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The New Issues

The preparatory process for the Third Ministerial Conference of the World Trade Organisation (WTO) established by the Ministers of WTO member countries through the Geneva Ministerial Declaration of May 1998 included consideration of various sets of issues in special sessions of the General Council of the WTO held from time to time in Geneva to enable members to take decisions at the Third Ministerial Conference. Some of the sets of issues are loosely referred to as “New Issues”. These new issues are:

- **Trade and Investment**
- **Trade and Competition Policy**
- **Transparency in government procurement**
- **Trade facilitation**

(All the above issues emanate from the work programme initiative at the First Ministerial Conference of the WTO at Singapore held in December 1996)

- **Trade and Environment**

(Future work for this was already provided for under existing decisions taken at the Marrakesh Ministerial Meeting in 1994 following conclusion of the Uruguay Round of multilateral trade negotiations)

Others

- **Labour standards or The Social Clause**
- **Industrial tariffs: New Round of negotiations**
- **Global Electronic Commerce**
- **Coherent Global Architecture**

Trade and Investment

The existing GATT/WTO rules do not directly create any multilateral disciplines for the flow of investments. The existing Agreement on Trade Related Investment

Measures (TRIMs) states that certain investment measures can restrict and distort trade and seeks the elimination of TRIMs inconsistent with GATT. The Agreement contains an illustrative list of TRIMs inconsistent with GATT. The list includes measures which require particular levels of local procurement by an enterprise (“local content requirements”) or which restrict value or volume of imports such an enterprise can make or use to an amount related to the level of its exports (“trade balancing requirements”). The Agreement requires notification of all non-conforming TRIMs and their elimination within two years for developed countries and within 5 years for developing countries from the date of signing of the Uruguay Round Agreement. This Agreement also calls for a review of the operation of the Agreement by 1 January 2000, when it will also be considered whether it should be complemented by provisions on investment policy and competition policy.

Meanwhile, Ministers at the first Ministerial Conference of the WTO held in Singapore in December 1996 (the “Singapore Ministerial Declaration”) decided to set up a Working Group on Trade and Investment to initiate a discussion on the subject in the WTO in order to study the relationship between trade and investment. While this work is continuing in the WTO, a number of countries led by the European Union (EU) have been pressing for a Multilateral Agreement on Investment (MAI). Discussions in the OECD (Organisation for Economic Cooperation and Development) on the proposed MAI having failed to make much headway, pressure has been mounting to bring this issue on the negotiating agenda of the WTO. The framework of the Agreement on Investment proposed by the EU envisages national treatment at the post-establishment stage for foreign investment along with

voluntary commitments in chosen sectors at the pre-establishment stage. The definition of foreign investment being proposed for coverage includes not only greenfield foreign direct investment (FDI) but also mergers, acquisitions etc. Grant of national treatment at pre-establishment stage, which would mean the right of entry and establishment on par with domestic investors, could pose serious problems to developing countries in the active pursuit of their developmental objectives and in directing investment to desired economic activities. The approach for national treatment suggested by EU is also beset with the apprehension of subsequent enlargement, which could curtail the country's sovereign right to screen investments.

Several questions would arise regarding the ongoing debate on the issue: (a) the most fundamental issue relates to the need for a multilateral agreement on investment in the context of development. There is no convincing evidence to show that there will be an increase in flows of foreign direct investment on account of a multilateral agreement on investment. Investment flows are dependent more on the health of economies than on multilateral agreement; (b) a second issue relates to whether there are perceived inadequacies in the existing instruments that point to the need for an MAI; (c) the more general issue is whether an overloaded system can take on a major additional area of work and whether developing countries have the resources to effectively handle such expansion in the area of global agreements; (d) another issue relates to the possibility of cross retaliation through the dispute settlement mechanism; (e) such an agreement could negate the rights of member countries to direct investment in such manner that it promotes growth without endangering the balance of payment position; (f) there is also the issue relating to restrictive business practices of transnationals, their enormous financial clout which can threaten small and medium industry in developing countries and investor obligations; (g) another issue

relates to the preservation of the State's sovereign rights over its natural and biological resources; and (h) it is also asked whether, if at all discussion on investment is to take place, is it not necessary to examine the movement of all factors of production, including labour, without restricting discussions to just one factor, namely, capital. There are many other issues relating to investment which need to be carefully examined through open ended continuation of the educative process already initiated.

