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Foreword

ICRIER in collaboration with the Ministry of Commerce, Government of India, organised a half-day workshop on “India’s Approach to the Demand for a Multilateral Agreement on Investment (MAI)” on June 25, 1999. The workshop was chaired by Union Commerce Minister, Shri Ramakrishna Hegde, and the participants included Members of Parliament, senior policymakers, academicians and representatives of industry and the media. While the original move by some members of the OECD to secure an MAI floundered in the face of resistance to many of its provisions from within the OECD countries, some countries are keen on resurrecting the MAI. It is highly likely that the MAI issue may be back on the agenda at the next WTO Ministerial meeting at Seattle which is scheduled from November 27 to December 2, 1999.

The timing of this workshop was motivated by the importance of engaging in a debate within India on this very important issue of the MAI before the G-15 Ministerial meeting in Bangalore in August and the Seattle Ministerial meeting in November/December. We requested Mr. A.V. Ganesan, Advisor to ICRIER on WTO-related issues and former Union Commerce Secretary, to prepare a background paper which formed the basis for discussions at the workshop.

The paper by Mr. Ganesan and a report of the proceedings of the workshop are presented here to facilitate wider public debate. Most participants at this workshop shared the perception that given the international mood, India must take a view on the demand for an MAI, not just restricting itself to the pros and cons of the proposed OECD draft but also examining other ideas that are being discussed in and around the WTO. Rather than be reactive, India must adopt a proactive role, especially since it has a declared national policy of seeking foreign investment, and seek an MAI that addresses both the concerns of investors and the host economies.

The Union Commerce Minister, Shri Ramakrishna Hegde, was very appreciative of the free and frank exchange of views at the workshop. ICRIER hopes to continue to provide such fora for dissemination of information and knowledge as well as free and frank exchange by the very distinguished participants.

Isher Judge Ahluwalia
Director & Chief Executive
ICRIER

Executive Summary

The question of establishing a legally binding Multilateral Agreement on Investment (MAI) in the World Trade Organization will be a major subject for discussion at the third Ministerial Conference of the WTO scheduled to be held in Seattle in November/December, 1999.

As foreign direct investment (FDI) is becoming a key vehicle for transnational corporations to access new markets around the world, the industrialized countries have been pushing for a Multilateral Agreement on Investment (MAI), which postulates `liberalization' of the foreign investment regimes of the host countries based on the core principle of non-discrimination between domestic and foreign investors in all phases of an investment.

Foreign direct investment flows to developing countries have risen sharply in the 1990s and are expected to rise further in the foreseeable future. The direction of these flows is determined principally by consideration of market access and investment potential as country after country has followed the policies of liberalizing their foreign investment regimes. China alone receives about 36 per cent of the total foreign investment going to all developing countries, while nineteen other developing countries, including India, account for another 52 per cent.

An MAI will not be a decisive factor either in augmenting FDI flows to developing countries or enhancing the quality of such flows. Other things being equal, an MAI can at best be a confidence building measure and embellish the investment climate of a host country. Our response to the demand for an MAI should therefore not be influenced by the hope that joining it will augment the receipt of FDI, nor by the apprehension that not joining it will place us at a competitive disadvantage vis-à-vis other countries.

The key issues of concern to us in the MAI advocated by industrialized countries are (i) definition of investment (ii) national treatment to foreign investors in the entry and establishment stages of an investment (iii) prohibition of a wide range of performance requirements (iv) dispute settlement procedures extending to investor to state disputes in the pre-establishment phase and (v) absence of obligations on investors. As far as post-establishment phase issues are concerned, the proposed MAI does not differ significantly from our own policies, laws and regulations, or from the numerous bilateral investment promotion and protection treaties that we have signed with other countries.

Against the background, our first best option is to question the need for an MAI at this juncture and oppose its inclusion in the negotiating agenda of the WTO. Under this option, we may agree to a further continuation of the study on trade-investment relationships by the Working Group constituted by the Singapore Ministerial Declaration.

In case there is a consensus among developing countries to include investment rules in the negotiating agenda, our second best option is to ensure that the MAI does not go beyond the multilateralisation of the typical existing bilateral investment promotion and protection agreements. That is to say, the MAI will not deal with issue of pre-establishment phase national treatment. In order to ensure this, we should press for the negotiating mandate itself limiting the scope of the investment rules to post-establishment phase of an investment that takes place in accordance with a host country's laws, regulations and administrative procedures.

In case the negotiating mandate does not categorically exclude the pre-establishment phase national treatment issue, our third best option is to ensure that the negotiating mandate includes elements that will concretely build the "development dimension" into the proposed agreement.

We should be willing to consider options two and three only if there is a sufficient quid pro quo in other areas of the negotiations that will be of benefit to us.

Discussion Paper

India's Approach to the Demand for a Multilateral Agreement on Investment (MAI)

by

A.V. Ganesan*

I. Introduction

1.1 The question of establishing a legally binding multilateral agreement on investment (MAI) within the ambit of the World Trade Organization (WTO) is now reaching a critical stage in international trade discussions. There are enough indications that in the third Ministerial Conference of the WTO scheduled to be held in Seattle, USA later this year, the industrialised countries will put pressure on the developing countries for the launching of a comprehensive new round of trade negotiations in the WTO in the year 2000, to be called the 'Millenium Round'. The establishment of multilateral rules and disciplines in the area of foreign investment will certainly be a major demand of the industrialised countries in setting the negotiating agenda for the Millenium Round. Two comparatively recent developments have paved the way for industrialised countries pushing ahead with their demand for an MAI: the decision taken at the WTO Singapore Ministerial Conference of December, 1996, and the OECD negotiations on an MAI launched in September, 1995. Although the Singapore Ministerial Declaration has only mandated an examination of the relationship between trade and investment without any pre-judgment as to whether negotiations will be initiated in this area after the two-year study period, there is little doubt that it has sown the seeds for inscribing foreign investment on the agenda of the WTO. As for the OECD negotiations, the idea behind them was to establish an MAI with very high standards for the treatment and protection of foreign investment; the MAI was to be a free-standing international treaty open for accession to the 29 OECD member countries undertaking the negotiations as well as to non-OECD countries wishing to join it. After nearly thirty months of negotiations, the OECD member countries could not reach an agreement on some key issues and the OECD-MAI effort is virtually dead now. But the draft that has emanated from these negotiations on many issues, and more importantly, the philosophy that has underpinned them, will propel the demands of the industrialised countries when the scene shifts to WTO for establishing multilateral rules on investment.

1.2 The time is therefore fast approaching for India and other developing countries to be prepared to respond to the demand of the industrialised countries to initiate negotiations in the WTO for establishing legally binding multilateral

* The views expressed in the paper are those of the author and do not reflect the views of ICRIER or any other organization or person.

rules and disciplines on foreign investment. At the G-15 Summit held in Montego Bay, Jamaica last month (10-12, February 1999), India offered to host a meeting of the G-15 countries in order to coordinate the position of developing countries in preparation for the WTO Ministerial Conference to be held in Seattle, USA in November/December, 1999. The demand for an MAI will obviously be an important issue for the consideration of the developing countries at the G-15 meeting to be held shortly in India.

