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

### **CONFLICTING REQUIREMENTS**

**(Note by the Chairman)**

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1. The Negotiating Group agreed to consider the issue of conflicting requirements and the implications for the MAI. One delegation has submitted a specific proposal on this subject [DAFFE/MAI/RD(96)23].
2. Conflicting requirements imposed by countries on multinational enterprises arise when a country's legislative or legal requirements with extraterritorial reach, conflict with legislation or policies in other countries and affect the operations of entities of multinational enterprises located in these countries. This issue involves questions of sovereignty over economic activities and imposes severe burdens on the enterprises and individuals caught in the middle. The internationalisation of economic life contributed to the development of the problem -- which had some of its earlier manifestations in the field of competition policy. Problems have arisen in a wide variety of other fields, including evidence gathering for law enforcement generally, regulation of securities markets, re-export of armaments or sensitive technologies, and foreign policy embargoes.
3. Some cases of conflicting requirements involve a country's assertion of extraterritorial jurisdiction on a basis which other countries generally regard as unlawful or excessive. Some cases arise out of concurrent but generally recognised bases of jurisdiction. Both categories can produce problems for investors and it is relevant to examine these problems in the context of the MAI.
4. The MAI might already contain implicit disciplines in the draft articles under consideration: the general obligation for a MAI party, as host state, to accord fair and equitable treatment in accordance with international law to investors of other parties and their investments in its territory, combined with the MAI dispute settlement mechanism. These provisions might operate to the extent that a measure taken affects the investor or investment of another Party and results in treatment which is unfair, inequitable or violates international law. However, those provisions would not appear to offer a clear solution for some cases of legitimate concurrent jurisdiction, or cases in which conflicting requirements were imposed by the investor's home state on activities of the investor or its investment in the host state or elsewhere.
5. An explicit discipline would be to establish a binding jurisdictional rule for such cases, e.g., "territorial priority" -- prohibiting a Party from imposing measures on an investor or its investment which oblige the investor to act in conflict with the legal requirements of another Party in its territory. Such an approach might also be considered for cases of conflict with the express policies of the territorial Party.
6. In May 1984, OECD countries reached agreement on "General Considerations and Practical Approaches concerning Conflicting Requirements Imposed on Multinational Enterprises". The purpose of the arrangement was to help avoid, or at least mitigate, some of the difficulties which had arisen in connection with the exercise of "extraterritorial" jurisdiction in a variety of fields. This legally non-binding arrangement, first adopted as a report of the CIME endorsed by Ministers, was annexed to the 1976 Declaration on International Investment and Multinational Enterprises in 1991 and a Council Decision was adopted providing, inter alia, for consultations in the CIME at the request of any Member.
7. The OECD arrangement provides no binding rules of jurisdiction, but relies on transparency, moderation and restraint, and co-operation. The "General Considerations" invoke international law without defining its meaning, since there is no consensus in Member countries on what limits customary

international law places on the exercise of extraterritorial jurisdiction or on what norms should be adopted.. The General Considerations section also stresses the importance of respect for contractual obligations and the adverse impact of retroactivity.

8. The adoption of this arrangement in 1984 was followed by intensified activity to work out or improve co-operative arrangements and reduce problems in a number of fields which had been marked by conflict; controversial extraterritorial reach appears to have been avoided in a number of laws or regulations as a result of the agreed approach. However, as recent events have shown, this arrangement has not precluded controversial jurisdictional reach and potential conflict when particularly strong political interests are at stake.

9. Against this background, the threshold questions which Delegations are invited to address are the following:

- a. Is the general standard of treatment provided by the agreement sufficient to address the concerns relating to the imposition of conflicting requirements? If not, should the MAI include a specific obligation?
- b. Do delegates consider that the proposal made by one of the delegations [DAFFE/MAI/RD(96)23] represents a potentially acceptable approach? In particular,
  - i) should the MAI establish a legally binding rule governing the imposition of conflicting requirements?
  - ii) should such a rule accord the same binding priority in case of conflict to "established policies" of the territorial state as it might accord to the latter's laws and regulations?
- c. Do the 1984 General Considerations and Practical Approaches of the OECD represent an acceptable type of discipline? Would it be useful to refer to it, attach, or incorporate it in the text of the MAI?
- d. What other approaches or elements ought to be considered?