Trade and Competition Policy

A Working Group was established to study the relationship between trade and competition policy as mandated by the Singapore Ministerial Declaration. EU is the main proponent for a multilateral agreement on Competition Policy. The major elements of the framework agreement being mooted by EU include enactment, by all members, of a national competition law based on the principles of non-discrimination and transparency; effective enforcement of such a law; harmonisation of competition principles of the member countries; and cooperation among member countries in dealing with anti-competitive practices extending to more than one member. While the EU proposal targets restrictive business practices of multinational corporations, it also targets government policies that limit competition or encourage state monopolies or dominant market position to state undertakings. The proposal, therefore, seeks to open these areas to competition from foreign and domestic private entities. While competition policy relating to government policies and practices with a competition angle and having cross border effects are being targetted by developed countries, the interests of developing countries lie in targetting such measures undertaken by enterprises in member countries, with cross border effects.

The net benefits accruing to the developing countries due to the adoption of multilateral rules in the area of

competition policy depend on the details of the elements that may be identified during the discussions.

Government Procurement

There is at present no multilateral agreement on Government Procurement.

Government departments, agencies and public utilities all over the world spend large amounts on procurement of goods, services and construction services to meet their needs. Governments are generally the largest single spenders in any country. Estimates by the WTO indicate that procurement by government entities constitute 10-15% of the GDP of the countries.

Government Procurement is an important instrument available at the disposal of governments to direct investment to desirable sectors, social/economic groups and underdeveloped regions. Purchase and/or price preferences can be used by government entities to encourage production by small scale or other preferred sectors serving social objectives. Besides, development of backward regions can also be encouraged by giving purchase/price preferences to items manufactured in such regions. In view of this social objective dimension, procurement by government entities has been exempted from the core WTO obligation of national treatment. National treatment obligation (requiring non-discrimination as between domestic products and those imported into the country) does not apply to the "laws, regulations, or requirements governing procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in production of goods for commercial resale" [GATT Art.III.8(a)]. However, a limited membership Agreement on Government Procurement (GPA) was signed in 1979 as a result of Tokyo Round

Trade negotiations, but separately, the parties to this limited Membership Agreement negotiated to extend its coverage. This resulted in the Government Procurement Agreement (GPA). As GPA is only a plurilateral agreement, covering only specified entities in member countries party to the Agreement, there have been concerted efforts to multilateralise GPA. India is not a member of GPA.

The Singapore Ministerial Conference established a Working Group on 'Transparency in Government Procurement' with a view 'to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'.

During the more than two years of the Working Group process various elements of transparency in public procurement have been discussed. However, there has been no consensus even on the definition of Government procurement or on the scope of government procurement for coverage in a multilateral agreement on transparency. The position that India has been taking in the Working Group has been that while transparency in the public procurement process is important and India is already having a transparent public procurement system, discussions in the Working Group have not progressed to the stage where an agreement on transparency can be negotiated. Besides, the elements being proposed to be included in the agreement by some Members and their 'building block' approach go beyond 'transparency' and is not acceptable. The right of WTO Members to make and modify public procurement rules and to maintain price/purchase and other preferences to small scale and other specified sectors or groups cannot be compromised in a transparency arrangement.

Trade Facilitation

The advocates of trade facilitation in the WTO believe that inefficient and unnecessary import, export and customs procedures impede trade. They further argue that the WTO, as the main organisation for international trade, has a natural role in setting rules and in promoting existing international standards with a view to simplify, harmonise and automate procedures, reduce red tape and documentation, and increase transparency. In view of the above, it is being argued by developed countries that developing a set of WTO commitments in this field is vital.