1.3 Against this background, this discussion paper seeks to analyse the options available to us in responding to the demand for an MAI, the key issues involved, and the possible approaches that we can consider in dealing with them. It is important for us to understand why the industrialised countries are pushing for an MAI and what are the critical elements of the MAI being demanded by them. It is also important for us to understand how far the demands of the industrialised countries differ from our own autonomous policies on foreign investment and how they will impinge on our freedom to follow our policies. The paper attempts to address these aspects. In doing so, the paper deals only with the broader issues, and since we are not yet at the negotiating stage, it does not deal with the details of all the individual elements of an MAI.

II. Reasons behind the demand for an MAI

2.1 There are first the traditional reasons for industrialised countries wanting an MAI. They are the main capital-exporting countries. Nearly 85 percent of the global outflows of foreign direct investment (FDI), which touched $ 400 billion in 1997, emanate from the industrialised countries. They are the home countries of the large transnational corporations (TNCs) whose strategies and operations are increasingly becoming globalised and therefore whose demands for unrestricted access to markets around the world for their goods, services and technology are rising. Related to this, there is a rising trend in the volume of FDI flows and their destination to developing countries. Although developed countries still absorb among themselves a predominant portion of the global FDI flows, the share of developing countries is rising significantly. During the period 1985-90, the *average annual flow* of FDI into developing countries accounted for barely 18 percent of the global FDI inflows and its volume was about $ 25 billion. This percentage has doubled in the last five year period 1993-1997 and the volume has increased nearly six fold. Taking the year 1997 alone, the share of developing countries in global FDI inflows was estimated to be 37.2 percent, with its volume being of the order of $ 149 billion (see Annex). Legal security for, and stability of treatment of, FDI in developing countries have therefore become a matter of greater interest to the capital exporting countries.

2.2 Be this as it may, the real reason behind the current push of the industrialised countries for an MAI, because of which the MAI being demanded by them focusses more on the issue of the *liberalisation* of inward foreign investment by host countries, is that foreign direct investment is now seen by

them as a key *'market access issue'*. They see FDI as a crucial ingredient for their enterprises, especially their TNCs, to gain and consolidate market access opportunities around the world, especially in developing countries that offer a good market and investment potential. Owing to the advancements in various kinds of technologies, FDI is increasingly becoming more important than trade for delivering goods and services to foreign markets. In addition, it is becoming an important vehicle for TNCs in organising their production, distribution or functional activities on an international basis to maintain their competitive strength. For example, with an estimated $ 7000 billion as the value of goods and services produced and sold by the *affiliates* of TNCs globally, the international production of TNCs outweighed the global trade in goods and services (roughly $ 6000 billion) in 1995, showing that local production and sales has become the dominant mode for the TNCs of industrialised world to gain access to foreign markets. (As far as developing countries are concerned, it must be noted that cross border exports continue to be the principal mode of delivering goods and services to foreign markets).

2.3 Moreover, integrated international production is increasingly becoming a key element of the operational strategies of TNCs, which means that TNCs look for countries not only for selling their outputs but also for sourcing their inputs, such as for example, supplies of components, parts and even finished items, computer software, and services. Any part of the value chain of a TNC is now potentially open to be located in a country that offers the best advantage for it. According to UNCTAD estimates, nearly one-third of the world trade is intra-firm trade between affiliates of TNCs, while another one-third is between TNCs and non-affiliated enterprises. It is only the balance of about one-third of the world trade which remains outside the control or influence of the TNCs.

2.4 To sum up, FDI now has multiple objectives in seeking market access opportunities around the world: natural resource seeking, market seeking, efficiency seeking, and input or asset seeking, depending on the strategies of the TNCs and the potential offered by the host countries. Multilateral rules and disciplines on foreign investment, which on the one hand ensure freedom for making the investment and on the other, ensure legal security and stable treatment for the investment made, have therefore become important for the TNCs of the industrialised world.

2.5 Besides these economic reasons, an important tactical reason is also bringing this demand to the fore now. For the European Union and Japan in particular, their participation in the negotiations for further liberalisation of the agricultural trade (which is a key demand of USA and the Cairns group of countries) has to be softened for their domestic constituencies by their own demands in the new round of trade negotiations. MAI and reduction of industrial tariffs are seen by them as two key issues of advantage to them. The USA and other industrialised countries would have no compunctions in supporting these issues.

III. Relationship between an MAI and FDI flows to developing countries

3.1 The industrialised countries advocate that there is a large pool of footlose capital waiting to be tapped by countries that offer the most congenial and secure environment for investment and that an investor-friendly MAI will augment significantly the flows of FDI to developing countries. To test the validity of this assertion, it is necessary to examine the current pattern of the flows of FDI to developing countries. Its dominant motif is that the FDI flows are highly skewed in their distribution. Taking for illustration the four year period 1993 to 1996, it is found that the total (i.e. cumulative) flows of FDI to all developing countries amounted to $ 388 billion in this period. Of this, China alone received $ 139 billion or about 36 per cent of the total flows to all developing countries. The next *five* largest recipients of FDI in this period, namely, Mexico, Singapore, Brazil, Malaysia and Indonesia in that order, together accounted for about 28 percent of the total flows, with their individual shares varying between 8 and 4 per cent. The next *fourteen* largest recipients, each one of which had an individual share varying between 2.5 and 0.8 per cent, together accounted for about 24 per cent of the total FDI flows to developing countries. These fourteen developing countries, in the descending order of their individual shares, are Argentina, Peru, Hong Kong, Colombia, Thailand, Chile, Nigeria, India, Philippines, Korea, Vietnam, Taiwan Province of China, Venezuela and Egypt. India was thus the fourteenth largest recipient of FDI flows among developing countries in this period with an individual share of just about 1 per cent. India's share is, however, rising with the increasing flow of FDI in recent years. Thus, the top *twenty* developing countries accounted for about 88 per cent of the total FDI flows to developing countries during the period 1993 to 1996. If the year 1997 alone is considered, eighteen economies (the same as above excepting Ecuador) accounted for over four-fifths of total FDI inflows into developing countries (see Annex). On the other hand, all the remaining developing countries, numbering over 130, barely receive about 10 per cent of the total FDI flows to developing countries. Of these, the forty eight least developed countries (LDCs as designated by the UN) accounted for a mere 1.3 per cent of the total FDI flows to developing countries in the period 1993 to 1996. In 1996, the 48 LDCs taken together received $ 1.6 billion out of a total FDI flow of $ 129 billion to developing countries. It is true that although many small developing countries receive small amounts of FDI, the proportion of FDI inflows in relation to their GDP is as large as in developed countries. Even allowing for this factor, the fact remains that the FDI flows to developing countries are heavily and consistently concentrated in about twenty developing countries.

