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

**Expert Group No.1 on Selected Issues Concerning Dispute Settlement and Geographical Scope**

**CONFLICTING REQUIREMENTS**

**(Note by the Chairman)**

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(Note by the Chairman)

1. At its June session, the Negotiating Group discussed extraterritoriality issues in relation to the MAI, based on notes by the chairman [DAFFE/MAI(96)18], contributions by one delegation [(DAFFE/MAI/RD(96)23 and 24)], and by one other delegation [DAFFE/MAI/RD(96)29 and 30]. In summing up, the Chairman noted that conflicting requirements imposed on multinational enterprises, and secondary investment boycotts, are subject to existing obligations under the OECD instrument entitled "General Considerations and Practical Approaches concerning Conflicting Requirements". Expert Group No. 1 on Dispute Settlement was asked to review the existing OECD instrument at the September meeting and report back to the Negotiating Group by its October meeting. All other aspects and proposals on these issues would remain on the Negotiating Group agenda.
2. This paper provides some background on the origins of the OECD instrument and poses questions that might be addressed. Interested Delegations are invited to submit national papers providing, in particular, current information concerning their experience under the instrument.

### Origins of the Present Instrument

3. At the very outset of the Organisation, the Committee of Experts on Restrictive Business Practices carried out work on extraterritoriality issues in the context of competition policy. By 1967, the Committee had developed an approach that involved notification, consultation, co-operation and policy discussion. This approach has been maintained and developed both in bilateral arrangements and multilaterally through the renamed OECD Committee on Competition Law and Policy and a series of Council recommendations, the current one being the Recommendation concerning Co-operation between Member Countries on Anticompetitive Business Practices affecting International Trade. [C(95)130/FINAL].
4. The Recommendation, which has undergone four revisions, proposes that countries: should notify one another whenever they investigate a practice which may affect the interests of other countries; allow consultations to take place where necessary; information to be requested which may be of importance to the investigation or proceeding; and action to be co-ordinated if the authorities of more than one country decide to proceed against the practice in question<sup>1</sup>.
5. Countries which consider that they are the victims of an anticompetitive practice directed at them from firms located in another country may also request consultations and action on the part of the other country, if such country agrees. The Recommendation therefore contains the elements of both negative and positive comity approaches under which foreign interests are taken into account when proceeding against anticompetitive behaviour and a country may request another country to take specific action against particular behaviour. It should be stressed however that such co-operation is purely voluntary and may be denied by any country on grounds of its own national interests.

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<sup>1</sup> Revised Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade

6. In the event of failure of the notification and consultation procedure, a conciliation procedure involving the good offices of the OECD's Committee on Competition Law and Policy may be invoked. The conciliation procedure has however never been invoked since its introduction in 1973.
7. The OECD Recommendation has formed the basis for bilateral co-operation agreements in existence between OECD countries.
8. Experience with the various versions of the Recommendation has been generally positive, as monitored within Working Party No. 3. Information has been exchanged between countries which has been useful and sometimes essential to complete an investigation or bring an action against anticompetitive behaviour with an international dimension. It has proven to be particularly useful in merger investigations where globalisation makes it difficult for one national authority frequently to gauge the competitive effects of a particular transaction without obtaining information from other countries. Problems however do remain in connection with the confidentiality rules in force precluding the transmission of certain confidential information to other authorities. This problem is a particular subject of study currently within the Committee.
9. During the 1970's, problems in other areas, including, in particular, economic sanctions or "foreign policy" controls, led to more general discussions within OECD. In 1976, OECD countries agreed to "co-operate in good faith [either within the CIME or through other mutually acceptable arrangements] with a view to resolving" problems which arise when multinational enterprises are made subject to conflicting requirements. This agreement was included in the Guidelines on Multinational Corporations, adopted by Ministers as an Annex to the 1976 Declaration on International Investment and Multinational Enterprises, as well as in the legally binding Council decision dealing with the Guidelines. [C(76)117 and C(79)143].
10. During the 1980's, the CIME was the focus of discussion on extraterritoriality issues. These discussions were given impetus by the imposition of gas pipeline sanctions by the United States arising from actions of the U.S.S.R. At the same time, the issues were undergoing consideration and debate outside the OECD, including efforts by the American Law Institute to frame a jurisdictional theory which might bridge differences in approach and offer a legal framework for resolving conflicting jurisdictional claims through interest balancing.
11. Discussions in the CIME and its Investment Working Party led to support by a number of members for proposals to introduce into the 1976 Declaration a discipline that would include jurisdictional guidelines that would reflect a territorial priority. Some members considered that the realities of transactions in the modern world defied neat rules. The United States urged an approach, pioneered in the competition policy area, of notice, consultation, co-operation and interest balancing. This approach called for intergovernmental co-operation in particular fields of concern, such as securities market regulation and law enforcement, to reduce or avoid the need to protect legitimate governmental interests through recourse to unilateral extraterritorial measures.
12. In the run-up to the 1984 OECD Ministerial, an understanding was arrived at. A report of the CIME on the review of the 1976 Declaration [C/MIN(84)5(Final)] included an agreed statement containing a set of non-binding "General Considerations and Practical Approaches concerning Conflicting Requirements Imposed on Multinational Enterprises". In May of 1984, this statement was endorsed by OECD Ministers. Several paragraphs were included in a binding Council Decision [C(84)91] related to the Guidelines, elaborating the existing commitment of Members to co-operate in good faith to resolve conflicting requirements.

13. The general considerations part of the understanding provides a set of principles which Member countries should take into account when considering legislation with extraterritorial reach. The objective of these general considerations is to prevent situations of conflicting requirements from arising or, at least, minimise the potential for conflict. The practical approaches part of the understanding proposes ways and means at the bilateral and multilateral level, based on notification and consultation, for dealing with problems that may arise.

### **OECD Work on Implementing the Instrument**

14. Following the adoption of the instrument, several related activities were carried out within the CIME framework.

15. In the early years of the arrangement, a number of formal and informal notifications were received by OECD. A list of these, prepared in late 1988, DAFFE/IME/88.26, included a Canadian notification on its Competition Act, notifications from Norway, Sweden and Denmark on South Africa economic boycott legislation, notifications from the United Kingdom concerning its Financial Services Act and its Outer Space Act, and 14 formal and informal notifications from the United States on the following matters: 1985 Amendments of its Export Administration Act, a Comprehensive Anti-Apartheid Act, money laundering legislation, its Commercial Space Launch Act, and economic sanctions against Syria, Libya, Nicaragua and Panama. The notices generally indicate efforts to apply the approach of moderation and restraint and reduce extraterritoriality problems.<sup>2</sup>

16. In October of 1987, the CIME published a report on how OECD members construed the provision of the General Considerations that obliged members to follow "an approach of moderation and restraint". The report summarised the experience of members and set forth suggestions for enhancing moderation and restraint. The conclusions of the report were repeated in the CIME's 1991 review of the Conflicting Requirements instrument.

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<sup>2</sup> For example, the U.S. pointed out that the 1985 amendments of the Export Administration Act included protection of contract sanctity, except if the President determines that a "breach of the peace" poses a serious and direct threat to U.S. strategic interests, and established criteria severely limiting the ability of the President to impose foreign policy controls. DAFFE/IME/87.7(Add.,1)(CORR1). The U.S. notified economic sanctions against Syria, IME/M(86)2, Addendum 1, applied to re-exports of U.S. origin goods from third countries but not to foreign subsidiaries of U.S. companies or to transactions under pre-existing contracts -- in deference to concerns of OECD and COCOM countries. The U.S. proposed money laundering law would have extraterritorial jurisdiction over non-citizens only when conduct occurred in part in the United States and met certain other conditions; moreover, restraint was expected to be exercised when the underlying offence was one involving policy conflicts with the foreign jurisdiction, e.g., under the International Emergencies Economic Powers Act or the Export Administration Act. While the prohibitions of Danish law on investments in South Africa applied to persons in Denmark exercising a controlling influence on an enterprise abroad, it did not apply to investments made to maintain the sound operation of existing investments. A similar result was reached under the Swedish South Africa Investment sanctions. The Norwegian South Africa Boycott would not, in case of conflict, require a Norwegian subsidiary to violate the law of the territory in which it was acting.

