Multilateral Agreement on Investment
An Analysis
Biswajit Dhar
Sachin Chaturvedi

The Multilateral Agreement on Investment (MAI) mooted by the OECD will bring about major changes in the foreign investment regime. Existing policies of government regulation of foreign investment would have to be altered completely and in their place would have to be introduced policies for the protection of foreign investors. By truncating the powers of nation-states, the proposed foreign investment regime raises several important issues. One critical question relates to the implications of lifting of controls over the movement of all forms of capital. Another fundamental issue is the future of the post-war multilateral framework built essentially around sovereign states having inviolable rights over their economic domains.

In the emerging global economic regime, policies governing foreign investment are being given considerable attention. This stems largely from the widely accepted view that transnational corporations (TNCs) have become the prime motive forces in the global economy. The influence of the TNCs in the realm of trade, involving both goods and services, has been presented as one of the indicators of the pre-eminent position that these conglomerates hold. According to the World investment Report 1995, TNCs were involved inasmuch as two-thirds of the global trade in goods and non-factor services in 1993, half of which was intra-firm trade.

This large presence of the TNCs in the global economy has been used as a justification for introducing a regime that protects the interests of the TNCs in their host economics. The multilateral discipline introduced by the Uruguay Round Agreements, in particular, the Agreement on Trade Related Aspects of Investment Measures (TRIMs) has in fact been the most significant attempt at providing a policy framework for the operations of TNCs in keeping with their key role in the global economy. In its essentials, the Agreement on TRIMs seeks to reduce, and ultimately eliminate restrictions that sovereign governments have imposed on the TNCs.

Even before the foreign investment regime that the Agreement on TRIMs seeks to introduce has begun to be implemented by most countries, the Organisation for Economic Co-operation and Development (OECD) has taken a major initiative for an eventual adoption of the Multilateral Agreement Investment, aimed providing better opportunities for investors, for their investments from almost all controls of the host governments. What needs to be pointed out is that while the Agreement on TRIMs provided a degree of ambiguity as regards the treatment to TNCs by host countries,7 the OECD proposal, on the other hand, is largely free of any such problems of interpretation, as we shall elaborate below.

The important common feature of these initiatives has been that the processes were unilaterally put in motion by the developed countries who have an overwhelming control over outward flows of FDI. The developing countries who have practically no outward investments, but are hosts to FDI, eventually played only a nominal role in the negotiations. This aspect of the negotiations towards formulating a multilateral agreement on investment was less apparent in the Uruguay Round, but in precluding the developing countries from the substantive negotiations, the OECD initiative reflects the views of only the developed countries.

At a more fundamental level, initiatives towards evolving a multilateral framework for FDI assume significance because they provide a different orientation to one of the most piquant problems faced by post-war multilateralism, viz, the exercise of the powers of sovereign states over the transnational interests (represented primarily by the TNCs) operating within the territorial boundaries of the former. This form of multilateralism that has evolved over the past half a century was defined with an explicit recognition of sovereignty of nation-states but at the same time it also imposed certain limits on the "unrestricted self-determination" by individual states through the enunciation of the objectives of interdependence. However, in the absence of any clear delineation of the exercise of the limits of state sovereignty, the multilateral framework so conceived put the transnational interests in sharp conflict with the nation states. In exercise of their rights' nation states attempted to regulate the operations of the TNCs through the formulation of multilaterally accepted codes, of conduct' which till less than a decade ago, was one of the major areas of international economic negotiations under the UN System.

Multilateralism has thus acquired a changed character insofar as the relationship between the sovereign states and the TNCs is sought to be re-defined through the proposed investor-oriented Multilateral Agreement on Investment. States would no longer be in a position to regulate the TNCs keeping in view their development needs, and instead the operations of the latter have been given the primordial place. Emphasis has been laid on the rights that the firms should enjoy and the obligations that the host country governments should accept in fulfillment of the actors' rights.8

The present paper is an attempt at understanding the proposed MAI and its implications from the viewpoint of developing countries. The paper is in two parts. At the outset, the paper would discuss the OECD proposal for a Multilateral Agreement on Investment (MAI). We would briefly indicate the background of the initiative before looking at the main features of the proposed Agreement. In Section II we would make a critical assessment of the MAI. First, we would question the veracity of introducing an instrument for investment protection particularly in a phase where the host country-foreign investor relationship has changed completely in favour of the latter. Two factors have contributed to this change. One, almost all host countries to the TNCs, especially in the developing world, have entered into a large number of bilateral investment treaties thus expressing their commitment to investment protection. And, two, the emergence of foreign direct investment (FDI) as the most preferred source of foreign capital, in the aftermath of the debt crisis of the 1980s, has led to increasing competition among the recipient countries for FDI. These countries have been making competing claims on a source most of which flows to a relatively small number of preferred destinations. Close to 85 per cent of the FDI flows in 1995 went to the...
developed countries and to the south-east Asian region, including China. Given this situation, most developing countries have adopted preferential policies in order to maximise their share of the residual FDI. The second part of this section would critically evaluate one of the major objectives of the MAI, viz, liberalisation of capital movements across national boundaries. What needs to be emphasised in this context is that the OECD countries are seeking this liberalisation of capital movements even when all evidence points 10 the fact that limiting capital movements, particularly the volatile component of the flows, should be the prime focus of the management of the global capital markets.

OECD Proposals for a Multilateral Agreement on Investment

The process of negotiations aimed at formalising a multilateral investment treaty was launched by the OECD ministers in May 1995. The negotiations were initiated with the expectation that the treaty would be in place by mid-1997. Two dimensions of the proposal need to be considered in order that its import can be understood. First, the background of this initiative, and two, the main elements of the proposed agreement.

BACKGROUND OF THE INITIATIVE

The OECD initiative can be seen as an extension of the two main OECD instruments pertaining to foreign investment, viz, the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations and the Declaration and Decisions on International Investment and Multinational Enterprises adopted in 1961 and 1976, respectively. These instruments, though not having the same origin and scope, together cover all direct investment transactions, whether by non-resident enterprises or by established enterprises under foreign control. In terms of their applicability, the two instruments are quite distinct, the difference arising from the separate legal status they hold. While the codes have the legal status of OECD Council Decisions that are binding on all member countries, the declaration and decisions express a broad policy commitment of the OECD members towards inward investment and is thus non-binding.

Three fundamental principles form the basis of the instruments, viz, right of entry and establishment, national treatment and freedom on repatriation, both on capital and current accounts. These aside, the instruments have been guided by the broad objective of progressive liberalisation of policies to be carried out by the member countries in respect of FDI.

(i) Right Entry and Establishment

Since 1964, the signatories to the Code of Liberalisation of Capital Movements were under the obligation to progressively liberalise inward and outward direct investment. The Code of Liberalisation of Current Invisible Operations, on the other hand, took note of the direct investment by insurance companies in the form of branches or agencies and introduced the concept of ‘equivalent treatment’ in order to put the foreign companies on equal footing with the domestically-owned companies. More extensive obligations were introduced in 1989 by including the entire financial sector, i.e., branches of banks and other financial institutions, within the purview of the code.

The right to establishment was however put on a firmer ground through an earlier modification of the Code on Capital Movements. It was made obligatory for members not to introduce or maintain regulations that raised special barriers against non-resident investors.

(ii) National Treatment

Included as a key element of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises, the principle of national treatment was applied only to already-established enterprises. Members thus agreed that they would treat foreign-owned or foreign-controlled firms operating in their territories no less favourably than domestic firms. The national treatment principle so defined was not applicable to foreign investors at the pre-establishment stage.

(iii) Freedom to Repatriate Profits and Other Returns

One of the important aspects of the Codes on Capital Movements and Current Invisible Operations has been that foreign investors can engage themselves in repatriation of capital and other current account items like profits, dividends and interest payments, among others without any restriction.

Although, the above mentioned instruments gave a fair degree of predictability to their in vestment regimes, a view had emerged within the OECD member states that these investments taken together do not constitute a comprehensive and fully binding multilateral agreement on investment. Accordingly, the OECD Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) initiated the process in 1991 and in 1994, technical and analytical work was undertaken by five working groups to explore the major issues of the agreement. This work by the OECD Committee was being done at a time when several of the member countries of the organisation had entered into regional arrangements like NAFTA and the Energy Charter Treaty (ECT), which had dealt with the issue of foreign investment quite prominently, as well as the bilateral investment treaties (BITs). The general understanding was that MAI would draw upon the strongest elements of the existing investment agreements.

The framework of the proposed MAI has been influenced by the NAFTA to a considerable extent and by the ECT. In fact, several key provisions of the MAI bear strong resemblance with the corresponding provisions of the NAFTA. We would discuss this aspect in the later discussion.

The proposed MAI, in its essentials, has three main parts. The first relates to the issues of non-discrimination, the second to the in vestment protection, and the third relates to the dispute settlement mechanism. Besides, at the very outset, the scope of the MAI has been defined in a very elaborate manner. In the following discussion, we would first discuss the scope of the proposed Agreement and subsequently the major elements of the three parts of the Agreement as alluded to above.