3.2 It is difficult to visualise that the attraction of FDI by China, India or the other top-bracket developing countries in Asia and Latin America will be significantly altered by their adherence or non-adherence to a multilateral agreement on foreign investment. The African developing countries, the LDCs and small developing countries, which today are on the fringe of FDI flows, are also unlikely to attract additional FDI merely because they subscribe to a liberal

multilateral treaty on foreign investment. As noted earlier, there has been a sharp increase in the flows of FDI to developing countries since the early 1990s, without there being an MAI. The chief reasons for the rising flows of FDI to developing countries and their heavy concentration in a limited number of developing countries are, firstly, the investment and market opportunities that they offer, and secondly, their own unilateral liberalisation of their FDI regimes. It is this synergy of investment opportunities and investment climate of the top-20 developing countries that lies at the root of their attracting the vast bulk of the FDI flows to developing countries.

3.3 The case for an MAI cannot therefore be rested on the argument that it will significantly enhance the flows of much needed investment capital to the developing countries. An MAI cannot alter the investment opportunities side of the equation. Other more important factors being favourable, it may at best serve as a confidence building measure for foreign investors (assuming that the MAI embodies all the major demands of the foreign investors) and thereby embellish the investment climate of the host country. A key question for the consideration of developing countries is therefore: What is it that the MAI will achieve that cannot be achieved by the unilateral and autonomous liberalisation of their FDI regimes by host countries and what is the *quid pro quo* for developing countries by being a party to an MAI?

IV. Main components of an MAI as advocated by industrialised countries

4.1 The MAI as advocated by the industrialised countries and as evidenced by the mandate and draft of the OECD negotiations will have four major components: (a) the liberalisation of foreign investment regimes by host countries; (b) fair and equitable treatment of investment; (c) legal security for investment; and (d) effective dispute settlement procedures. Furthermore, the definition of investment for an MAI will be as wide as possible. The draft OECD-MAI defines investment as “every kind of asset owned or controlled, directly or indirectly, by an investor”, while “investor” means any natural or legal person of a Contracting Party, with the legal person being any kind of entity constituted or organised under the applicable law of a Contracting Party. Such a definition of investment is purposely intended to go far beyond the traditional notion of foreign direct investment (FDI). The definition will cover not only equity investment (regardless of whether it is above or below any specified threshold level), but also portfolio investment, debt capital, monetary and financial transactions, and more importantly, every form of tangible and intangible asset, including, in particular, intellectual property rights, concessions and licences. The only exceptions to this broad definition will be trade operations and purely financial transactions in capital and money markets, such as for example, trade credits, traded goods and foreign exchange operations. Needless to say, the definition of investment is key to the scope and ambit of an MAI.

4.2 The cornerstone of the MAI being demanded by industrialised countries is the liberalisation of the foreign investment regimes of host countries through a legally binding adoption of the principle of non-discriminatory treatment (i.e. the principle of "national treatment") as between domestic and foreign investors. According to a paper circulated at the WTO by the Euopean Union, the purpose of an MAI is to create a "level playing field" for foreign investors around the world so that they are legally assured that they will stand on the same footing as domestic investors when they wish to make an investment in a host country. This principle of non-discriminatory or national treatment is to apply to all stages of an investment, namely, entry, establishment and operation of an investment.

4.3 The main elements of the second component of the proposed MAI, namely "fair and equitable treatment of investment" are, (i) national treatment, MFN treatment and transparency in the post establishment phase, (ii) performance requirements, (iii) employment of key personnel, (iv) privatisation and (v) monopolies. Of these*, performance requirements, privatisation and monopolies* require specific attention. The draft OECD-MAI prohibits several performance requirements totally, while some other performance requirements are permitted if they are connected with the grant of fiscal, financial or other advantages by the host country. Among the prohibited performance requirements are: local content requirements, export obligations, hiring a given level of nationals, establishing a joint venture, achieving a minimum level of local equity participation and transfer of technology requirements. It needs to be noted that performance requirements are prohibited even if they apply equally to domestic and foreign investors.

4.4. On **privatisation** the draft OECD-MAI wants to apply the national treatment and MFN principles to all kinds of privatisation and all phases of privatisation (i.e. to the initial sale of publicly owned assets as well as the subsequent sale of these assets). As regards *monopolies*, the draft OECD-MAI does not prohibit the creation of government-designated monopolies, but prescribes that such monopolies observe the rules of non-discrimination in their sales and purchases. Preferential or special treatment to domestic or nationally owned companies in purchases, for example, will come under prohibition. The only exception to the non-discriminatory treatment is when government procurement is made not with a view to commercial re-sale or use in the further production of goods and services for commercial sale.

4.5 The MAI provisions relating to the third component, namely, "legal security for established investment", will cover issues such as nationalisation and compensation, free transfer of payments, subrogation and protection of existing investments. These issues will not be analysed in detail as they do not clash seriously with our own policies and practices.

4.6 On the question of dispute settlement, a critical component of an MAI, what needs to be noted is that the dispute settlement provisions, as indicated in

the draft OECD-MAI, will cover not only State to State disputes, but also investor-to State disputes, with the investor having the right to choose the resolution of disputes either through national courts or through international arbitration. The investor will also have the right to choose the rules for arbitration out of ICSID, UNCITRAL or ICC Rules. The arbitral panel in such cases shall be appointed by the Secretary General of the ICSID or the ICC as the case may be. In the case of State to State disputes, the arbitral panel shall be appointed by the Secretary-General, ICSID. At its extreme, an investor can take a State to international arbitration for a host country rejecting his proposal for an investment on the ground of an alleged violation of pre-establishment phase national treatment obligation. It is also worth noting that while an investor can take a State to international arbitration, the State cannot do so. The State can only take recourse to available national legal remedies if it has a dispute with an investor.

Lastly, it is also important to note what the draft OECD-MAI does not contain. It does not address the issue of the obligations of the investors. The general philosophy of the industrialised countries is that an inter-governmental treaty can impose binding obligations only on the signatory States and that corporate behaviour and obligations must be regulated only by national laws and regulations that are applicable alike to both domestic and foreign investors. However, as a sop to trade unions and NGOs, the draft OECD-MAI incorporates as an Appendix the 1976 OECD 'Guidelines for Multinational Enterprises' (which sets out voluntary standards for the behaviour of such enterprises). The draft OECD-MAI, however, makes it clear that they are only voluntary guidelines and that their inclusion as an Appendix does not affect the content or character of the MAI itself.