The majority of these issues are a part of the revised Kyoto Convention, the final report of which has already been ratified by the World Customs Organisation (WCO) in June 1999. In view of the fact that many international organisations and the WCO in particular, are considering the issues relating to Trade Facilitation under their auspices, there is no real need for the WTO to duplicate the work.

The EU, who are strong supporters of an initiative in the WTO in this field, consider that it is a win-win situation for all concerned and that simplifying customs procedures would lead to increase in trade and investment. In the event that a multilateral set of rules on trade facilitation is made part of the agenda, it may be restricted to simplification of customs procedures and electronic data interchange in trade transactions. However, developing countries need to be provided assistance for capacity building to implement these procedures and also transition period for completing the same, since for time bound commitments for speedy clearance of consignments countries may lack the infrastructure to discharge contractual obligations. While facilitation of trade is an issue that should legitimately be tackled within the WTO, the proposal being pushed by certain developed countries will bring customs procedures within the WTO system, including its retaliatory provisions.

Trade and Environment *

A Ministerial Declaration on Trade and Environment was adopted in Marrakesh on April 14, 1994, just before the signing of the Uruguay Round Agreement. It established a Committee on Trade and Environment (CTE) to identify the relationship between trade measures and environmental measures and to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required for the promotion of sustainable development. The Decision also required the CTE to give its recommendation to the WTO's first Ministerial Conference.

The CTE had intensive discussions on a ten-point agenda for two years where some developed countries wanted widening of the scope of Article XX to GATT 1994 to exclude trade measures taken for environmental purposes from applicability of GATT disciplines. India and most other developing countries resisted this. Finally, the CTE sent a factual report to the Ministers at Singapore. The Singapore Ministerial Conference directed the CTE to continue its work and to report to the General Council of the WTO. This work has been continuing in the Committee.

India has been active in the CTE deliberations and was instrumental in developing a balance on the issues being discussed and conclusions and recommendations formulated in that body. This was possible because India developed its own positive agenda to counter the agenda of the developed countries. India has made several proposals in the CTE. The most important among them relate to transfer of environmentally sound technologies and products on affordable terms, rewarding indigenous knowledge and bio-diversity utilised in creating IPRs, and safeguarding and enhancing market access of developing countries in the face of increasing environment related barriers.

* The issue of Environment is not strictly a new one as it was included in the agenda of the Uruguay Round Agreement signed at Marrakesh in 1994 with the setting up of a Committee on Trade and Environment.

A number of concerns have been expressed by developing countries on the issue of environment. While work already accomplished in the CTE must provide the starting point, measures taken for environmental purposes should not be allowed to be used as protectionist devices. Further, there should be clear recognition that environmental standards differ from country to country and that the solution lies in mutual recognition of product-related standards rather than harmonisation of standards. It is also imperative that while developing environmental requirements, members should take into account the need to safeguard existing market access of developing countries and the need to increase their market access further in order to facilitate sustainable development.

Meanwhile, pressures are mounting from developed countries, especially EU and the US, for substantive decisions to be taken at the Third Ministerial Conference on this issue. They propose to address the environmental concerns through the respective negotiating groups on sectors and issues mandated by the Third Ministerial Conference, thereby bypassing the balance existing in the CTE. There are also attempts to widen the scope of Article XX of GATT 1994 and of bringing non-product related Process and Product Methods under WTO disciplines. Developing countries, including India, have been taking the stand that environmental issues should be addressed through Multilateral Environmental Agreements and relevant bodies and that the present WTO disciplines adequately address environmental concerns.

Labour Standards

The issue is about the linkage between Trade and Labour Standards. A number of developed countries have been strongly advocating a link up between these issues and the need for WTO to engage in efforts to ensure respect

for such core labour standards. According to them, labour rights and trade liberalisation are mutually reinforcing.

India's position along with that of many developing countries has been that it is fully committed to the observance of labour rights and promotion of labour welfare through its domestic policies. However, the issue of labour standards at the international level can be appropriately addressed only in the ILO and not in the WTO. The use of trade measures to enforce labour standards is a protectionist device and has to be rejected.