SCOPE OF PROPOSED MULTILATERAL AGREEMENT ON INVESTMENT

Although most of the arguments in favour of introduction of the MAI have been advanced by focusing on foreign direct investment (FDI) and the advantages this form of investment has for the global economy, the draft framework of the proposed Agreement presented by the OECD Expert Groups contains a very wide definition of investment, going substantially beyond FDI. Not only is portfolio investment included, every kind of asset which is directly or indirectly owned by a foreign investor in his host country is also brought within the ambit of the proposed agreement.

This marks a departure from the past instruments adopted by the OECD directed at liberalisation of FDI entry and establishment, most of which had a narrow focus. The comprehensive nature of coverage, in the MAI, stems from the adoption of an asset-based definition of investments opposed to the enterprise-based one. Accordingly, all forms of assets which cover the recognised as well as the evolving forms of investment are sought to be included in the scope of the MAI. In keeping with the above suggestion, the only major derogations that have been included relate to “public debt, debt securities of and loans to a state enterprise or the government, financial assets not having the characteristics of investment and real estate or other tangible and intangible assets” acquired for personal use.

The wide definition of investment that is containted in the proposed MAI appears to have been adopted following the trend set
in this regard by some of the recent agreements, including the Energy Charter Treaty (ECT) and several bilateral investment treaties. All these agreements cover every kind of asset while defining the investment covered by them. In fact, almost all forms of assets that the ECT treats as being investments for the purposes of the treaty have found a place in the proposed M A I.

Besides the issue of exclusion, the coverage of assets proposed by the expert groups can give rise to several conceptual problems. The inclusion of "claims to money" for instance, could lead to a situation where the host countries may find themselves under obligation to provide protection to operations that are purely financial transactions which are independent from the operations of a firm. Both NAFTA and ECT, the two arrangements from which the proposed M A I derives its basic character exclude claims to money from their purview unless these claims are associated with long-term investment interests, in a similar vein, the extending of the definition of investment to cover portfolio investment could bring the government under obligation to protect the non-too-beneficial speculative capital flows. The inclusion of the volatile forms of capital could, however, run contrary to the one of the main objectives of the M A I, that of achieving "efficient utilisation of economic resources, the creation of employment opportunities and improvement of living standards" in countries that would eventually be parties to the agreement. The second issue relates to the inclusion of in vestments indirectly owned or controlled by foreign investors in their host countries in the proposed Agreement. The major point of contention in this case has been whether or not investments involving an entity from a non-M A I party should be covered by the proposed agreement. Two cases discussed in this regard relate to: (i) investments in a M A I-party by an M A I subsidiary of a non-M A I parent company and (ii) investment in an M A I-party by a non-M A I subsidiary of an M A I parent company. The OECD members, while broadly agreeing to include both these cases in the M A I, could not arrive at a consensus. The third issue on which the countries presently engaged in the negotiation on the M A I seem to have less common ground relates to the inclusion of intellectual property rights. The absence of any degree of consensus between the OECD members on this issue, particularly when the negotiating countries have been trying to clarify the relationship of the M A I with other multilateral agreements, most significantly the Agreement on TRIPs, could give rise to considerable problems. Specific changes in the treatment of IPRs as proposed by the expert groups have been proposed by Mexico and France. The former has contended that M A I should deal with IPRs only when they are acquired in the expectation of economic benefits or other business purposes. France, on the other hand, has sought exclusion of "literacy and artistic property rights" from the coverage of the proposed Agreement.

**STUBSTANTIVE PROVISIONS OF M A I**

The case of the M A I has two broad sets of obligations for the host countries. The first seeks to establish what the OECD considers is a non-discriminatory investment regime. Two key elements included here are the national treatment find the most-favoured-nation standard. While the former seeks to remove discrimination in treatment accorded to domestic and foreign entities, the latter is aimed at equal treatment of all foreign investors by the host countries. Besides, a few other important issues like performance requirements, privatisation policies, and treatment of monopolies and state-run enterprises have also been included in the proposed Agreement. The second set of obligations on host countries is a series of investment protection measures. The following discussion deals with the two sets of issues alluded to above.

**MEASURES TO ENSURE A NON-DISCRIMINATORY INVESTMENT REGIME**

(i) National Treatment

The national treatment provision in the draft framework of M A I seeks to ensure that entry restriction on foreign investors as well as the limitations on their operations that host countries have often enforced in the past are removed. Removal of entry restrictions, in other words would imply granting right to establishment to the foreign investors. The formulation adopted in the draft text as regards the national treatment provision bears dose resemblance with the OECD National Treatment instrument. The National Treatment instrument was first adopted as a part of the Declaration on International Investment and Multinational Enterprises referred to above. But while the National Treatment instrument was applicable in case of only the established enterprises, the M A I seeks to extend the scope of the national treatment provision to include right to establishment.

The national treatment instrument in the proposed M A I provides that Contracting Parties to the agreement “shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than that accorded to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments”. The national treatment provision thus specifies that host countries have to provide foreign investors at least the same treatment as they would normally give to their domestic investors. But at the same time the M A I does not propose to ban more favourable treatment for foreign investors which, if introduced, would be quite inconsistent with the very essence of M A I and this brings the removal of discrimination in general between the foreign and the domestic investors. This aspect was addressed in the Calvo doctrine which had formed the basis of several instruments that the Latin American countries had adopted in their regional integration arrangement, the Andean Common Market (ANCOM) National Treatment, as defined in the Calvo Doctrine, provided that "while aliens should be given equal treatment with nationals, they are not entitled to 'extra' rights and privileges."

One of the key features of the National Treatment provision which has been emphasised in the received literature is that sets relative and not absolute standards for dealing with investment. This stems from the fact that the standards of treatment indicated in the National Treatment provision refer to a body or a system of rules which lay down the broad principles but not the precise content of the rules. The purpose of introducing the National Treatment standard, it has been argued, is to ensure that foreign investors receive the same treatment as domestic investors and not to establish absolute standards on investment policy. The OECD National Treatment investment, for instance, reflects an agreement between the member countries "that they should treat foreign owned or foreign controlled firms operating in their territories no less favourably than similarly situated domestic firms" (emphasis added).

This understanding of the National Investment provision, as mentioned above, has led to the debate whether or not the comparative nature of this provision should be put down in explicit terms. In this debate, some countries involved in the OECD negotiations on M A I have emphasised that the qualification "under similar circumstances" (or "in similar circumstances", as is used in the draft text) needs to be added to the National Treatment provision of the proposed agreement. This is necessary, in their view, to highlight the fact that comparison between foreign and domestic investors "needs to be placed in their respective environment." The importance of the qualification "in like circumstances" has been made explicit in the commentary presented by the US in the M A I negotiations. The qualification, it is maintained, "ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of the comparison”. It has further been argued that the "objective (of

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the proposed instrument) is to permit the
comparison of all relevant circumstances,
including those relating to a foreign investor
and its investment, in deciding to which
domestic or third country investors and
investment they should appropriately be
compared, while excluding from
consideration those characteristics that are
not germane to such a comparison”.

The Application of the National Treatment
Provision is, however, fraught with several
imponderables. In the first place, Comparison
between foreign and domestic entities are
difficult to make in concrete terms. It has
in fact been argued that a foreign firm is not
entirely comparable with a domestic one.”

This view would be particularly relevant if
the National Treatment provision as proposed
in the draft text of the MAI is applied in case
of a developing country. The obvious
differences in sizes of the transnational
operations of a developing country. The obvious
differences in sizes of the transnational
operations of a developing country will make
it quite meaningless.

The second major problem associated with
the application of the National Treatment
provision would arise from the extensive set
of exceptions covering several sectors that
OECD members themselves seek under the
existing OECD instruments. Exceptions are
provided by some countries such as the US
not just at the national level but at the sub-
federal level as well. Annex II provides the
list of exceptions that some of the OECD
countries presently seek under the National
Treatment instrument.

Particular attention has been given in the
MAI negotiations to the issues of exceptions
sought by their sub-federal governments in
some countries. What has been debated in
this context is whether the treatment accorded
to foreign investors by a sub-federal
government would meet the national
treatment test only if it was less favourable
than the treatment accorded to investors of
the state in question or whether it would be
sufficient to accord treatment no less favour-
able than that accorded to the investors from
any other state of the Union. A final decision
on this important operational dimension of
the National Investment Treatment provision
has however not been taken.

(ii) Most-Favoured Nation (MFN)

The MFN Treatment in the proposed MAI
provides that investors from all countries
would be treated in the same manner, or in
other words, there cannot be any
discrimination by any host country of foreign
investments originating from different
countries. The draft text provides in this
regard that “Each Contracting Party shall
accord to its investors of another Contracting
Party and to their investments, treatment no
less favourable than the treatment it accords
[in like circumstances] to investors of any
other Contracting Party or of a non-
Contracting Party, and to the investment of
investors of any other Contracting Party or
of a non-Contracting Party, with respect to
the establishment, acquisition, expansion,
operation, management, maintenance, use,
enjoyment, and sale or other disposition of
investments” (emphasis added). The MFN
treatment that would have to be given under
the proposed MAI would thus derive its
basis from the manner in which the investors
not only from the MAI member states but
also from the non-member states are treated.