The draft OECD-MAI does not address the issue of investment incentives or taxation either, although it does address the issue of performance requirements. One of the reasons for this approach is that most investment incentives are tax incentives and that taxation is covered by bilateral tax treaties. This is too complicated a subject to be addressed by an MAI. The draft OECD-MAI does not concern itself adequately with the environmental issues (which is the reason for environmental lobbies in the West opposing the MAI), except to the extent that the draft permits the stipulation of performance requirements by host countries for environmental reasons. Environmental lobbies have argued that unfettered freedom for foreign investors, as advocated by the OECD-MAI, would limit the ability of host countries, especially developing countries, to safeguard their natural and biological resources, and that therefore the negotiation of any such MAI should be preceded by a comprehensive environment impact assessment.

On the question of the movement of natural persons, the draft OECD-MAI has certain provisions on 'key personnel and employment requirements' prohibiting restrictions on the temporary entry, stay and work of individual investors, managers, executives and specialists. These provisions however are subject to the over-riding application of the host country's immigration and labour laws, as

well as the professional qualification and certification requirements of the host country. Thus, the supremacy of the immigration, labour and taxation laws of the host country has been kept beyond the pale of the proposed MAI.

V. Differences between the proposed MAI and our own foreign investment regime

5.1 The key and the most critical difference between our own foreign investment regime and the MAI demanded by the industrialised countries lies in the *'pre-establishment phase national treatment'* issue, i.e. non-discriminatory treatment as between foreign and domestic investors at the stage of entry and establishment of an investment. Our entire legal system embodies the national treatment principle only in the post-establishment or operational phase of an investment. All our laws, as for example, company law, taxation laws, import-export laws, labour or factory laws, patent, trade mark or copyright laws, contract or arbitration laws, laws relating to the raising of capital in the market, the competition law or other business and commercial laws, are subject-based and do not discriminate between nationals and foreigners in their application. Once an investment is made and a business entity is established, our laws apply equally to both parties regardless of whether the entity is wholly or partially national or foreign owned. There is therefore no major problem for us so far as the principle of national treatment in the post-establishment phase is concerned.

5.2 But the proposed principle of national treatment in the pre-establishment phase is wholly contrary to our present policies and regulatory framework for foreign investment. Our existing framework is based on (a) screening and approval of foreign investment (b) exclusion of foreign investment from certain sectors or activities, and (c) domestic ownership requirements, including limitations on foreign portfolio investment in existing enterprises. It is true that we have the 'automatic approval' process for foreign direct investment but it is only an exception to the normal screening and approval procedures. It still involves a foreign investor going through a process that is not applicable to a purely domestic investor. The reservation for the small scale sector will also be a technical deviation from the national treatment principle because what is available to a prescribed category of nationals is not available to foreigners. Thus, the pre-establishment phase national treatment standard will cut at the roots of our existing policy and regulatory framework for foreign investment.

5.3 Unlike the national treatment principle, the MFN and transparency principles do not create much of a problem for us even if the MFN and transparency principles are made applicable to all stages of an investment including the pre-establishment phase. The General Agreement on Trade in Services (GATS) of the WTO, for example, applies the MFN and transparency obligations to the entire universe of services, regardless of whether they are committed to be opened up or not. The national treatment and market access obligations on the other hand apply only to the services that are specifically

agreed to be opened up by a host country according to negotiated commitments. Our existing regulatory framework for foreign investment embodies the MFN and transparency principles for all phases of an investment including the entry phase. We do not discriminate among countries in applying our foreign investment rules, nor do we have any reservation in publicising our policies and regulations. The preferential treatment that we accord to NRIs (even if they are nationals or permanent residents of another country) or to some countries under a regional cooperation arrangement can be accommodated within the standard MFN principle.

5.4 The second critical area of difference lies in the *definition of investment.* As observed earlier, the intention of the industrialised countries is to have the widest possible definition for investment so that it covers every conceivable kind of asset, tangible or intangible, that is owned or controlled by a foreign investor. Our existing regulatory framework for foreign investment is basically a framework for foreign direct investment (FDI), i.e. FDI as per the definition of IMF for balance-of-payments statistics, which covers only equity investment with a long term interest and with a view to controlling or influencing the management of the enterprise. For portfolio equity investments by foreign investors, we have a different set of regulations, and for raising foreign debt capital, we have yet another set of regulations. The policy considerations, the regulatory authorities, the approval processes and the conditions applicable differ among these three routes. But so far as the issues relevant to an MAI are concerned, our present regulatory framework limits foreign investment to the traditional FDI. A broad definition, as envisaged in the draft OECD-MAI, will therefore have significant implications for the range and nature of obligations to be undertaken by us.

5.5 Whether a narrow or broad definition of investment is appropriate depends critically on how the issue of national treatment in the pre-establishment phase is looked at. For example, India has signed nearly 35 bilateral investment promotion and protection treaties with other countries (developed and developing). The definition of investment in these bilateral treaties is a broad one that includes both equity and portfolio investments and even intellectual property rights. But the reason for accepting a broad definition is that these treaties apply only to investments that are made in accordance with the host country's policies, laws and regulations. National treatment for investment is guaranteed by us in these treaties only for the post-establishment phase of the investment, i.e. for investments that are made in accordance with our policy and regulatory framework. In fact, there has been an explosion from the 1990s in the number of bilateral investment treaties (BITS) signed by developing countries (with developed countries as well as amongst themselves); there were as many as 1513 treaties in existence as on 31 December 1997, of which 157 were concluded in 1997 alone. The main reason for this proliferation is that typically they apply only to investments made in accordance with each country's policies, laws and regulations. They do not contain any commitments for liberalisation of the foreign investment regimes and they guarantee national treatment and other

privileges for investment only if the investment has been made in conformity with the host country's regulatory regime. The definition of investment in the bilateral investment treaties is therefore broad. It is worth noting here that the USA and Japan are not party (barring a small number of exceptions) to bilateral treaties mainly because they do not contain commitments on pre-establishment phase national treatment. The main objective of the MAI as is being demanded now by the industrialised countries is, however, to secure legally binding commitments for the liberalisation of the foreign investment regimes of host countries by applying the principle of non-discriminatory treatment to the entry and establishment stages of investment as well. A broad definition of investment under such an MAI will therefore expand significantly the obligations undertaken as compared to our existing regulatory framework and the bilateral treaties we are willing to conclude.

5.6 The third major area of difference is in respect of performance requirements. As of now, we are committed only to the avoidance of the performance requirements prohibited by the TRIMS Agreement of the WTO, namely, local content and trade-balancing requirements. But as noted earlier, the proposed MAI will go far beyond the TRIMS Agreement in listing and prohibiting performance requirements.

5.7 The other important areas where significant differences might crop up between our existing policies and the proposed MAI will be in respect of dispute settlement procedures, privatisation and monopolies if the proposed MAI follows the approach of the draft OECD-MAI. In addition to these included areas, what is left out of the draft OECD-MAI (see paras 4.7 to 4.9 above) is also of considerable interest to us if an MAI is to achieve a fair balance between the interests of capital exporting and capital importing countries.

