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

**Expert Group No.4 on “Institutional Matters”**

**THE MAI AND BILATERAL, REGIONAL AND SECTORAL AGREEMENTS**

**(Note by the Chairman)**

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### (Note by the Chairman)

At its September meeting, the Negotiating Group considered the question of including a “non-derogation” clause in the MAI, on the basis of the Chairman's note on bilateral, regional and sectoral agreements [DAFFE/MAI(96)26]. Such a clause could address the relationship between provisions in different agreements which were more or less favourable than those of the MAI.

The general view was that there should be such a clause addressing the case in which there were provisions of other agreements more favourable to the investor than those of the MAI. The following draft clause would, in its first paragraph, provide for non-derogation broadly, with respect to all other more favourable sources, but would not bring obligations under those sources within the scope of the MAI.<sup>1</sup> Another drafting approach to the question of other more favourable provisions is found in the illustrative text submitted by one delegation to DG 3.<sup>2</sup>

The majority view was that there was no need for a further clause to specify that the MAI would prevail over less favourable clauses in other agreements. However, should the Group wish, the second paragraph of the following draft might be considered. It would limit the ability to infer that a future less favourable agreement (with no non-derogation clause in it), was intended to override the MAI, while recognising that we cannot preclude parties from expressly overriding the MAI in the future if they wish.

1. Nothing in this Agreement shall be construed to derogate from the provisions of any other international agreement, contract, or measure of any Contracting Party which provides for treatment more favourable to the investor or investment than is required by this Agreement.
2. This Agreement is intended to prevail over the provisions of any future agreement between any of the Contracting Parties providing less favourable treatment to investors unless the contrary intent is expressly stated in that future agreement.

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<sup>1</sup> The latter point is being considered separately, in EG1, under the rubric of protection of investor rights from other agreements (“respect” clauses).

<sup>2</sup> The text by the delegation reads: “If the provisions of law of a Contracting Party or obligation or a Contracting Party under international law, existing at present or established hereafter, contain a rule, whether general or specific, entitling investors of other Contracting Parties or their investments to a treatment more favourable than is provided for by the present Agreement, such a rule shall, to the extent that it is more favourable, prevail over the present Agreement.” [DAFFE/MAI(96)16/REV1, p. 11]