same effect be achieved without a specific provision in the MAI, for example, by defining investment to cover rights under contracts?

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<sup>1</sup> France's model, for example, provides investor-state dispute settlement for "any dispute related to investments between one contracting party and a national or company of another" -- a broad provision that would cover disputes under any contract or international agreement. The Australian, German, Netherlands, Swiss and preferred U.K. alternative would have similar broad scope. The United States model would cover disputes under that treaty or under a party's investment authorisation or agreement with an investor. The Canadian model, however, would only cover disputes concerning breach of the treaty itself.