VI. Options for consideration in our approach to an MAI

6.1 The first, and possibly the best, option for us is to question the need for an MAI at this juncture and to argue for the continuation and strengthening of the current trends and arrangements relating to investment, namely, the autonomous liberalisation of their FDI policies and regulatory framework by developing countries supported by the bilateral, regional and inter-regional treaties that they may conclude on their own volition to promote and protect foreign investment. Generally speaking, developing countries are competing for FDI and are liberalising their FDI policies as part and parcel of a broader set of reforms that include the opening up of their economies, liberalisation of their foreign trade regimes, focus on attaining international competitiveness, and deregulation. The current upsurge in the flows of FDI to developing countries is basically due to the autonomous liberalisation of their FDI policies by developing countries coupled with the broader economic reforms that they have undertaken. Being voluntary in nature, these autonomous policies have acquired a certain strength, durability and acceptance in the host economies. At the same time, they have the merit of

each country being in a position to pursue its liberalisation policies according to its own individual needs and perceptions and at a pace that is best suited to its own circumstances. We could argue that it might be counter-productive to disrupt the current momentum towards autonomous liberalisation by starting negotiations on a legally binding multilateral agreement that treats FDI as a market access issue and focusses on the contentious issue of the rights of entry and establishment for foreign investors.

6.2 We need to emphasize that the advocacy of this option does not in any way imply a negative or restrictive attitude towards foreign investment. It does not mean that developing countries should reduce their commitment to the liberalisation of their FDI regimes or dilute the standards for the equitable treatment and effective protection of FDI. Nor does it mean that developing countries should not treat foreign investors on a par with domestic investors. The advocacy of this option only means that in pursuing their policies for the liberalisation and treatment of FDI, developing countries retain their freedom and flexibility to ensure that they are in accordance with their own developmental, political and social objectives.

6.3 A question may be asked whether India may lose its competitive edge in attracting FDI if it were not a party to an MAI (as demanded by industrialised countries) while some other developing countries agree to be a party to it. Even if this were to happen, there is no reason to believe that FDI flows to India will be adversely affected. Our strength lies in the potential size of our market. Coupled with our legal and institutional framework, and the quality and diversity of our human and natural resources, India will continue to be an attractive destination for foreign investment provided we maintain on our own a congenial investment climate and sound macro-economic conditions. Our approach to an MAI should not therefore be influenced by the apprehension that our not being a party to it will diminish our capacity to attract FDI, nor by the hope that our being a party to it will boost our receipt of FDI.

6.4 The availability of this option of questioning the need for an MAI rests, however, not on its desirability but on its feasibility. Unless the developing countries can show the collective will and strength to resist the pressures of developed countries, the launching of negotiations for an MAI will soon become a reality. The Uruguay Round experience, and more recently the developments leading to the Singapore Ministerial Declaration itself, do not inspire a great deal of confidence that developing countries will forge a common stand on this issue. More importantly, given the heterogeneity in the size and levels of development of these countries and in their overall objectives, the approach and attitude of individual developing countries towards an MAI may vary significantly from our own perceptions. Their being party to existing or planned regional, sub-regional and inter-regional arrangements will in particular influence their attitude towards an MAI. Developing countries which are or which propose to be members of regional integration arrangements such as NAFTA, APEC, ASEAN, AIA,

MERCOSUR and FTAA have on their agenda the complete liberalisation of trade and investment across the regions. It is quite possible that developing country members in these arrangements make take a regional stand and may be willing to negotiate an MAI on the basis that their specific concerns are addressed by the proposed MAI through substantive exceptions and sufficient transition periods. So far as the African and small developing countries, as well as the LDCs are concerned, they may take the view that even under the existing situation without an MAI, they are not receiving much of FDI, and so, they may look upon an MAI as a major measure to generate confidence in their investment environment. The national treatment issue does not raise the same degree of sensitivity when there is no significant FDI flow or when there are no domestic investors who could compete with foreign investors. The small developing countries may also feel that given their limited bargaining power vis-a-vis major economic powers, they might be better off with a multilateral agreement than if they were to negotiate bilateral agreements on their own. In this context, it is significant to note that the Communique of the latest G-15 Summit held at Montego Bay, Jamaica on 10-12, February, 1999 makes no reference to the trade and investment issue, although it does make a specific reference to the trade and labour standards and trade and environment issues. This perhaps reflects the divergence in their interests and attitude towards negotiating an MAI.

6.5 We need therefore to be prepared with and work for other possible options. The second best option from our standpoint is that if there is to be a multilateral agreement on investment, it does not go beyond the multilateralisation of the typical existing bilateral investment promotion and protection treaties. In essence, this means that such an MAI will comprise standards for fair and equitable treatment of investment (including the application of national treatment, MFN and transparency principles in the post-establishment phase of an investment), legal protection of investment and dispute settlement procedures. In other words, it will apply only to investments that take place in consonance with the host country's laws, regulations and procedures. It will not deal with the issue of pre-establishment phase national treatment. This does not imply that host countries should refrain from liberalising their FDI regimes or from guaranteeing pre-establishment phase national treatment to foreign investors. All that it means is that if a country wishes to do so, it may do so through its own autonomous policies and measures. The proposed MAI will not make it a legally binding obligation.

6.6 From the perspective of the international community, this option is not as unambitious as it may seem at first sight. The multilateralisation of the existing bilateral treaties will in itself be a significant advancement in this area as it will substantially address three of the four components (referred to in para 4.1 above) that make up the MAI being demanded by industrialised countries. It will not have only the component of liberalisation of FDI regimes through legally binding "market access" commitments. Furthermore, if this option is followed, it will avoid the need for following a negative or positive or hybrid list approach, or the

top-down or bottom-up approach, for liberalisation commitments, which has perennially been the most vexed and divisive issue of negotiating such multilateral agreements.

6.7 To follow this option, it is most important that the negotiating mandate itself confines the ambit of the negotiations to this approach. In other words, we need to press for the negotiating mandate itself making it clear that the envisaged multilateral agreement will apply only to investments that take place in conformity with the host country's laws, regulations and procedures. We need to argue that if the development dimension is to be built effectively and substantively into a multilateral agreement on investment, it is imperative that the agreement allows adequate freedom and flexibility to developing countries to pursue their liberalisation policies and reforms according to their own perceptions of their needs and circumstances. We need also argue that an agreement can be an investor-friendly agreement even when it covers only the post-establishment issues of fair and equitable treatment, legal protection and dispute settlement procedures.