This is a major departure from the existing
multilateral agreements where the MFN
principle requires to be applied only while
dealing with the countries acceding to
agreements.

(iii) Performance Requirements

The proposed MAI provides that
performance requirements cannot be imposed
on foreign investors. Accordingly, the draft
text presents an exhaustive list of specific
performance requirements including those
requirements which the host countries had
to bear on the foreign firms in the past. In so
doing, the MAI seeks to extend the
scope of the performance requirements
provisions contained in the Agreement on
Trade Related Investment Measures
(TRIMs). While, the Agreement on TRIMs
is generally considered to be applicable only
to the strictly trade-related measures, such
as local content regulations and export
obligations that have been imposed on foreign
enterprises, the provisions in the MAI include
aspects such as transfer of technology and
local equity participation, both of which have
been part of a wider set of policies to regulate
the activities of foreign companies. The
exhaustive list of performance clauses that
MAI seeks to cover is given in the Annex III.

The provision prohibiting use of any
measure to ensure transfer of technology,
a production process or other proprietary
knowledge to a natural or legal person in its
territory by a MAI Contracting Party is the
most demanding of all the performance
requirements. This needs to be given
particular attention because of its importance
for developing counties. Although a limited
derogation is provided in the draft text which
allows measures to be imposed when either
competition laws are violated or the courts
and administrative tribunals seek imposition
of such measures, there has been little
agreement over the breadth of the proposed
derogation. But the more important aspect
of this provision, if it is accepted without
the derogation, is that it would violate pro-
visions of the several multilateral agreements,
the more significant of which are agreements
currently monitored by the World Trade
Organisation (WTO) and the Agenda 21
endorsed by the Rio Earth Summit. We
would elaborate on these points below.

Two of the WTO agreements are
particularly relevant in this context. The
General Agreement on Trade in Services
(GATS) provides that “developed country
members, and to the extent possible other
members, shall establish contact points to
facilitate the access of developing country
members’ service suppliers to information,
related to their respective markets,
concerning...the availability of services
technology”. The Agreement on TRIPs in
recognising the particular needs of the least-
developed countries states that “developed
country members shall provide incentives to
enterprises and institutions in their respective
territories for the purpose of promoting and
encouraging technology transfer to least-
developed country members in order to
enable them to create a sound and viable
technological base”.

The Agenda 21 agreed to in Rio has very
elaborate provisions on measures to promote
transfer of environmentally sound
technologies which were considered as one
of the instruments for promoting sustainable
development. This was in keeping with two
major objectives that were agreed to in this
regard; (i) to help to ensure the access, in
particular to developing countries, to scientific and technological information,
including information on state-of-the-art
technologies, and (ii) to promote; facilitate
and finance, as appropriate, the access to and
the transfer of environmentally sound
technologies and corresponding know-how,
in particular to developing countries, in
favourable terms, as mutually agreed, taking
into account the need to protect intellectual
property rights as well as the special needs of
developing countries for the implementa-
tion of Agenda 21. In order to meet
this objective, the Rio Earth Summit agreed
that the governments and international
organisations should promote, and encourage
the private sector to promote effective
modalities for the access and transfer, in
particular to developing countries, of
environmentally sound technologies...

The countries in Europe themselves have
an agreement that explicitly provides for
transfer of technology. The Energy Charter
Treaty (ECT) concluded in 1994, the treaty
signatories to which include the Republics
of the former Soviet Union called upon the
Contracting Parties to promote access to and
transfer of technology on a commercial and
non-discriminatory basis”. The ECT
provided further that “the Contracting Parties
shall eliminate existing and create no new
obstacle to the transfer of technology in
the field of energy materials and products
and related equipment and services...
An exception to the prohibition of the technology transfer requirement has, however, been proposed in the MAI in case the technology has the potential of meeting health, safety and environmental requirements.

Further exceptions to the prohibition on imposing performance clauses have been provided under particularly well defined circumstances. In the first place, the members would be allowed to condition the receipt or continued receipt of an advantage accruing to a foreign investor with: (i) location of production, (ii) provision of a service, (iii) training or employment of workers, (iv) construction or expansion of specific facilities, and (v) carrying out R and D in their territories. The second set of exceptions are provided for environmental considerations to be taken care of. This exception provides that domestic content regulations can be imposed to ensure environmental protection which are: (a) necessary to secure compliance with laws and regulations, (b) necessary to protect human, animal or plant life or (c) necessary for the conservation of living or non-living exhaustible natural resources. A third set of exceptions are expected to be provided in the proposed MAI. These would be applicable in case of export promotion or foreign aid programmes, tariffs or quota programmes, procurement by state enterprises and privatisation programmes. Proposed by the US and Canada, the last mentioned set of exceptions is clearly aimed at providing a fillip to the initiative these countries have been taking under the NAFTA, and which have been without significant reference to the multilateral system determined by the WTO.

(iv) Privatisation

The primary objective of bringing acts of privatisation under the MAI discipline, as has been indicated, is to extend the principle of non-discrimination to cover this area. Thus, in the event of privatisation, the MAI proposes to apply the standards of national treatment and most-favoured-nation treatment. The provision in this regard recognises the fundamental right of the state to carry out privatisation of their own volition. This has been interpreted as being ‘an expression of the state’s discretionary competence regarding the choice of economic policies’.[29]

The clause providing the contours of applicability of MAI discipline in this regard has indicated that special shareholding arrangements which include, (a) the retention of the so-called ‘golden shares’ by any Contracting Party, (b) stable shareholder groups assembled by a Contracting Party, (c) management/employee buy-outs and (d) voucher schemes of members of the public, have a strong potential to be used for discriminating against foreign investors and are therefore violative of the national treatment and most-favoured-nation standards.

(v) Monopolies/State Enterprises

The inclusion of monopolies/state enterprises in the proposed MAI marks another important departure from the existing practices of dealing with foreign investment. It has been proposed that government designated monopolies should be so covered by the MAI as not to allow them to treat foreign investors less favourably than national investors. This objective of non-discrimination is sought to be achieved by defining a clear set of rules, mainly connected to the purchase of goods and services. In the coverage of purchases of monopoly goods and services, it was agreed that the GATT Agreement on Government Procurement should be excluded. However, what was unclear was the precise coverage of this provision after the Government Procurement Agreement had become fully operational.

The relevant provision, however, underscores the point that the right of the government to create, allow or maintain monopolies cannot be challenged. This principle is akin to the one adopted in case of privatisation, as mentioned above. An important flexibility provided as regards monopolies is that they would be permitted to charge different prices in different geographic markets, assuming that the difference in prices are based on commercial considerations.

(vi) Intellectual Property

The broad definition of investment as proposed in the draft MAI has brought to the fore issues like intellectual property rights (IPRs) which have become subject matters of multilateral discipline in the WTO through the Agreement on TRIPs. The inclusion of this issue has raised the critical dimension of jurisdiction of the existing and the proposed agreements which deal with the IPRs. Although several aspects of this issue remain to be finalised, the negotiating countries have arrived at one important agreement in that the MAI obligations would not extend the national treatment and the most favoured nation treatment obligations in the existing intellectual property agreements, which include TRIPs. But while taking care of the above-mentioned area of conflict with the Agreement on TRIPs, the negotiations on MAI have not been able to resolve two other possible areas of conflict with the proposed agreement.

The first pertains to the definition of IPRs that should be included in the MAI, and the second to the dispute settlement mechanism. The major consideration in case of the definition of IPRs has been whether or not the forms of IPRs should be limited to those included in TRIPs. Given that the domain of IPRs has been extending to include forms like databases,[30] the above-mentioned consideration has assumed particular significance. The dispute settlement provisions proposed in the MAI, as we shall discuss below, seek to extend the WTO dispute settlement mechanism that provides only for state-state disputes and allowing for investor-state disputes to be brought forth.

INVESTMENT PROTECTION

Central to the MAI are the seven elements that have been included to provide investment protection. Besides the introductory article which lays down the basic standards for providing investment protection on a non-discriminatory basis, the six substantive provisions relate to: (i) expropriation and compensation, (ii) protection from strife, (iii) transfer of funds, (iv) subrogation, (v) protection of existing investment, and (vi) relationship with other sources of protection of foreign investment.

At the outset, the investment protection dimension of MAI provides that investments on its territory of investors belonging to another Contracting Party have to be given full and constant protection and security. In all circumstances, foreign investments are to be given treatment no less favourable than that provided by international law.

Two of the above mentioned substantive provisions require detailed consideration because of the critical nature of issues involved. These are (i) expropriation and compensation and (ii) transfers.