The Singapore Ministerial Declaration of December 1996 had vindicated the above stand taken by the developing countries and had rejected the use of labour standards for protectionist purposes. Further, it had reaffirmed that ILO is the competent body to deal with these standards. However, both US and EC have submitted formal proposals in the General Council recently. The US proposal is more ambitious and envisages setting up of a Working Group in Trade and Labour in the WTO which would produce a report for consideration by Minister by the 4th Ministerial Conference. The EC proposal advocates the creation of a Joint ILO/WTO Standing Working Forum on Trade, Globalisation and Labour Issues. Both these proposals are unacceptable as they include items specifically rejected by the Singapore Ministerial Declaration (SMD).

Industrial Tariffs

Under the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 following the Uruguay Round, member countries had submitted schedules indicating the rates of duties which may be charged by the conditions of qualifications set forth in the schedule. The schedule is divided into two sections, one for agricultural products and another for other products (industrial products including textile items).

The tariff reduction programme commenced from March 1, 1995. The duties are required to be brought down in six equated instalments to the committed bound levels by March 1, 2000 for industrial products other than textile items. As regards textile items, the phase out period extends up to March 1, 2005. This effectively means that for industrial tariffs other than textile items, the schedule comes to an end in the year 2000. Pressure has, therefore, started for a fresh round of negotiations of industrial tariffs, including textile tariffs. Though the GATT 1994 has not specifically mandated any specific time frame for any further negotiations for reduction of tariffs, Article XXVIII provides that the contracting party may sponsor such negotiations from time to time.

From the developing countries' point of view, the issue of renegotiation of industrial tariffs has to be dealt with essentially from the perspective of the domestic industry and the exporters although there are revenue implications as well. Lowering of industrial tariffs further may mean increased competition for the Indian industry. On the other hand, lowering of tariffs by the major markets of our interests may mean greater market access to our exporters. A brief analysis of the tariff peaks in the developed countries indicates that the average level of 3.8 per cent tariff in the post Uruguay Round period for developed countries does not provide a correct picture about the market access allowed to the exports of developing countries like India. This is because of the existence of 'tariff peaks' and the phenomenon of 'tariff escalation' particularly for the products of export interest to India and other developing countries. There is evidence to suggest that both, the level and frequency of tariff peaks are high for products of export interest to the developing countries. For instance, the trade weighted average tariff of the developed countries for textiles and clothing and leather is as high as 12.1 per cent. As

examples of tariff peaks on individual products, Japan has 160 per cent tariff on footwear with leather uppers, USA has 79 per cent on raw cotton, 58 per cent on sports footwear with textiles uppers and 33 per cent on watch movements, and EU has 22 per cent on certain women's dresses. Therefore, there seems to be a possibility of higher market access by seeking reduction of tariff peaks for products of export interest to India, notwithstanding the fact that such reduction or elimination of tariff peaks to be meaningful has to be accompanied by removal of non-tariff barriers.

Another area of concern for the exporters is the emergence of large regional trading blocks, customs unions and free trade areas which have either a preferential internal duty structure or a duty free regime within the Regional Trading Arrangement. Some of these blocks have, as its members, both developed as well as developing countries. This trend suggests that the long term solution for rectifying the resultant discrimination faced by products from countries like India lies in global reduction of tariffs which will make such regional arrangements increasingly irrelevant from a tariff perspective.

A fresh round of negotiations may, however, mean some additional competition from outside to the domestic industry in India and also less flexibility to raise tariffs. India has, however, as a part of the reform process, kept its tariffs significantly lower than the bound levels. However, any fresh round of tariff negotiation will take time to conclude and implementation will commence only thereafter, in phases.

Global Electronic Commerce

The Second Ministerial conference of the WTO at Geneva adopted a Declaration to commence a work programme to examine all trade related issues on this subject in the

General Council of the WTO, for making any recommendations for action at the Third Ministerial Conference. Without prejudice to the outcome of the work programme, it was also decided to continue with the current practice of not imposing customs duties on electronic transmissions.