6.8 We need to be prepared with a third option also if it transpires that the negotiating mandate does not exclude categorically the pre-establishment phase national treatment issue. We may come up against the conventional WTO euphemism that nothing should be pre-judged in negotiations. If the negotiating mandate does not clearly exclude the liberalisation or pre-establishment phase national treatment issue, then it is important to press for the following elements being clearly incorporated in the negotiating mandate:

- the development dimension being substantively and integrally built into the agreement by, *inter-alia*, ensuring adequate freedom and flexibility to developing countries to pursue their own policies towards foreign investment in accordance with their individual development strategies; and by recognising the need for the substantive provisions themselves being different for developing countries to meet their developmental needs

- the agreement addressing equally the issue of liberalisation of the temporary movement of skilled natural persons (This will at least bring in a measure of *quid-pro-quo* in the agreement)

- the agreement adressing the issue of the obligations of the investors

- the agreement recognising the need for developing countries fostering the development of tiny, small and medium enterprises

- the agreement recognizing the need for developing countries strengthening and upgrading their industrial and technological capabilities

- the agreement recognizing the sovereign rights of States over their natural and biological resources.

The reason for highlighting the above issues is that if the negotiating mandate clearly specifies such issues, it would help in building them substantively into the agreement through exceptions, exclusions and specific provisions to address them. The structuring of the whole agreement will be influenced by the negotiating mandate specifying in some detail the needs and concerns of the developing countries

6.9 Negotiations on the negotiating mandate itself are necessary to pursue the second and third options mentioned above to ensure that such a mandate paves the way for our concerns being substantially met by the resulting agreement. In other words, in case there is an "explicit consensus" that an MAI may be negotiated, then we need to press for the negotiating mandate being formulated on the lines mentioned in the second and third options.

6.10 We need also to examine the alternative proposals to be put forward by us for dealing with the pre-establishment phase national treatment issue, although this issue will come up for detailed consideration only when an MAI is actually negotiated. Since the bedrock of the envisaged OECD-MAI is the principle of non-discriminatory treatment as between foreign and domestic investors in all phases of an investment, including the entry and establishment phases, the draft OECD-MAI has followed a "top-down" approach to the liberalisation of foreign investment regimes by host countries. According to the draft OECD-MAI, national treatment in all phases of an investment is the standard rule, but deviation from it is permissible in two ways: (i) by "general exceptions" applicable to all countries on a permanent basis, and (ii) by "country-specific reservations", applicable to individual countries, which however should be reduced and removed over a period of time.

6.11 National security and public order will definitely qualify for "general exceptions". Some countries, like France, Canada and Belgium also wanted certain so-called "cultural industries", such as publishing, broadcasting, television and films, to be placed under "general exceptions", but this was not acceptable to the USA, and this difference was one of the factors contributing to the collapse of the OECD negotiations.

6.12 As for "country-specific reservations", each country has to lodge its "negative list" showing the industries or activities where the national treatment principle will not be applied. Nearly 700 pages of negative lists were lodged by the 29 member countries. The sheer magnitude of the negative lists was a dampener on the OECD's goal of achieving an ambitious and high-standard treaty, and was also a contributory factor to the collapse of the negotiations. The OCED negotiations, however, envisaged that the negative lists would be pruned over time through successive rounds of further negotiations.

6.13 The first preference of the industrialised countries will be for the 'negative list' approach to the national treatment issue, with "stand-still" and "roll-back" commitments being attached to such lists. This approach will place the maximum limitations on a host country's freedom to pursue its policies on admission and regulation of foreign investment. Some of the alternative approaches that India and other developing countries could advocate are the following:

- complete exclusion of pre-establishment phase national treatment issue from the purview of the MAI

- the applicability of the MAI only to investments that are made in conformity with each country's laws, regulations and procedures

- pre-establishment phase national treatment being voluntary and non-binding, as contained for example in the Energy Charter Treaty and the APEC Non-binding Investment Principles

- the "bottom-up approach of the General Agreement on Trade in Services (GATS), i.e., a positive listing of the sectors and activities by each country to which alone national treatment will apply, subject to the limitations stated in the list

- freedom to each country to prescribe the quantum of FDI above which alone it need grant national treatment. (This will help keep tiny, small and medium enterprises out of the ambit of the MAI).

VII. Co-ordination with other developing countries

7.1 The feasibility of pursuing the options outlined in the preceding section will obviously depend on the extent to which developing countries are able to co-ordinate their views and arrive at a common stand. As noted earlier, different developing countries may have different perceptions on the need for an MAI, its scope and ambit, the main issues and the possible ways of addressing them. We should therefore be prepared for a diversity of views among the developing countries and work towards finding mutually acceptable common positions. The up-coming G-15 meeting being hosted by us would give us an opportunity to test these and other options that may be suggested and to establish some modalities for developing countries discussing the issues involved on a regular basis to reach possible common positions. Even as we canvass support for our views, we should be willing to adjust our position to accommodate the viewpoints of other developing countries if it can help in forging a common stand that may be of benefit to all developing countries.

VIII. Harmonisation with our existing policies on foreign direct investment

8.1 It cannot be overemphasized that none of the options suggested in this paper should be understood as suggesting the adoption of a negative attitude towards foreign investment or towards the liberalisation of our foreign investment policies. The contribution that foreign investment can make to development and growth or the need for providing a congenial environment for attracting foreign investment is not questioned. All that the options argue for is that the liberalisation of foreign investment policies can be pursued through the autonomous route, out of conviction and not through compulsion, with each country having the freedom and flexibility to pursue its liberalisation policies, as a part of its overall economic and political policies, according to its own needs and circumstances.

8.2 Our existing policy is to welcome foreign direct investment, especially in the infrastructure, high technology and export oriented sectors, and to minimise the procedural and other impediments to the inflow of FDI. We are constantly expanding the areas where FDI is welcome even with 100 per cent foreign ownership. We are also continuously expanding the list of "priority industries" where FDI will be automatically approved with 51 per cent or 74 per cent foreign ownership. We had even indicated an objective of attracting $ 10 billion of FDI every year as compared to about $ 2 to 3 billion that we are receiving currently. Our legal framework and the bilateral investment treaties that we are readily concluding guarantee national treatment to foreign investors in the post establishment phase of an investment. Fair and equitable treatment of foreign investment, its legal protection, and dispute resolution mechanisms do not pose a problem under our existing policy, legal and judicial framework. We have a large domestic market, coupled with human and natural resources, that will induce foreign enterprises to access our market through investment and local production than through exports from abroad. Thus we have both the investment opportunities and the investment clilmate to attract large volumes of FDI that will serve our development and growth interests.

8.3 It is therefore extremely important that the views we advocate and the stand we take in international fora on the question of an MAI are in harmony with the policies we actually follow or plan to follow towards foreign investment. Our chief concern is that our sovereign right and freedom to screen, approve and regulate foreign investment, i.e. our right to regulate the entry and establishment of foreign investment according to our own policies, should not be curbed by any multilateral agreement. It is not our case that the host country environment, or a multilateral arrangement if it comes into being, should not be "investor friendly". Rather, it is our case that investment-friendliness can be ensured even without interfering with the sovereign right and freedom of host countries to regulate inward foreign investment. It is therefore important that we articulate our views from a positive rather than a negative angle. In case we overlook this aspect, we may unwittingly create a negative image about our attitude towards foreign

investment that may be inconsistent with the policies that we are actually following on our own.