(i) Expropriation and Compensation

The draft text of the proposed MAI provides that expropriation or nationalisation would not be allowed except under particular circumstances where public interest is at stake. Expropriations can take place only if the principles of non-discrimination are applied and if appropriate consideration is paid to the due process of law. The compensation due to the foreign investor, as proposed, was to be equivalent to the fair market value of the expropriated investment.

As regards payment to the foreign investors in the event of nationalisation, the negotiations witnessed convergence of views on matters related to prompt payment. The draft text provides that compensation in the event of expropriation or nationalisation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The concept of fair market value was generally considered to be nebulous and in response to this, Mexico, along with the US, proposed a clarification that could be incorporated. It was proposed that fair market value should include a valuation criteria that takes into consideration the going concern value, asset value including declared tax value of tangible
property, and other criteria, as appropriate. However, on the more important issue of the mode of calculation of the compensation, the negotiating countries were not unanimous in expressing their views. A majority of the participating countries were of the view that compensation in the event of nationalisation should not explicitly cover exchange rate provisions but should include interest at a commercially reasonable rate established on a market basis for the currency of payment from the date of expropriation to the date of actual payment.

This mode of calculation was among the four alternatives that were considered during the negotiations. The others provided a mechanism through which the investors could be protected against losses arising out of currency fluctuations before the actual date of payment. These alternatives provided a range of options for selecting the appropriate currency, through which the exchange rate factor could be taken care of. One of these proposed that the investor be given the option to exercise his choice of the currency in which he would like the value of his investment to be assessed. Two others gave the host country governments the option to exercise choice of currency.

The draft text of the proposed MAI ostensibly takes into consideration the majority view on this issue and proposes that only the interest rate factor and not the exchange rate factor could be taken care of. One of these proposed that the investor be given the option to exercise his choice of the currency in which he would like the value of his investment to be assessed. Two others gave the host country governments the option to exercise choice of currency.

The dispute settlement mechanism as proposed would address two types of disputes, (i) the state-state disputes and (ii) the investor-state disputes. The latter, where an investor can directly seek arbitration in the event of a possible violation of Agreement by his host state, is the distinguishing feature of the proposed MAI.

(ii) Transfers

The negotiating countries were of the view that free transfer of returns from an investment was one of the fundamental elements in the system of protection to investors that MAI was seeking to introduce.

The negotiating countries were broadly of the view that unrestricted transfer of all payments due to an investor from his investment should be allowed. Such transfers could be made in a fully convertible currency and the prevailing market rate of exchange. The main component of the payments was the returns that accrued to the foreign investors, and although the principal categories in which returns could be claimed were not mentioned in the draft text, it was finally agreed that an exhaustive list of returns would form a part of the section on definitions of the proposed Agreement.

The provision relating to transfers is sought to be introduced without any reservations. Balance of payments problems faced by the country from which the transfers take place can be a significant reason for allowing reservations, but the negotiating countries did not take this into consideration. It was argued that free transfer should be an absolute right and that even in a balance of payments crisis restriction on transfers was not justifiable. The negotiating groups dealing with this issue are, however, considering the veracity of including specific provisions relating to general exceptions and temporary derogations for reasons such as balance of payments, public order and the preservation of a monetary union.

DISPUTE SETTLEMENT

Besides the scope of coverage and the provisions relating to investment protection, the dispute settlement mechanism is the most significant feature of the proposed MAI. The main characteristic of the dispute settlement mechanism as proposed is the comprehensiveness of its coverage. This follows from the understanding that if the high standards of treatment and protection to investors as proposed by the Agreement are to be properly implemented, an effective dispute settlement mechanism has to be its essential component.

The dispute settlement mechanism as proposed would address two types of disputes, (i) the state-state disputes and (ii) the investor-state disputes. The latter, where an investor can directly seek arbitration in the event of a possible violation of Agreement by his host state, is the distinguishing feature of the proposed MAI.

(i) State-State Arbitration

In case of a state-state dispute, the procedures proposed to be followed by the MAI have a similarity with those of the WTO dispute settlement mechanism. As a first step, the parties to the dispute are expected to enter into mutual consultations. If these consultations fail, either of the party or both the parties involved in the dispute, could invoke a multilateral process of consultations by invoking the Parties' Group to consider the matter. On the exhaustion of the possibilities of a negotiated settlement of the dispute through both the above-mentioned avenues, either of the parties could submit the dispute to an arbitral tribunal for a binding decision. The tribunal could consist of three (or five, if considered necessary) members two of whom would be appointed by the parties while the third, the chairman of the tribunal, would be the national of a third state. An alternative procedure for selection of the tribunal has also been suggested where all three members are selected by the parties themselves, and one of them, by mutual consent, is appointed as the chairman. The members of the tribunal would be selected from a roster of highly qualified individuals which would be constituted through nominations by every contracting party.

It has been proposed that MAI would set out the basic rules and procedures for state-state arbitration. In case of particular disputes, however, parties to the dispute could mutually agree to seek modification in the rules. But if the rules provided for by the MAI appear to have some shortcomings, as a result of which the parties have disagreements, the United Nations Commission on International Trade Law (UNCITRAL) roles could be used instead.

The arbitration tribunals could consider the following forms of relief in their awards: (a) a declaration that the Party in question has failed to comply with its obligations under the MAI; (b) a recommendation that measures be taken to fulfil the obligations; (c) a pecuniary compensation, and (d) any other form of relief to which the party against whom the award is made consents, including restitution in kind.

The awards issued by a tribunal is proposed to be final and binding on the parties. In other words, there is no possibility of any appeal against the ruling of the tribunal as is provided in the WTO dispute settlement mechanism. The latter provides that parties to the dispute can move the standing Appellate Body in case they disagree with the ruling of the dispute settlement panel. The absence of any system of appeal against the tribunal ruling appears as a serious limitation of the proposed MAI.

(ii) Investor-State Arbitration

The MAI proposes to empower the investors to independently initiate dispute settlement procedures against their host states. The scope of applicability of this provision is however quite unclear. Although most of the negotiating countries have agreed on providing the option to the investors to initiate proceedings against their host states when the latter fails to meet any of the MAI obligations, the issue of whether or not to include other investment agreements within the purview of this provision is yet undecided. Yet another point of contention in this regard relates to the circumstances under which the investors can invoke the dispute settlement mechanism. While it was agreed that there should be a definite instance of loss suffered by the investors before they are able to bring a claim against their host states, there was no agreement on the point as to whether investors should have actually incurred the loss before bringing forth their claims.

A further issue raised in this regard related to the losses suffered by the investors in the form of lost opportunities to make profits from a proposed investment. This, in other words, covers the rights of the investors in the pre-establishment phase. The discussion indicated that the claims of lost opportunities to make profits that the investors make would not be considered "without prejudice to the
question of whether a specific amount of lost profits might later prove too remote or too speculative to be recoverable as damages". In other words, the claims of lost opportunities made by the investors would have to be considered uncritically. The investors would thus have significant latitude initiating proceedings under the dispute settlement mechanism of the proposed MAI.

The dispute mechanism gives the investors the choice of their forums in which they can submit the dispute for Resolution. These are:
(a) competent courts or administration tribunals of the Contracting Party to the dispute;
(b) any dispute settlement procedure that the parties to the dispute may have previously agreed to, and;
(c) arbitration in accordance with the provisions of the MAI and which should conform to the provisions as under:
(1) the Convention on the Settlement of Investment Disputes between state and nationals of other states (the 'ICSID Convention');
(2) the Additional Facility Rules of the Centre for Settlement of Investment Dispute (the ICSID Additional Facility);
(3) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or
(4) the Rules of Arbitration of the International Chamber of Commerce (ICC).

In the event that investor decides to seek arbitration as provided for in the Agreement, the procedures, including the granting of relief, as in the case of state-state arbitration would be followed.

GENERAL EXCEPTIONS

The proposed MAI allows general exceptions to be made for meeting certain well defined objectives. The two purposes for which these exceptions can be made are (i) essential security purposes and (ii) maintenance of public order. As regards the former, the negotiating countries were largely in agreement, but in the latter case there were considerable differences in the perceptions of the countries involved, France, for example, indicated that a public order clause was meant to ensure certain objectives, including the non-discriminatory application of its laws and prevention of disturbances to public order that could be caused by foreign investment. It added further that given the different circumstances of foreign and domestic investors as concerns the protection of public order, giving equivalent treatment to foreign and domestic investors would not be possible. However, not all countries were agreeable to the suggestion that foreign and domestic investors should not be treated in a non-discriminatory manner so that public order can be protected.

II
A Critical Assessment of Proposed MAI

The proposed MAI, discussed in the foregoing, is solely intended to be an investor protection arrangement through which the foreign investor is to be given unsurmountable rights. What is particularly striking in this context is the fact that no attempt has been made in the draft text to enumerate explicitly the objectives of the proposed Agreement. The touch stone of any multilateral treaty should necessarily be its ability to reflect on the broader dimensions of policy, one of the foremost of which is pursuit of the development objectives. The absence of any reference to the larger issues in the proposed MAI is its most significant limitation. This raises the important aspect of how the MAI would take note of the concerns of developing countries striving for development, which have been taken into consideration by the WTO Agreements.