A process is now under way in the General Council of the WTO to discuss and deliberate upon this work programme. These include issues relating to characterisation of electronic commerce, dutiability of electronic transmissions, protection and enforcement of trademarks and issue of control on access to new technology and on its transfer and dissemination. Thus, the development dimension of liberalisation of electronic commerce needs to be fully integrated into the process.

On the issue of rollover of the standstill on customs duties on electronic transmission, the majority of members would like to continue with the standstill. The EU has, however, indicated that they would not agree to such extension of the standstill unless there is an agreement on a satisfactory outcome of the work programme, by the time of the Third Ministerial Conference at Seattle.

India perceives information technology as an area of comparative advantage for itself, and has, therefore, not opposed the current initiatives on electronic commerce. However, along with a decision to rollover the standstill on customs duties for a period of 2-3 years, a suitable way will need to be found to address the important issues raised in the work programme. We also need to see that our options to levy domestic taxes on services, in the

nature of 'service tax' do not get circumscribed when services are electronically traded, as this is an important potential area for augmenting our revenue resources.

Coherence in Global Economic Policy Making

The Marrakesh Ministerial Declaration of 1994 mandated cooperation between WTO, the IMF and the World Bank with a view to achieving 'greater coherence in the decision making'. It was specified that 'the confidentiality requirements and the necessary autonomy in the decision making procedures of each institution, and avoiding the imposition on government of cross-conditionalities or additional conditions' should be respected. Accordingly, agreements have been signed by the WTO with IMF and World Bank. Cooperation between these organisations is in the form of regular consultations and reciprocal participation in meetings. The EU, which is the main protagonist of this issue, is seeking to expand the 'coherence mandate', by trying to further cement the existing linkage between IMF and World Bank and WTO and developing similar linkages with other international organisations like UNCTAD, UNEP, UNDP, WCO, ILO, FAO and WHO. However, it is necessary to ensure that greater policy coherence between WTO, IMF, World Bank and other such international organisations are not used for imposing cross conditionalities which could further narrow down the policy options for developing countries. It should also not result in dilution in the responsibility for addressing the development dimensions of WTO issues by developed country members of WTO.



India's proactive agenda for Seattle - Market access the key issue

India has good cause to be optimistic about the WTO Ministerial Meeting to be held in Seattle in November 1999. India's most important objective was to gain market access as an outcome of Seattle discussions. This is because the kind of market access for developing countries that was supposed to come out of the Marrakesh Ministerial never materialised, for various reasons, Mr. P.P. Prabhu Commerce Secretary said at a National Seminar on "WTO: Indian Industry's Agenda for the New Millennium" organised by the Confederation of Indian Industry (CII) on 16th September 1999 in New Delhi.

Mr. Prabhu said that India was ready with its proactive agenda, though the focus was now sector-specific mandates, covering what issues must be brought up at Seattle, and what the terms and conditions for each issue would be. These positions should be based on a process of consensus-building within the sectors. He said that India's position was that the Seattle Ministerial should focus on the built-in agenda and its implementation.

On the issue of the internal constraints faced by Indian industry, Mr. Prabhu said that it was unlikely to be accepted under the WTO that a country needed more transition time because of internal constraints. Competition could force and expedite the process of internal reforms, felt Mr. Prabhu.

Commenting on Regional Trading Agreements (RTAs), Mr. Prabhu said that these were permitted and hopefully strong RTAs which aim to bring tariffs down would support and further the objectives of the WTO.

The Seminar was attended by over 200 delegates from all over India. The Ministry of Commerce participated with a very high level presence. Mr. Rahul Bajaj, President, CII, outlined CII's views. Mr. N.N. Khanna, Special Secretary (WTO), Ministry of Commerce, also addressed the Seminar.