Annex

Geographical distribution of world FDI inflows, 1983-1997

(Percentage)

Region/economy	1983-1988[a]	1991	1992	1993	1994	1995	1996	1997[b]
Developed countries	78.4	72.2	68.4	63.8	58.2	63.9	57.9	58.2
Developing countries	21.5	26.2	29.1	33.3	39.3	31.9	38.5	37.2
Africa	2.3	1.7	1.8	1.7	2.3	1.6	1.4	1.2
Asia and the Pacific	11.4	14.7	17.1	26.3	25.0	20.5	23.8	21.8
Latin America and the Caribbean	7.8	9.6	10.0	7.9	11.8	9.6	13.0	14.0
Central and Eastern Europe	0.1	1.6	2.5	2.8	2.4	4.3	3.7	4.6
World	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
In billion dollars	93.3	159.4	175.8	217.6	243.0	331.2	337.5	400.5
Memorandum :								
Selected economies in Asia and the Pacific								
China	2.0	2.7	6.3	12.6	13.9	10.8	12.1	11.3
Hong Kong, China	1.4	0.3	1.2	0.8	0.8	0.6	0.7	0.6
India	0.1	0.1	0.1	0.3	0.4	0.6	0.7	0.8
Indonesia	0.4	0.9	1.0	0.9	0.9	1.3	1.8	1.3
Korea, Republic of	0.4	0.7	0.4	0.3	0.3	0.5	0.7	0.6
Malaysia	0.8	2.5	2.9	2.3	1.8	1.2	1.4	0.9
Philippines	0.3	0.3	0.1	0.6	0.7	0.4	0.5	0.3
Singapore	2.1	3.1	1.3	2.2	3.4	2.5	2.8	2.5
Taiwan Province of China	0.5	0.8	0.5	0.4	0.6	0.5	0.6	0.6
Thailand	0.5	1.3	1.2	0.8	0.5	0.6	0.7	0.9
Selected economies in Latin America and the Caribbean								
Argentina	0.5	1.5	2.3	1.2	1.3	1.4	1.5	1.6
Brazil	1.6	0.7	1.2	0.6	0.9	1.5	3.3	4.1
Chile	0.5	0.3	0.4	0.4	0.7	0.5	1.2	1.4
Colombia	0.6	0.3	0.4	0.4	0.7	0.7	1.0	0.6
Ecuador	0.1	0.1	0.1	0.2	0.2	0.1	0.1	0.1
Mexico	2.4	3.0	2.5	2.0	4.5	2.9	2.4	3.0
Peru	0.01	-0.004	0.1	0.3	1.3	0.6	1.1	0.5
Venezuela	0.1	1.2	0.4	0.2	0.3	0.3	0.5	1.2

Source : UNCTAD, FDI/TNC database

[a] Annual average

[b] Estimated

Report of Discussions

Welcoming Mr. Ramakrishna Hegde, the Commerce Minister and the participants, Dr. Isher Judge Ahluwalia observed that the question of establishing a multilateral framework of rules on foreign investment within the ambit of the World Trade Organization (WTO) was now gaining momentum and would be a major issue for consideration in the Ministerial Conference of the WTO to be held in Seattle later this year. The objective of the Seminar, she explained, was not to discuss whether or how we should liberalise our foreign investment policies, but to focus on the options available to us in responding to the demand for establishing a multilateral agreement on investment (MAI). This seminar was a part of a series that ICRIER proposes to hold in order to generate a national debate on various WTO issues.

Introducing his discussion paper, Mr. A.V. Ganesan stated that the driving force behind the demand of the industrialised countries for an MAI was the recognition that foreign investment was increasingly becoming a key vehicle for transnational corporations (TNCs) to gain and consolidate market access opportunities around the world. That is why the cornerstone of the MAI being demanded by the industrialised countries was the liberalisation of the foreign investment regimes of host countries and the establishment of a `level playing field' or non-discriminatory treatment between foreign and domestic investors in all phases of an investment, including the pre-establishment or admission stage. Mr. Ganesan argued that considering the economic and non-economic factors that influenced foreign investment flows to developing countries, an MAI could at best be a confidence building measure, but it would not by itself be a major factor in attracting foreign investment to a host country. India's response to the demand for an MAI should not therefore be influenced by the expectation that joining an MAI would help us attract more foreign investment, nor by the apprehension that if we remained outside an MAI, we would lose foreign investment or be at a competitive disadvantage vis-à-vis other countries.

Explaining the three options contained in his paper, Mr.Ganesan stated that the first, and possibly the best, option from our viewpoint was to question the need for an MAI at this juncture and to argue for the continuation and strengthening of the existing trends and arrangements relating to foreign investment. Pursuant to this option, we could at best agree to the Working Group on Trade and Investment (appointed under the Singapore Ministerial Declaration of December 1996) to continue with its study. In case there was not enough support for this option and the negotiation of an MAI became unavoidable, our second best option would be to ensure that the proposed multilateral framework was confined to investments that took place in consonance with the host country's laws, regulations and administrative procedures. Care must also be taken to see that it did not extend to issues related to the entry and establishment of an investment, such as the pre-establishment phase national treatment. In essence, this option

would be tantamount to the multilateralisation of the existing bilateral investment promotion and protection treaties that we were concluding with other countries. If even this option was not found feasible, the third best option would be to ensure that the "development dimension" issues were adequately built into the negotiating mandate itself by incorporating specific elements such as those outlined in the discussion paper. Mr. Ganesan also suggested that in case negotiations were initiated on any kind of an MAI, they should go hand in hand with similar negotiations for an agreement on competition policy, further both agreements should come into operation simultaneously.

Mr. Ganesan's presentation was followed by the comments of the discussants, Mr. Pradeep Mehta, Secretary General, CUTS, Jaipur; Mr. Deepak Singh, CII; and Mr. Muchkund Dube, former Foreign Secretary to the Government of India.

Mr. Pradeep Mehta agreed generally with the analysis contained in the discussion paper and favoured the first option as there was no credible evidence that a multilateral agreement was needed to boost FDI flows to developing countries. In case the first option did not materialise, it would be necessary to ensure that the envisaged framework stopped at the second option. He also emphasized the need for a simultaneous competition policy framework and for adequate caution on the implications of the proposed dispute settlement procedures.

Mr. Deepak Singh observed that Indian industry was not afraid of competition, but such competition must be fair and there must be a `level playing field' that offset the disadvantages suffered by the domestic industry. He expressed the view that an MAI should not be seen in isolation of other issues pertaining to globalisation and that it should not cover the pre-establishment phase treatment of foreign investment.