The Agreement on establishing the WTO emphasised in its preamble that "trade and economic endeavour should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand". It was further stated that "there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". The WTO has thus been mandated to facilitate trade among the member countries after giving due consideration to the ability of the lesser developed members of the organisation to benefit from the emerging trading regime. This mandate of the WTO, in other words, implies that the imperatives of trade should not be divorced from those of development. It follows therefore that the relationships between trade and investment need to be examined with a direct reference to the development dimension.

That development concerns of developing countries is a prime concern has found recognition in the Agreement on Trade Related Investment Measures (TRIMs). The Agreement on TRIMs is aimed at "expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members". The Agreement also emphasises the need to take account of "the particular trade, development and financial needs of developing country members, particularly those of the least-developed country members". The TRIMs Agreement thus appears quite unambiguous in underlining the importance of the development needs of the developing countries even as an investor-friendly regime for foreign investment was being proposed.

The narrow focus of the MAI with its sole objective providing investor-protection raises a pertinent issue of its relevance particularly at a time when host country-foreign investor relationship has undergone a metamorphosis. The host countries have moved completely away from an earlier stance of trying to regulate operations of TNCs and have joined in a competition to provide a wide range of incentives to foreign investors. This transformation in the attitude of host countries is particularly noticeable in case of developing countries. This aspect of the host state-foreign investor relationship needs to be carefully considered in order to understand fully the impact MAI could have on developing countries.

We would elaborate on the changing host state-foreign relationship alluded to above. Our contention is that given the competition developing countries face arising out of their need for foreign capital, it is quite inconceivable that there would be any reversal of their changed attitude towards the foreign investors. Strengthening of the position of the foreign investor vis-a-vis the state through the MAI in the given situation could have far-reaching implications for the ability of developing country states to exercise meaningful control over their domestic resources. This raises the crucial issue of state sovereignty which while forming a part of most multilateral agreement in the post-war era does not form a part of the proposed framework of the MAI. Our view is that for an investment regime to be meaningful, it should allow for the balancing of the rights of the investors in the host countries and their obligations. In other words, the host countries must also be provided with opportunities to benefit from the operations of TNCs in their territories. Enforcement of obligations on TNCs, particularly when they are to be the sole responsibility of the host countries, would be possible only if the role of the state in this process is recognised. However, given the enormous differences in the relative sizes of the TNCs alluded to above, most developing countries would not be able to effectively control the TNCs unless an appropriate multilateral system is introduced in the realm of investment. Multilateralism, it has generally been argued, is basically intended to enable the economically weaker countries to deal with the stronger ones, and therefore any multilateral regime on investment should specifically address the more contentious issues that foreign investment gives rise to. This requires consideration of an alternative perspective on foreign investment, which is beyond the scope of this paper.
Our assessment of the role of the MAI would be completed with looking at the implications of one of the main objective of the proposed regime, viz, liberalisation of the capital account. We would bring to the fore some of the perspectives on capital account liberalisation that are available from the received literature and use this for the basis for critically commenting on the justification of the MAI.

CHANGING RELATIONSHIP BETWEEN HOST STATES AND FOREIGN INVESTORS

The relationship between the TNCs and their host countries had started to undergo significant changes since the second half of the 1980s. It has been contended that the initial signs of this change were noticed in the initial years of the decade, and by the closing years, it had become quite clear that the changed relationship had come to stay. In this section, we would elaborate on the changed relationship between the TNCs and that host countries by discussing the available evidence in this respect. We would then try to argue that the process of change is apparently irreversible given the fact that there has been increasing competition among developing countries to seek FDI. This has largely been because of the fact that although the absolute magnitude of FDI flows have increased quite rapidly these flows have remained concentrated in a very small number of countries.

(i) Bilateral Investment Treaties

The changing relationship between the host countries and the TNCs in recent years is best reflected in the proliferation of bilateral investment treaties (BITs) for the protection and promotion of FDI. The distinctive feature of the BITs has been their exclusive concern with investment. The BITs essentially consist of a broad open-ended definition of investment, inclusive of non-equity forms and different types of assets that can be treated as being investment. Many of the BITs have an extended coverage to include portfolio investment as well. Most BITs have adopted the national treatment and most-favoured nation treatment, with the former being included after the exceptions have been qualified, Specific standards of investment protection are provided in all the BITs, which include those concerning transfer of funds, expropriation and nationalisation and the settlement of disputes both between the treaty partners and between investors and the host state.

The BITs, whose essential purpose is to ensure investment protection, have come to be considered as the important indication of a country's attitude towards foreign investment. This is notwithstanding the fact that BITs entered into by developing countries have tried to emphasise the need for FDI to give due consideration to the development process of these countries, besides providing some exceptions or qualifications as for example the limitation on transfer of funds for balance of payments reasons.

The increase in BITs, in recent years, has been phenomenal. Nearly two-thirds of the 1,160 treaties, which were in existence up to June 1996, were entered into in the 1990s. In 1995, 175 BITs involving 158 countries were concluded, i.e., about 60 per cent of the 294 BITs concluded between 1994 and 1996, were finalised in 1995 alone. There has thus been significant initiatives on the part of the developing countries and the economics in transition to provide assurances to the foreign investors that they can undertake their operations without any major incumbrances.

The above mentioned phenomena of increase in BITs has come during a phase in which expropriation of foreign investment by developing countries had registered dramatic declines. In the 1960s, earliest period for which data on expropriation are available, an average of about 14 acts of expropriation took place every year. The following quinquennium saw a sharp increase in the average member of expropriations per year to 56. During the second half of the 1970s, expropriations at the rate of almost 22 a year took place. From the early 1980s, the number of acts of expropriation declined quite dramatically.

An average of close to three expropriations per year took place between 1980 and 1985, the lowest for any single period and that too by a very wide margin. Tables 1 and 2 provide the details.

The above discussion shows quite clearly that the relationship between the TNCs and their host countries had changed quite significantly during the past decade and a hair. The latter had undertaken major initiatives to set the tone for an altered relationship with foreign capital than existing in the past and this could be seen through the rapid increases in the Bilateral Investment Treaties and the sudden drop in the number of acts of expropriation carried out by the host countries. Besides these initiatives, the host countries were also carrying out systematic changes in their domestic policies aimed at inducing larger inflows of FDI in their territories. These changes formed the core of the policies of economic liberalisation that had to be accepted the world over during the past decade or so.

It could be argued that the changes in the host developing countries' attitudes towards FDI was induced by the ever-increasing competition among countries to obtain what most of them considered as the preferred source of external capital. The preference for FDI over the other long-term sources of capital came as a response to the growing problems that these countries had encountered after contracting large volumes of debt in the 1970s and early 1980s. This gave rise to competing claims being made by developing countries on FDI. These competing claims appeared justified on two counts. The first was the fact that this component of financial flows has been registering the fastest growth during the 1990s and was therefore an attractive source. The second arises from the nature of FDI flows and which has remained concentrated in a relatively few destinations. This nature of flows has tended to raise the level of competition among the countries other than the large beneficiaries to increase their share in the global flows. We would discuss these two factors below.

(ii) FDI Flows and Developing Countries

Attention on foreign direct investment has coincided with the rapid increases in the magnitude of flows that this form of capital has witnessed during the 1990s. Total FDI inflows to both developed and developing countries in 1995 exceeded $90 billion, increasing by more than two-and-a-half times.

### Table 1: Time Pattern of Expropriations (1960-1985)

<table>
<thead>
<tr>
<th>Period</th>
<th>No of Acts</th>
<th>Percentage of Total</th>
<th>Average Acts Per Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960-64</td>
<td>55</td>
<td>10.0</td>
<td>11.0</td>
</tr>
<tr>
<td>1965-69</td>
<td>81</td>
<td>14.0</td>
<td>16.0</td>
</tr>
<tr>
<td>1970-75</td>
<td>336</td>
<td>59.0</td>
<td>56.0</td>
</tr>
<tr>
<td>1976-79</td>
<td>87</td>
<td>5.0</td>
<td>22.0</td>
</tr>
<tr>
<td>1980-85</td>
<td>15</td>
<td>3.0</td>
<td>3.0</td>
</tr>
</tbody>
</table>

**Note:** The total in column 2 does not add up to 100 due to rounding.

**Source:** UNCTC, Transnational Corporations in World Development: Trends and Prospects, 1988, New York, United Nations, Table XIX.1.