17. A second large project was a study of "Extraterritorial Information Requirements in Securities Regulation", distributed in February 1988 [DAFFE/IME/87.1(2nd Revision)]. This study, carried out within the Investment Policy Working Party, supported work being carried out on a bilateral basis by certain Member countries to put in place appropriate co-operation mechanisms.

18. A third project was a study of "corporate nationality". This was the subject of national contributions and an extensive note by the Secretariat, entitled "Corporate Nationality and International Conflicts of Jurisdiction", DAF/IME/89.12, which was commented upon by the Members and discussed by the Investment Working Party on several occasions. The note described many of the complexities of the issue, including the use of "control" as a basis for piercing the multinational corporate veil, sometimes under a direct control theory, sometimes under other rubrics, in particular "enterprise unity", but generally for very limited purposes. The project proved controversial, however, and the CIME concluded its discussion of the topic in November 1990 by deciding that the "report" (DAFFE/IME/89.12 2nd Revision) "should remain under the Secretariat's responsibility and serve as background for future activities in the area of conflicting requirements."

### **The 1991 Review of the Conflicting Requirements Instrument**

19. The experience of Members under the Conflicting Requirements instrument was examined as Chapter IV of the 1991 Review of the 1976 Declaration and Guidelines. The Review analysed the conflicts as arising from two broad categories of measures:

- i) measures with extraterritorial reach taken to meet economic regulatory objectives; and
- ii) legislation or regulations with other objectives, such as national security interests, foreign policy, emergency war powers, etc..

20. In the first category, the report looked at several examples. In banking, a need for co-ordinated international action between prudential supervisors had led to the Basle Concordat in 1979, which had gone a long way toward reducing extraterritorial regulatory conflict. In securities regulation, conflicts produced by the absence of agreed methods for obtaining needed information were extensively analysed, the problems pin-pointed, the willingness of Members to co-operate in this field confirmed, and the existence of various available and proposed mechanisms for doing so was cited. In the field of competition regulation, the review noted that conflicts had considerably lessened in recent years due to growing acceptance of competition policy objectives and increasing international co-operation, as evidence by the OECD Revised Recommendation concerning co-operation on restrictive business practices.

21. In the second category, which consisted of measures taken for reasons other than economic regulation, the report identified controls on assets, trade sanctions, export controls and investment prohibitions. It noted that countries have often resorted to sanctions including asset freezes and strategic goods export bans in time of war or other national emergencies. Generally, wartime measures do not give rise to much controversy. However, concerns may arise when measures affect countries that are neutral in the dispute or when measures are extended after the conclusion of a crisis, becoming quasi-permanent. The report identified the 1950s, 60s and 70s as witnessing a wide range of economic sanctions by countries in response to political situations in others, sanctions which had sometimes produced important conflicts. However, it stated that "[m]ore recently, greater attention is being paid to curtail extraterritorial application as concerns the imposition of foreign policy controls."

22. In discussing trends, the report stated:

"Increasing interdependence in the international economy is a major reason why conduct abroad has a growing impact on national economies; likewise, the possibilities of avoiding national laws are perceived as greater. In order to avoid or minimise conflicts which could arise as a result of this evolution, Member countries are demonstrating increasing willingness to apply moderation and restraint in exercising jurisdiction. International co-operation, based on such instruments as the 1984 agreement on conflicting requirements has contributed to a growing awareness of the sovereign interests of the countries affected by extraterritorial application of legislation. Countries so affected are also better able to appreciate the motivations underlying the extraterritorial reach of certain national laws."