Mr. N.N. Khanna addressed some specific sectoral concerns that were brought up. On the issue of industrial tariffs, he said the problem of tariff peaks could only be addressed at Seattle if the issue of industrial tariffs as a whole was brought up, and this was at present not on the agenda. Several countries were able to gain greater protection than India from industrial tariffs as they had agreed to industrial tariffs on a specific basis, while India had negotiated tariffs on an ad valorem basis. However, India had only bound 62 per cent of its tariffs, and still needed to bind the rest 38 per cent, said Mr. Khanna. India also needed to decide what the best approach for binding industrial tariffs would be.

On the issue of the Agreement on Anti-Dumping, Mr. Khanna said that India would seek to enlarge certain windows that existed for developing countries, However, it would not be pushing for a completely new agreement as this would be a very difficult process, he added. Mr. Khanna further said that India was very much opposed to the misuse of anti-dumping as a NTB (Non Tariff Barriers).

On the Agreement on Textiles and Clothing, Mr. Khanna said that though there was great advantage for developing countries in the integration of textiles into the rest of the

world trading order, the danger of negotiating on this issue was that the full integration of this sector could be further pushed back from the present date of 2005.

Mr. Khanna outlined the issues that particularly affected industry as agriculture, tariffs and services. In particular, India must come to a negotiating position on services as the present governmental regimes governing services could be drastically changed under the multilateral trading system.

Mr. Rahul Bajaj President, CII, stressed on the importance of balancing free trade with national interest pointing out that India was a developing country suffering from severe competitive disadvantages, and thus needed a certain amount of transition period. He said that internal reform and competition should precede international competition, and said that issues such as labour laws, cost of finance, power supply needed to be addressed

immediately. He also said that India should formulate a subsidies regime that was fully WTO- compatible.

Mr. Bajaj suggested that India outline the major issues that affected it and then look for support from other countries that shared that same views. Consensus on all issues was impossible, added Mr. Bajaj, so issue-wise concern must be the focus. On the Multilateral Agreement on Investment (MAI), Mr. Bajaj said that though post-establishment all foreign investors must be given national treatment, every country had the right to choose the kind of foreign investment that came into the country. Mr. Bajaj strongly opposed the proliferation of non-tariff barriers (NTBs), saying that these were against the spirit of the WTO.

Mr. P.P. Prabhu also released a CII - Rajiv Gandhi Foundation book on "The WTO Millennium Round - Towards a Negotiating Agenda for India".

(Source: CII release)

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

A discussion paper by

A.V. Ganesan

(Some Excerpts)

1. Introduction

The question of establishing a legally binding Multilateral Agreement on Investment (MAI) within the ambit of the World Trade Organisation (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, 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 'Millennium 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 Millennium 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-judgement 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 the negotiations 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 both 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 under-pinned them, will propel the demands of the industrialised countries when the scene shifts to WTO for establishing multilateral rules on investment.**

Against this background, the discussion paper seeks to analyse the options available to India in responding to the demand for an MAI, the key issues of an MAI, and the possible approaches that we can consider in dealing with those issues. 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.

Reasons behind the demand for an MAI :

There are, first, the traditional reasons for industrialised countries wanting an MAI. They are the main capital-exporting countries. Nearly 85 per cent 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 rising trend in the volume of FDI flows and their destination to developing countries.

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. Due to the advancements in various kinds of technologies, FDI is increasingly becoming more important than trade for delivering goods and services to foreign markets, and 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.

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. Nearly one-third of the world trade is intra-firm trade between affiliates of TNCs, while another one-third of the world trade is between TNCs and non-affiliated enterprises. It is only the remaining about one third of the world trade which remains outside the control or influence of the TNCs.

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.

Main Components of an MAI as advocated by industrialised countries

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 as 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 corner-stone 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 European 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...

Differences between the proposed MAI and our own foreign investment regime

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 operation phase of an investment.** Once an investment is made and a business entity is established, our laws apply equally 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.**

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 and it still involves a foreign investor going through a process that is not applicable to a purely domestic investor. Thus, the pre-establishment phase national treatment standard will cut at the roots of our existing policy and regulatory framework for foreign investment.