### Table 2: Expropriation Acts by Year (1975-85)

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Acts</th>
<th>No of Countries Involved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>83</td>
<td>28</td>
</tr>
<tr>
<td>1976</td>
<td>40</td>
<td>14</td>
</tr>
<tr>
<td>1977</td>
<td>15</td>
<td>13</td>
</tr>
<tr>
<td>1978</td>
<td>15</td>
<td>8</td>
</tr>
<tr>
<td>1979</td>
<td>17</td>
<td>13</td>
</tr>
<tr>
<td>1980</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>1981</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>1982</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1983</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>1984</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1985</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

**Source:** UNCTC, Transnational Corporations in World Development: Trends and Prospects, 1988, New York, United Nations, Table XIX.2.
since the beginning of the decade. The increase in FDI contributed considerably to the rapid growth of private capital flows to developing countries. In fact, during the 1990s, increase in aggregate net flows to developing countries has been primarily as a result of the buoyancy in the private flows. Official development finance, which has been largest component of external finance to developing countries in 1990, making up for almost 60 per cent of the aggregate net flows, declined in absolute terms between 1991 and 1994. Although it recovered moderately in 1995, the share of official development finance in the aggregate flows to developing countries had gone down to just a quarter (Table 3).

The pattern of distribution of FDI inflows as between country-groups and regions brings out clearly the nature of this form of foreign capital. Table 4 provides the details.

An important feature of the FDI flows in years for which data are presented in Table 3 is the marked unevenness across country-groups. The tendency for FDI inflows to remain concentrated in a relatively small number of countries has been one of its key characteristics. This is not withstanding the fact that over the years the share of developing countries in the total inflows has increased. Although developing countries as a group accounted for 32 per cent of the inflows in 1995 as compared to 24 per cent in the mid-1980s, this increase in their share was brought about by the fast growth in inflows experienced by a few countries. In fact, the Asian region received almost 21 per cent of the total FDI inflows in 1995 and more than one half of these were accounted for by China. Two-thirds of the $100 billion of FDI inflows to the developing countries in 1995 went to the south and south-east Asian region, where, apart from China, the faster growing economies of the east and south-east Asia received most of this form of capital inflows.

Thus, the developed countries and nine developing countries from the dynamic Asian region (including China) accounted for more than 84 per cent of the total inflows in 1995. Africa and Latin America received less than 10 per cent of the FDI flows, which marked a decline from the high of more than 13 per cent that the two regions had received in 1994.

The most significant dimension of the unevenness in FDI flows can be seen from the experience of the 48 least-developed countries. Except for 1991, when these countries as a whole had received 1 per cent of the total flows, in all other years, the share of the countries in question was substantially lower. In 1995, for instance, only 0.36 per cent of the FDI flows went into the poorest countries.

The pattern of FDI flows that has emerged shows quite clearly that most developing countries have had only a nominal role as recipients of capital. The flows have remained concentrated in a few countries and even as the share of the OECD countries has declined somewhat in the more recent years, most of the incremental flows have gone to countries in the dynamic Asian region. The poorest countries in the developing world are yet to see any increase in their shares, despite the phenomenal increase in the FDI flows in absolute terms. Thus, the most likely scenario in the foreseeable future would be that of a large number of developing countries chasing a small residual amount of FDI, i.e., after the inflows to the more preferred destinations have taken place. Given this situation developing countries as recipients of FDI far, it is well nigh impossible to imagine a change in the attitude of the capital-short developing countries towards foreign capital in general and TNCs in particular.

But with an MAI in place, what could in fact happen is that owners of capital and other complementary resources like technology, could utilise their superior bargaining power much to their advantage. These circumstances could thus only perpetuate and even strengthen the unequal relationship between the TNCs and their host countries.

### Table 3: Behaviour of Major Components of Foreign Capital Flows to Developing Countries (US $ billion)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Flows</td>
<td>56.9</td>
<td>106.9</td>
<td>157.1</td>
<td>161.3</td>
<td>164.2</td>
<td>243.8</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private Debt Flows</td>
<td>16.2</td>
<td>35.9</td>
<td>44.9</td>
<td>44.9</td>
<td>56.6</td>
<td>88.6</td>
</tr>
<tr>
<td>Foreign Direct Investment</td>
<td>33.5</td>
<td>43.6</td>
<td>67.2</td>
<td>83.7</td>
<td>95.5</td>
<td>109.5</td>
</tr>
<tr>
<td>Portfolio Investment</td>
<td>7.2</td>
<td>11.0</td>
<td>45.0</td>
<td>32.7</td>
<td>32.1</td>
<td>45.7</td>
</tr>
<tr>
<td>2 Official Development Finance</td>
<td>65.6</td>
<td>55.4</td>
<td>55.0</td>
<td>45.7</td>
<td>53.0</td>
<td>40.8</td>
</tr>
<tr>
<td>Total</td>
<td>122.5</td>
<td>146.0</td>
<td>212.0</td>
<td>207.0</td>
<td>237.2</td>
<td>284.6</td>
</tr>
</tbody>
</table>

**Source:** World Bank, *Global Development Finance, 1997*, vol 1, Table 1.

### Table 4: FDI Flows by Host Region and Economy (US $ billion)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Developed Countries</td>
<td>116.7</td>
<td>114.8</td>
<td>119.7</td>
<td>138.8</td>
<td>142.4</td>
<td>205.9</td>
<td>208.2</td>
</tr>
<tr>
<td>Developing Countries of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Africa</td>
<td>2.9</td>
<td>2.8</td>
<td>3.2</td>
<td>3.7</td>
<td>5.5</td>
<td>4.7</td>
<td>4.9</td>
</tr>
<tr>
<td>Latin America and Caribbean</td>
<td>8.1</td>
<td>15.4</td>
<td>16.2</td>
<td>18.1</td>
<td>27.0</td>
<td>25.4</td>
<td>38.6</td>
</tr>
<tr>
<td>Developing Europe</td>
<td>0.05</td>
<td>0.2</td>
<td>0.2</td>
<td>0.3</td>
<td>0.4</td>
<td>0.4</td>
<td>0.6</td>
</tr>
<tr>
<td>Central and Eastern Europe</td>
<td>0.04</td>
<td>2.4</td>
<td>4.4</td>
<td>6.3</td>
<td>5.9</td>
<td>14.3</td>
<td>12.3</td>
</tr>
<tr>
<td>Asia</td>
<td>13.5</td>
<td>23.1</td>
<td>29.6</td>
<td>50.9</td>
<td>57.5</td>
<td>65.2</td>
<td>84.3</td>
</tr>
<tr>
<td>of which: China</td>
<td>2.7</td>
<td>4.4</td>
<td>11.2</td>
<td>27.5</td>
<td>33.8</td>
<td>35.8</td>
<td>42.3</td>
</tr>
<tr>
<td>Least Developed Countries*</td>
<td>0.6</td>
<td>1.8</td>
<td>1.5</td>
<td>1.7</td>
<td>1.0</td>
<td>1.0</td>
<td>1.6</td>
</tr>
<tr>
<td>Total</td>
<td>141.9</td>
<td>158.9</td>
<td>173.8</td>
<td>218.1</td>
<td>238.7</td>
<td>316.5</td>
<td>349.2</td>
</tr>
</tbody>
</table>

**Notes:** 1. The figures of FDI inflows to developing countries shown in Tables 3 and 4 do not match because of the differences in the definitions of developing countries adopted by the World Bank and the UNCTAD.
2. 44 countries.

convertibility in all countries. This could introduce a large element of uncertainty for developing countries in a world where private capital flows have become important and potentially more volatile in many of these countries. What needs to be understood in this context is that contemporary literature has brought out the considerable disagreement that exists on the likely implications of an outright lifting of controls over the movement of capital flows by developing countries. We would provide a brief account of the various dimensions of the current debate on capital account regimes, that provides several interesting aspects with which to make an assessment of the proposed MAI.

The disagreement over the capital account regimes that countries should adopt has been most evident from the varying positions taken by the IMF in recent years. One of the more prominent prescriptions of the IMF over the past few years has been the adoption of capital account convertibility by all member countries. The Fund’s Managing Director, Michael Camdessus, has been among the main votaries of this prescription. In early 1997, the interim committee of the Board of Directors of the Fund gave approval to the extending of the jurisdiction of the organisation to cover capital movements. This gave direction to the efforts of the Fund which for several years now, has been trying to amend the Articles of Agreement to make it mandatory for countries to accept capital account convertibility, in addition to the Article VIII requirement of current account convertibility.

