


achieved through FDI than through trade (although FDI and trade are highly positively correlated). While 54% of Canada's FDI stock is in the United States (and thereby already has national treatment), the MAI will be very useful in setting stable rules for the rapidly increasing stock of Canadian FDI elsewhere, especially in the European Union and Asia. The MAI, in this sense, should help Canada to continue to diversify its outward FDI away from the United States. Of particular relevance in the MAI will be investment rules to ensure Canadian busi-

ness has stable access to the European Union in resource-based sectors such as forestry products (where there has been a wave of protectionism in the last four years). The MAI should also help to open up the Japanese, other Asian, and Latin American markets for Canadian FDI.

CONCLUSIONS

In general, because investment has a long-term time horizon, business people need to be assured that political risk is low. New and capricious investment regulations deter FDI and

thereby reduce global economic efficiency. Canada has mitigated the worst excesses of left-wing economic nationalism through the investment provisions of the FTA and NAFTA. The MAI is the icing on the cake of globalization for Canada. In short, the MAI is a good-news story. The NAFTA is such an advanced trade and investment pact that it is being used as the model for the MAI. Given that Canada has survived quite well for the last ten years under the investment provisions of the FTA, it is well-placed to take on

board the MAI. The MAI has the additional advantage of helping to open up markets in Europe and Asia for Canadian investors on the same terms as the U.S. market. 

Alan M. Rugman is Professor of International Business at the Joseph L. Rotman School of Management, University of Toronto. He is on leave as Thames Water Fellow of Strategic Management at Templeton College, University of Oxford.

EDITORIAL

FROM THE HAVANA CHARTER TO THE MAI: INTERNATIONAL INVESTMENT REGIMES

BY DANIEL DRACHE

FIRST THE HISTORY LESSON

The year is 1948. The policy elites from more than fifty countries have come to Havana to put the finishing touches on an all-encompassing proposal to finalize the details of a multilateral investment regime that is the first of its kind. It is comprehensive, forward-looking, and equitable, with "high standards" for the liberalization of investment protection and trade expansion.

Almost all major powers are "present at creation"; those with mixed economies as well as *laissez-faire* ones, the developed no less than the under-developed, the imperialist world as well as the colonized. At the table is a highly diverse group of nations including India, Egypt, China, Mexico, Sweden, Portugal, Canada, and the United States, to name

but a few. Only the Soviet bloc absents itself, but it too has been present behind the

At Havana, the U.S. chief delegate signed the final document; but American investors at home and their Republican allies in Congress opposed its provisions, which gave capital-importing countries rights to control investment flows.

scenes. When ratified, this legal instrument was to become the Charter for the International Trade Organization, the

international institution designated to oversee the world's trading system along with the World Bank and the IMF.

So what happened to the Havana Charter? In a word, its fate was decided by U.S. trade politics. Congress killed the broadest multilateral international investment agreement that had ever been negotiated. At Havana, the U.S. chief delegate signed the final document; but American investors at home and their Republican allies in Congress opposed its provisions, which gave capital-importing countries rights to control investment flows. And that was that. Most experts treat Havana as a failed episode in international relations of little relevance for today. But they are woefully wrong.

TWO CRITICAL ELEMENTS

In the rear-view mirror of history, two ideas stand out. First, at the time there was a solid international consensus that a trade and investment regime had to be more than an abstract set of rigid legal principles to defend investors' rights at any price; rather, it had to be functional, efficient,

and practical. Nothing less would "ensure the workability of the new order". So the countries of the world chose non-discriminatory trade and, by the end of the negotiations, decided to make foreign direct investment accountable as the lynchpin of international governance. [See box on p. 25, *Key Dates in the Regulation of Foreign Investment*, for the long-term effects of this decision.]

Secondly, as the framework agreement for a new age, it could not be a system of pure commercial gain designed primarily to advance the free enterprise principle. Instead, investment rights had to accommodate the full employment obligation that all states accepted as the cornerstone of the world trading system. Further, countries had to make an equal commitment to eliminate all forms of arbitrary and discriminatory barriers that the state and market actors routinely erected for public or private profit.