"Moderation and restraint is beginning to weigh more in areas involving trade sanctions and export controls designed to achieve political ends. The Committee...has been encouraged by the efforts of several countries to avoid or minimise conflicts in this area. Trade restrictions have been narrowed, for example, in some instances, to reach foreign branches of US companies but not foreign subsidiaries (unless the transaction involves US origin goods or technology). There have also been encouraging precedents in fields such as banking supervision, international transborder data flows and anti-fraud regulations, which suggest the effectiveness of international co-operation..."

23. The section of the report on "implementing the 1984 agreement on conflicting requirements" noted that the CIME's work on how to understand the General Considerations and how best to implement the associated practical approaches had allowed a better understanding of where the problem areas are and the possible solutions. Looking back to the 1987 report on moderation and restraint, the 1991 review report noted that:

"... Members agreed on the utility of mutual assistance treaties, as well as bilateral arrangements, in particular with respect to economic regulations (such as export controls), discovery of evidence abroad, and antitrust enforcement. Multilateral consultative mechanisms including the Committee's 1984 agreement on general considerations and practical approaches and the 1986 Revised Recommendation on co-operation on restrictive business practices affecting international trade, were cited as particularly relevant for resolving the problems of conflicting requirements."

"In summary, the (1987) report reveals that there are important areas of agreement and makes more transparent the remaining differences among the Member countries' views. The differences appear to be most pronounced on general topics, e.g., concerning the fundamental nature (legal, political) of approaches to moderation and restraint. Similarities tend to become more important when implementation is concerned, and more generally on practical matters such as balancing of competing states' interests, judicial rules of abstention or deference to foreign law or jurisdiction, etc. The Report also emphasises that international co-operation in the area of conflicting requirements is rapidly evolving. This implies, in particular, that approaches to moderation and restraint are also evolving, revealing improved mutual understanding among Member countries achieved in part through their co-operation in the Organisation in the area of conflicting requirements."

24. The same section of the 1991 report also stated that the Member countries had taken note of the ICC's study entitled "The Extraterritorial Application of National Laws" which had recommended that extraterritoriality conflicts be reduced by adopting a jurisdictional rule of reason; reasonableness to be determined by weighing competing national interests and the need to facilitate the free flow of international commerce. The CIME had decided "that although further consideration of these proposals is not to be excluded, there is clearly not sufficient international consensus to permit the Committee to endorse them at this time."

25. With regard to the CIME's work on corporate nationality, the 1991 report stated:

"In practice, there seems to be less controversy on jurisdictional issues where national policies coincide. In certain areas of economic regulation in which piercing of the corporate veil occurs, such as consolidated accounts of MNEs for tax and reporting purposes, conflicts have been limited by the similarities of legislative approaches among Member countries. This consensus is less likely to be present in areas such as export controls indicated by foreign policy objectives, which may provoke disagreement on the suitability of the policies applied or the effectiveness of particular types of measures."

26. The overall finding of the 1991 Review was that the 1984 agreement on General Considerations and practical approaches "had proved its effectiveness" and that its status should be enhanced. This recommendation was accepted and the conflicting requirements arrangement was upgraded by annexing the General Considerations and Practical Approaches formally to the declaration. The paragraphs on conflicting requirements were removed from the Council Decision dealing with the Guidelines and put into a separate Council Decision on Conflicting Requirements. [C(91)73]

### **The Recent Work of the CIME on Conflicting Requirements**

27. The CIME has remained available as a forum for consideration of conflicting requirements issues. However, no general work has been carried out on the subject since the 1991 review and the issue has arisen, in the context of the Helms-Burton and D'Amato bills, for the first time since the review.

### **Questions:**

28. The following questions are proposed for discussion:

*Do delegations consider that the current OECD instrument has generally been successful in promoting co-operation and reducing conflict?*

*Would the instrument, in its current form or with some modification in status or content, meet the needs of delegations in the context of the MAI?*

*What modifications, if any, would be both desirable and likely to achieve consensus?*