Even though it may have just begun the formal process of making capital account convertibility mandatory for its members, the Fund has tacitly imposed its viewpoint as regards capital controls. This has been well articulated in a paper not too long ago. It was pointed out that the Article IV consultations with developing countries it has been indicated that ‘the tightening of controls over capital movement [by member countries]...was generally discouraged’. The Fund’s approach reflected “a general distaste for such controls as a way of addressing balance of payments "difficulties".41

Alongside these views, the Fund has also taken a substantially different position on the veracity of maintaining capital controls while addressing to the issue of volatility induced by capital flows. In recognition of the problems that volatile capital flows can cause, the Fund has pointed to the desirability of policies to manage the capital account. One of the more important recommendations in this regard has been postponement of capital account liberalisation.42

This recommendation is in keeping with the broad findings of yet another study undertaken by the Fund which points to a set of preconditions, the foremost being macro-economic stabilisation and financial sector reforms, which need to be realised before a country carries out a comprehensive opening-up of the capital account.43 The findings of the study are based on experiences of several countries which went along the path of convertibility on the capital account, and the problems, the developing countries amongst them in particular, encountered in their transition towards full convertibility. Elaborating on this position, the Fund has indicated that “[S]uccessful movement toward full capital account convertibility requires cautious removal of controls in a context of not only sound macro-economic fundamentals but a sound banking sector, but also an exchange rate policy that allows an adequate degree of flexibility”.44

Apart from the importance of the preconditions referred to above, which has particularly been dealt with in the discussion on the failure of the southern core countries with capital account liberalisation in the 1980s, recent literature indicates that the successful macro-economic performances of two Latin American countries during the 1990s were due to the capital account regulation undertaken by the countries concerned. Both Colombia and Chile, the countries in question, resorted to selective controls on capital account transactions, including imposition of reserve requirements and which, it has been argued, allowed the macro-economic policies to become successful in the manner they did.45

Experiences of countries of the kind mentioned in the foregoing have led to the conclusion that “capital controls - both direct and indirect - have played an important positive role in the macro-economic management of a great many developing countries’.46 Such controls have assumed further importance in a phase where volatile private capital movements have tended to cause severe macro-economic instabilities.47 That capital controls continue to remain an instrument of policy despite moves towards liberalisation of the financial system is confirmed by the fact that out of a total of 155 developing countries surveyed by the IMF, 119 were maintaining some form of capital controls in 1995 (see Annexure IV for details).

The issue of managing the volatile capital movements has emerged in the forefront of the discussion centring around the global financial markets. Besides questioning the judgments about the merits of the arguments favouring unrestricted capital movements,48 these discussions have revealed a strong support for the continued used of policies that could help developing countries to respond to problems caused by the volatile capital flows.49

Finally, what makes the arguments in favour of the MAI more tenuous is the
### Annex II: Exceptions to National Treatment Provided by Select OECD Countries

<table>
<thead>
<tr>
<th>United States</th>
<th>Germany</th>
<th>Japan</th>
<th>France</th>
<th>Canada</th>
<th>Australia</th>
<th>Sweden</th>
<th>Netherlands</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Fishing</td>
<td>1 Air Transport</td>
<td>1 Land</td>
<td>1 Agriculture</td>
<td>1 Limits and direct and indirect acquisition of existing business in the following sectors:</td>
<td>1 Real estate</td>
<td>1 Financial</td>
<td>1 Banking*</td>
<td></td>
</tr>
<tr>
<td>2 Mineral, oil and gas</td>
<td>2 Maritime Transport</td>
<td>2 Agriculture, forestry, and fisheries</td>
<td>2 Banking, financial services, accounting and legal services</td>
<td>2 Oil and gas*</td>
<td>2 Financial services*</td>
<td>2 Air transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Atomic Energy production</td>
<td>3 Inland waterways</td>
<td>3 Mining</td>
<td>3 Uranium*</td>
<td>3 Maritime transport</td>
<td>3 Inland waterways</td>
<td>3 Maritime transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Banking*</td>
<td>4 Inland transport</td>
<td>4 Leather and leather products manufacturing</td>
<td>4 Insurance</td>
<td>4 Fishing*</td>
<td>4 Air transport</td>
<td>4 Inland waterways</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Air transport</td>
<td>5 Maritime transport</td>
<td>5 Financial services</td>
<td>5 Air transport</td>
<td>5 Life Insurance*</td>
<td>5 Maritime transport</td>
<td>4 Air transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Air transport: freight forwarding and charter activities</td>
<td>6 Inland waterways</td>
<td>6 Air transport</td>
<td>6 Inland waterways</td>
<td>6 Air transport</td>
<td>6 Air transport</td>
<td>5 Maritime transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 Telecommunications</td>
<td>Publishing*</td>
<td>7 Insulation</td>
<td>7 Air transport</td>
<td>7 Telecommunications</td>
<td>7 Air transport</td>
<td>5 Maritime transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In addition, govs of several states provide for limited exceptions to national treatment in the following areas:</td>
<td>8 Telecommunications</td>
<td>8 Maritime transport</td>
<td>8 Maritime transport</td>
<td>8 Maritime transport</td>
<td>8 Maritime transport</td>
<td>8 Maritime transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 Ownership of agricultural land</td>
<td>9 Maritime activities</td>
<td>9 Maritime activities</td>
<td>9 Maritime activities</td>
<td>9 Maritime activities</td>
<td>9 Maritime activities</td>
<td>9 Maritime activities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Mining</td>
<td>10 Road transport</td>
<td>10 Road transport</td>
<td>10 Road transport</td>
<td>10 Road transport</td>
<td>10 Road transport</td>
<td>10 Road transport</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Banking</td>
<td>11 Broadcasting and cable TV*</td>
<td>11 Tourism</td>
<td>11 Tourism</td>
<td>11 Tourism</td>
<td>11 Tourism</td>
<td>11 Tourism</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Insurance: Licensing</td>
<td>12 Film distribution</td>
<td>12 Film distribution</td>
<td>12 Film distribution</td>
<td>12 Film distribution</td>
<td>12 Film distribution</td>
<td>12 Film distribution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Insurance: surplus fund requirements</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td>In addition, govs of several states provide for exceptions to national treatment in the following areas:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 Limits on direct and indirect acquisitions of Canadian business irrespective of the sectors</td>
<td>2 Real estate</td>
<td>2 Real estate</td>
<td>2 Real estate</td>
<td>2 Real estate</td>
<td>2 Real estate</td>
<td>2 Real estate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Real estate</td>
<td>3 Forestry</td>
<td>3 Air Transport*</td>
<td>3 Air Transport*</td>
<td>3 Air Transport*</td>
<td>3 Air Transport*</td>
<td>3 Air Transport*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Forestry</td>
<td>4 Fishing</td>
<td>4 Newspapers*</td>
<td>4 Newspapers*</td>
<td>4 Newspapers*</td>
<td>4 Newspapers*</td>
<td>4 Newspapers*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Fishing</td>
<td>5 Mining</td>
<td>5 Maritime Transport*</td>
<td>5 Maritime Transport*</td>
<td>5 Maritime Transport*</td>
<td>5 Maritime Transport*</td>
<td>5 Maritime Transport*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Mining</td>
<td>6 Oil and gas</td>
<td>6 Telecommunications*</td>
<td>6 Telecommunications*</td>
<td>6 Telecommunications*</td>
<td>6 Telecommunications*</td>
<td>6 Telecommunications*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Oil and gas</td>
<td>7 Films</td>
<td>7 Films</td>
<td>7 Films</td>
<td>7 Films</td>
<td>7 Films</td>
<td>7 Films</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 Films</td>
<td>8 Financial services</td>
<td>8 Financial services</td>
<td>8 Financial services</td>
<td>8 Financial services</td>
<td>8 Financial services</td>
<td>8 Financial services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Financial services</td>
<td>9 Insurance</td>
<td>9 Insurance</td>
<td>9 Insurance</td>
<td>9 Insurance</td>
<td>9 Insurance</td>
<td>9 Insurance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Limited exception provided in these cases
increasing support that introduction of regulations over volatile forms of capital is receiving in the on-going debate. Various policy options have been suggested towards putting in place a regulatory mechanism for private capital markets that is comparable to the one introduced by the banking regulators through the Basle Committee on Banking Supervision. Among the options that analysts have considered is the Tobin tax, an idea that has been revived almost two decades after it was first propounded. Significant analytical justification has been provided for introducing the Tobin tax, the primary aim of which was seen as throwing "sands in the wheels" of the financial markets, thus dampening the volatility of capital flows. It is in the light of the above discussion that the major objective of the MAI which aims at liberalising all forms of capital movements the world over appears ill-conceived.

ANNEX III: PERFORMANCE REQUIREMENTS WHICH WOULD BE DEEMED VIOLATIVE OF MAI

1. To export a given level or percentage of goods and services.
2. To achieve a given level or percentage of domestic content.
3. To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.
4. To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment.
5. To restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
6. To transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory (except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of the Agreement).
7. To locate its headquarters for a specific region or the world market in that Contracting Party.
8. To supply one or more of the goods that it produces or the services that it provides to a specific region or world market exclusively from the territory of that Contracting Party.
9. To achieve a given level or value of production, investment, manufacturing, sales, employment, research and development in its territory.
10. To hire a given level or type of local personnel.
11. To establish a joint venture, or
12. To achieve a minimum level of local equity participation.