Mr. Muchkund Dube maintained that the first option contained in the discussion paper was the best option, but our opposition to an MAI should be based on positive arguments, as suggested in the paper, and not on negative considerations. An important additional argument that we should highlight is the experience of the OECD negotiations on the same subject. When 29 like-minded countries could not come to an agreement on pre-establishment phase national treatment and other issues, how was it realistic to expect 134 countries with different interests and perceptions to arrive at a meaningful agreement? He felt that the third option was no option at all because it was naïve to expect that the mere mention of the phrase `development dimension' in the negotiating mandate would lead to contractually enforceable provisions in the body of the agreement. His views was that if we did not succeed with the first option, we should keep out of the negotiations on investment. He argued that if we got into the negotiating mode as in the second or third options, we could not be sure how we would emerge from the negotiations.

In the discussions that followed, various views were expressed both on the options best suited to us and on related matters. It was pointed out that the industrialised countries had begun a process, since the last several years, to establish a new world order based on the five pillars of “democracy, human rights, free markets, environment, and peace and social order”. The proposed MAI for free movement of capital and abolition of the distinction between foreign and domestic investors was but a component of the larger drive towards free and open markets. The clauses and areas of concern to us in an MAI were “expropriation, entry level protection for host country, dispute settlement mechanism, obligations of TNCs and investors, transfer of technology obligations, and restraints on rogue companies”. It was suggested that right at the outset, we should express our concerns and point out what an MAI should and should not contain from our perspective.

Based on the experience of the Uruguay Round Agreements, another view expressed was that we were not actually realising the benefits we were supposed to from certain agreements because we had not prepared ourselves for the changes, nor had we put in place the supportive measures needed to realise the benefits (e.g. the textiles and agriculture agreements of the Uruguay Round). The apprehension was that in a similar way, the MAI would become a reality because of the pressure of the industrialised countries, but we would be slow in preparing ourselves for the changes necessary to cope with the new situation.

The nexus between investment and competition policies was also highlighted in the discussions. It was pointed out that liberalising investment policies alone without paying attention to its effects on competition in the market place would be shortsighted. In this context, the need for strengthening our competition laws was emphasised.

There was general agreement on the point made in the discussion paper that there was no empirical evidence to show that an MAI would by itself augment FDI flows to developing countries or significantly alter the existing pattern of distribution of FDI flows among developing countries. On the contrary, the available empirical evidence suggests that countries which had followed selective and judicious policies of intervention had in general attracted better quality FDI flows.

With respect to the options suggested in the discussion paper, the preponderant view was in favour of the first option, namely, that we should oppose the negotiation of an MAI because it was oriented towards the interests of the TNCs and its main long term objective was to eliminate the distinction between domestic and foreign investors. In this context, several arguments were advanced, i.e., that the agenda of the WTO was getting overloaded with newer and newer issues favourable to the industrialised countries, that the economic sovereignty of the developing countries was getting eroded, and that the policy

options available to developing countries to pursue their developmental strategies were getting circumscribed. In the event of Option I not being available for any reason, the preponderant view was that we might consider falling back on Option II. But it would not be advisable for us to consider Option III because that would ultimately lead to a full-blown MAI under the WTO. The need for an MAI addressing equally the obligations of the investors was also emphasized in case Option II came into play.

There was also a strong viewpoint questioning our opposition to an MAI and arguing that we should straightaway go to Option II. It was stated that there was no logical basis to our opposing an MAI when we were readily signing bilateral investment promotion and protection treaties with a number of countries. It was in our interest to show a positive approach and agree to an MAI that simply multilateralised the existing bilateral treaties. It was pointed out that in the old GATT era, it was possible for us to say `no' to whatever demands were made on us for lowering trade restrictions and get away with being a `freer rider' on the multilateral trading system. But it was time that we changed our mindset because the new system was built on *quid pro quo* and reciprocity. It was therefore essential that we approached all issues from a positive rather than a negative angle and that we articulated what was acceptable to us rather than opposing every demand put forward by others. Our negative approach had in the past eroded our credibility and effectiveness in the negotiations and ultimately we had failed in realising our objectives. The pursuit of Option II, which was in consonance with our present policies and practices, was therefore a better proposition than Option I.

In the discussions that followed the articulation of the above viewpoint, it was pointed out that if we started with Option II as our first position, it was unlikely that it would be the final resting position. Rather, the negotiating mandate might go even beyond Option III and pave the way for a full scale MAI as contemplated by the industrialised countries. It was important to bear in mind that the MAI being advocated by the other side involved not only the question of pre-establishment phase national treatment, but also the abolition of a variety of performance requirements. Existing bilateral treaties avoided both these issues. Beyond this tactical risk, the question of accepting Option II depended crucially on the *quid pro quo* for us in agreeing to negotiate an MAI. This *quid pro quo* would obviously have to come from an area other than the MAI issue. Our approach to a fallback on Option II would therefore have to be based not only on the nature of the negotiating mandate with respect to an MAI *per se*, but also on the adequacy of the *quid pro quo* that we received in other areas of the negotiations.

Summing up, Mr. N.N. Khanna, Special Secretary, Ministry of Commerce observed that the discussions revealed a large measure of consensus on Option I and that, equally, seemed to rule out Option III. With respect to Option II, however, there appeared to be two viewpoints. One favoured our going in for this

option straightaway and reinforcing it, the other favoured our adopting this option as a fall back position in the event of our inability to realise Option I and our getting sufficient *quid pro quo* in other areas of negotiations. He also thought that Option III was not opposed to Option II and that under certain circumstances, Option II could recede into Option III. Mr. Khanna concluded by stating that all the views expressed by the participants would be given due consideration by the government and that much would depend on how the negotiations and the thinking of the various groups of countries evolved in the run-up to the Seattle Ministerial.

Giving his concluding observations, Mr. Ramakrishna Hegde, the Commerce Minister assured the participants that India would participate in the negotiations at the WTO, but would not allow the industrialised countries to rush through the new issues. As the experience at the last Ministerial Conference in Geneva in May, 1998 revealed, if the developing countries showed their strength collectively, it would not be possible for anybody to ride roughshod over their interests. The government was keen to follow a two-pronged approach to the WTO negotiations : first, to build up a national consensus on WTO matters in an open and transparent manner through interaction, discussions, and debate with political parties, the business community, intellectuals and other interested sections of society, and secondly, to build up, to the extent possible, a consensus among the developing countries and least developed countries. For example, recently there was a dialogue with the SAARC countries, while a meeting of the G-15 countries on WTO issues is scheduled in Delhi in August. With respect to the demand for an MAI, Mr. Hegde was of the view that there should be a balance between the interests of the investors and those of the host country. There was no doubt that the foreign investor was guided by his self-interest, but this could be done without hurting the interests of the host country. The harmonisation of the two interests would need to be our main concern in dealing with foreign investment. In this context, he suggested a study of the experience of China which has successfully attracted a large volume of foreign investment flows in tune with its own policies. Mr. Hegde thanked ICRIER for holding the seminar and expressed the hope that such seminars would promote a national debate on various important WTO-related issues.

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