The second critical area of difference lies in the **definition of investment.** The intention of the industrialised countries is to have the widest possible definition for investment so that it covers every conceivable kind of an 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 debt capital, 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 applicable conditions 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 only. 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...

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, the proposed MAI will go far beyond the TRIMS Agreement in listing and prohibiting performance requirements.

Approach to an MAI

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 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...

* Trade Related Investment Measures

We need to emphasise 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 lessen 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 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.**

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) and if 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 by it. Our strength lies in the potential size of market.

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 climate to attract large volumes of FDI that will serve our development and growth interests.

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.

Monthly update from PMI*/Geneva

(15th August - 15 September, 1999)

The WTO was closed for vacation during the month of August 1999 and therefore there was no specific activity to report for the second fortnight of August 1999.

During the first fortnight of September 1999, the General Council met informally on September 8, to consider the leftover agenda items from the July meeting mainly relating to environmental issues, Technical Barriers to Trade (TBT), Trade Related Intellectual Property Rights (TRIPS), technical assistance, capacity building, coherence, industrial tariffs etc. At this meeting new proposals submitted by Members were briefly considered. It was also decided that though the majority of the proposals had already been submitted by Members, the second phase of the preparatory process should be allowed to continue, at least till the end of September, so that Members could submit their remaining proposals.

At the end of this meeting, the Chairman of the General Council (GC) circulated a draft outline of the Ministerial text to the Members, which he explained that he had

prepared on his responsibility and which was not intended to prejudice the position of any Member. One important feature of the outline is that 'implementation' has been included under the section titled "Future WTO Work Programme" . In addition there is also a reference to "immediate action on certain implementation problems". Since we have from the outset of the preparatory process been highlighting the importance that we attach to the redressal of implementational issues, the above reference would provide a suitable entry point for our endeavour in this regard. The comments of the Members on this draft Ministerial text will be discussed in the next GC meeting.

A small group of developing countries continued to meet under the auspices of UNCTAD to develop a possible "positive agenda" for the Seattle Ministerial Conference. Members highlighted the problems that they have been facing in the implementation of various agreements and discussed the possible ameliorative action that could be taken in this regard.

* Permanent Mission of India

Schedule of Meetings at the WTO, Geneva : October 1999*

1/10/99	:	Committee on Technical Barriers to Trade
1/10/99	:	Committee on Rules of Origin
4/10/99	:	Working Party on Domestic Regulation
4/10/99	:	Committee on Customs Valuation
4/10/99	:	Committee on Budget, Finance and Administration
5/10/99	:	Committee on Government Procurement
4-5/10/99	:	Trade Policy Review Body (Romania)
5/10/99	:	Committee on Market Access
6/10/99	:	GENERAL COUNCIL
6-7/10/99	:	Working Group on Transparency in Government Procurement
8/10/99	:	Working Party on GATS Rules
8/10/99	:	Committee on Regional Trade Agreements- 24th Session
11-15/10/99	:	Textile Monitoring Body
12/10/99	:	Committee on Budget, Finance and Administration
12-13/10/99	:	Committee on Trade and Environment
14/10/99	:	Council for Trade in Goods
15/10/99	:	Committee on Trade and Development
20/10/99	:	Working Party on State Trading Enterprises
20-22/10/99	:	Council for TRIPS
21/10/99	:	Committee on Import Licensing
22/10/99	:	Committee on Safeguards
25-26/10/99	:	Committee on Anti-Dumping - Ad-hoc Group on Implementation
25-27/10/99	:	Trade Policy Review Body (Nicaragua)
25-29/10/99	:	Special Session of the GENERAL COUNCIL (Min.)
27/10/99	:	Dispute Settlement Body
27/10/99	:	Committee on Anti-Dumping - Informal Group on Anti-Circumvention
28-29/10/99	:	Committee on Anti Dumping Practices
29/10/99	:	Committee on Rules of Origin

*Source : WTO / Geneva as on September 30, 1999

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