ANNEX IV: CAPITAL CONTROLS IN DEVELOPING COUNTRIES

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Countries Maintaining Controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any form of capital control</td>
<td>67</td>
</tr>
<tr>
<td>Comprehensive controls: on outflows</td>
<td>67</td>
</tr>
<tr>
<td>on inflows</td>
<td>17</td>
</tr>
<tr>
<td>Foreign direct investments: of non-residents</td>
<td>84</td>
</tr>
<tr>
<td>of residents</td>
<td>35</td>
</tr>
<tr>
<td>Profit repatriation and capital liquidation</td>
<td>34</td>
</tr>
<tr>
<td>Taxes on capital transactions</td>
<td>9</td>
</tr>
<tr>
<td>Non-resident-controlled enterprises</td>
<td>6</td>
</tr>
<tr>
<td>Portfolio investment: of non-residents</td>
<td>61</td>
</tr>
<tr>
<td>of residents</td>
<td>30</td>
</tr>
<tr>
<td>Security issuance by non-residents</td>
<td>15</td>
</tr>
<tr>
<td>Security issuance abroad by residents</td>
<td>6</td>
</tr>
<tr>
<td>Debt-to-equity conversion</td>
<td>2</td>
</tr>
<tr>
<td>Financial transactions: of non-residents</td>
<td>78</td>
</tr>
<tr>
<td>of residents</td>
<td>41</td>
</tr>
<tr>
<td>Trade-related financial transactions</td>
<td>66</td>
</tr>
<tr>
<td>Deposit requirements for borrowing from abroad by residents</td>
<td>7</td>
</tr>
<tr>
<td>Deposit accounts: of non-residents in foreign exchange</td>
<td>83</td>
</tr>
<tr>
<td>of non-residents in local currency</td>
<td>37</td>
</tr>
<tr>
<td>of residents abroad</td>
<td>52</td>
</tr>
<tr>
<td>of residents in foreign currency with domestic banks</td>
<td>29</td>
</tr>
<tr>
<td>Other capital transfers:</td>
<td>23</td>
</tr>
<tr>
<td>Personal capital transfers</td>
<td>70</td>
</tr>
<tr>
<td>Blocked accounts</td>
<td>34</td>
</tr>
<tr>
<td>Real-estate transactions: of non-residents</td>
<td>24</td>
</tr>
<tr>
<td>of residents</td>
<td>30</td>
</tr>
</tbody>
</table>


BY WAY OF CONCLUSIONS

The proposed multilateral agreement on investment could bring about significant changes in the foreign investment regime. This stems primarily from the fact that the hitherto existing policies of government regulation over foreign investors would have to be altered completely and in their place policies for the protection of foreign investors would have to be introduced. Foreign investors would not only enjoy the advantages of national treatment and most-favoured-nation treatment, they would also have unrestricted rights to transfer, particularly from their host countries, any payments that would be due to them from their investments. Furthermore, the rights they enjoy would not be tempered by any obligations to their home or the host states.

The proposed foreign investment, regime, by truncating the powers of nation-states to regulate transnational interests, raise several pertinent questions. One critical issue pertains to the implications of lifting of controls over movements of all forms of capital. This has assumed significance in the light of the experience of developing countries, in particular, with volatile capital flows. We have indicated that contrary to the objective of the MAI for introducing a liberalised regime for capital flows, all available evidence points to the need to put in place effective mechanisms for regulating capital flows across countries.

With the proposed MAI seeking to establish the primacy of international capital over nation-states, a fundamental issue about the future of multilateralism can be raised. It was pointed out that the post-war multilateral framework was built essentially around the sovereign states having inviolable rights over their economic domains. But as TNCs have increased their dominating influence over the global economy and the emerging regime proposing to strengthen their presence by recognising their rights in deferment of those of the individual states, post-war multilateralism could be passe.

Notes

1 The MAI, as we shall discuss in the following sections, is intended to cover all forms of assets which can be treated as investments. Included therefore are forms such as portfolio capital, intellectual property rights and real estate.
2 The Agreement on TRIMs provides an illustrative list of measures that would be violative of the provisions. This has given rise to considerable debate as to its precise nature of coverage.
4 Some commentators have, however, indicated that the existing instruments provide for national treatment at both pre- and post-establishment stage (see for example Wittebrull, William H, 'The OECD Multilateral Agreement on Investment', Transnational Corporations, vol 4, no 2, p 3). The legal texts are however unambiguous in maintaining that the national treatment applies only at the post-establishment stage. In fact, the extension of national treatment to pre-establishment stage is one of the major changes proposed in the MAI, as would be discussed below.
6 OECD, Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT), May 1995, Annex.

Economic and Political Weekly April 11, 1998
8 The present analysis is based on the MAI Negotiating Text issued by the OECD Secretariat on February 14, 1998.
10 The following types of assets are sought to be included in the proposed MAI: (i) enterprises of all kinds (including branches); (ii) shares and other forms of equity participation; (iii) bonds, debentures and other forms of debts (items (ii) and (iii) include portfolio investment); (iv) rights undercontracts, including turnkey projects, etc. (v) claims to money and claims to performance; (vi) intellectual property rights, (vii) rights conferred in pursuant to law or contract, (ix) any other tangible, intangible, movable and immovable property and any related property rights, such as leases, mortgages, liens and pledges and (x) real estate or other property, tangible or intangible acquired in the expectation or used for the purpose of economic benefit or other business purposes.
12 This is intended to cover, among others, the emerging forms of intellectual property rights, as, for instance, databases.
14 Preamble of the draft MAL
15 Charolles, Valerie, 'Definition and Treatment of Investors and Their Investments: National Treatment, Most-Favoured-Nation Treatment and Transparency', statement made at the Second Workshop on Multinational Rules on Investment, held on February 4-5, 1997 at Brasilia.
19 Charolles, Valerie, 'Definition and Treatment of Investors and Their Investments', op cit.
21 A comparison between the sizes of TNCs and the developing countries shows that but for six developing countries viz, China, India, Argentina, Brazil, Mexico and Indonesia, all other countries had CDPs which were of smaller magnitudes than that of the largest TNCs as of 1995 (see Annex I for details).
22 This point needs to be considered in light of available literature which pointed to the problems associated with the acquisition of technology by developing countries from the TNCs even under the existing circumstances, where foreign investors were not given such extensive rights as is provided for in the proposed MAI. For a detailed exposition of the a fore mentioned view see Graham, E M, 'The Terms of Transfer of Technology to the Developing Nations. A Survey of Major Issues in OECD, North/South Technology Transfer: The Adjustment A head, 1982, Paris and UN, Costs and Conditions of Technology Transfer through Transnational Corporations, ESCAP/CTC Publication Series B, no 3, especially Chapter III.
23 A later section deals with one specific issue, that pertaining to intellectual property rights.
24 Article IV 2(c) of the General Agreement on Trade in Services.
25 Article 46.2 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
27 United Nations, Agenda 21, Article 34.18.
28 Article 8 of the European Energy Charter Treaty.
30 The World Intellectual Property Organisation (WIPO) has been considering a proposal for including databases as a subject matter of protection in the IPR regime. For details see, WIPO, Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions: Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, CRNR/DC/6, August 1996.
33 Still under negotiations is the issue whether one party or both the parties should have the right to initiate this round of consultations.
34 The WTO Dispute Settlement mechanism provides that a standing Appellate Body established by the Dispute Settlement Body would hear appeals from the cases referred to the dispute settlement panels.
35 It has been argued that control of unfair practices by TNCs should be done through a domestic competition policy.
37 For an elaboration on the specific nature of the BITs see, Parra, A R, The Scope of New Investment Laws and International Instruments.
42 IMF, International Capital Markets, 1995. The Chairman of the interim Committee of the Fund, Philippe Maystad, has also hinted to the fact that some countries need a longer period to achieve the goal of capital account liberalisation, see IMF Survey, vol 26, no 9, May 12, 1997.
43 Mathieson, Donald J. and Liliana Rojas-Suarez, 'Liberalisation of Capital Account: Experiences and Issues', IMF Occasional Paper no 103, 1993, pp 30ff. It may be mentioned in this context that the Committee on Capital Account Convertibility (the Tarapole Committee) which made its recommendations about India going convertible on the capital account has also emphasised the need to meet the set of preconditions before the process is gone through in its entirety.
44 IMF, World Economic Outlook, October, 1997, p 96.
49 Helleiner suggests that IMF should be encouraged to recognise capital-account controls direct and indirect, as important macro-economic policy instruments in most developing countries for the foreseeable future.
50 Major contributions to this debate have been made in Haq, Mahbub ul, et al The Tobin Tax: Coping with Volatility, OUP, New York. For an exhaustive review of the volume, see Comford, Andrew, The Tobin Tax: Silver Bullet for Financial Volatility, Global Cash Cow or Both?, UNCTAD Review, 1996. Other interesting contributions are Felix, David, Financial Globalisation versus Free Trade: The Case of the Tobin Tax' in UNCTAD Review, 1996 and Dornbusch, Rudi, Cross-border Payments Taxes and Alternative Capital-Account Regimes'.
52 See Comford, Andrew, The Tobin Tax: Silver Bullet for Financial Volatility, Global Cash Cow or Both?, op cit.