Finally, the theoretical understanding behind the Ha-

continued on page 26

Key Dates in the Regulation of Foreign Investment

In 1948, the **HAVANA CHARTER** is signed by more than fifty countries, affirming the rights of investors to fair treatment, emphasizing the importance of foreign investment flows for development and reconstruction, as well as protecting the host country's right to develop national resources for national ends. Different articles pronounce in favour of countries taking domestic measures against restrictive business practices, including nationalization with compensation, while at the same time requiring states to dismantle barriers to trade.

In the 1960s, the principle of permanent sovereignty over national resources is declared in **GENERAL ASSEMBLY RESOLUTION 1803 (XVII) NO. 3 (1962)**. The principle affirms the rights of nations to control their natural resources and represents the high water mark to find common ground between the developed and developing countries. The resolution also provides for appropriate compensation when resources are nationalized.

In 1961, **CODES OF LIBERALIZATION OF CAPITAL MOVEMENTS AND OF CURRENT INVISIBLE OPERATIONS** establish binding rules and provides effective machinery for their gradual expansion and implementation by OECD countries.

In 1967, OECD developed countries negotiate a **DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PRIVATE PROPERTY**; it is approved by the Organization's Council but is never opened for signature.

In 1970, **DECISION 24 OF THE ANDEAN PACT** imposes stringent controls and screening procedures on FDI and the transfer of technology, including a provision requiring the disinvestment of foreign firms after a number of years.

In 1974, the **DECADE TO ESTABLISH A NEW ECONOMIC ORDER** is proclaimed. International activity is focused on host country's demands for economic independence and national control over TNCs.

In 1976, OECD takes the lead and adopts a **DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES** that includes a voluntary set of guidelines for MNEs. Among other things, it calls for assurance of national treatment, addresses problems of incentives and disincentives, and proposes an easing of performance requirements on TNCs. This and other instruments provide the key elements of an emerging liberal framework for states in the developed world.

In 1981, WHO pioneers the **INTERNATIONAL CODE OF MARKETING OF BREAST MILK SUBSTITUTES** in the area of consumer protection. This is one of several initiatives taken to protect consumers from TNCs and set new standards for corporate behaviour.

In 1983, an extensive **UN CODE ON THE CONDUCT OF TNCs** is proposed but the instrument is never adopted despite agreement on many of its provisions.

In 1985, World Bank is in the forefront of reversing the early trend set by the developing countries in proposing radical changes in the making of national investment laws. It sponsors the **CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY** that, among other things, leaves investors free to transfer their profits and capital out of the host country.

In 1986, **ILO TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MNEs AND SOCIAL POLICY** is adopted even if only voluntary.

In 1991, OECD Council of Ministers reviews the **OECD INSTRUMENTS ON TNCs** and agrees on a number of changes to strengthen them.

In 1991, Andean Countries amend their previous instrument on foreign investment and replace it with a **LIBERAL SET OF REGULATIONS** (a major reversal of policy). They now relax rules regarding foreign investment in the host country.

In 1992, the World Bank prepares and proposes the non-binding **GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT** that will be a benchmark in augmenting protection for foreign direct investment rights.

In 1993, **NAFTA** is negotiated, a path-breaking agreement that serves as the prototype for other agreements internationally. **CHAPTER 11** goes further than anyone anticipated in dismantling barriers to foreign investment, in affirming non-discriminatory pricing practices in the management of resources, and in extending national presence and national treatment to U.S. investors. It particularly limits Mexican and Canadian governments' ability to nationalize or expropriate.

In 1994, the Uruguay Round is successfully completed with its path-breaking agreement on **TRADE-RELATED INVESTMENT MEASURES AND TRADE-RELATED PROPERTY RIGHTS**. Specific commitments cover market access and national treatment. Most developing countries have had little experience with issues related to the liberalization of foreign direct investment and trade in services.

In 1994, the **FINAL ACT OF THE EUROPEAN ENERGY CHARTER TREATY** proposes new investment rights and protection for private investors.

In 1994, **APEC's NON-BINDING INVESTMENT PRINCIPLES** adopted, supporting foreign direct investment and new protection for investors.

By 1997, over 1,300 **BILATERAL INVESTMENT TREATIES** have been signed but there is still no comprehensive agreement (the goal that eludes the OECD for more than a quarter of a century).

In 1997-98, the **MAI-OECD TREATY** is negotiated by 28 developed countries responding to the coverage of financial services in the Uruguay Round. It is a framework agreement to promote a liberalized investment regime and provide an effective dispute settlement mechanism. Some reservations are permitted for national security, subnational measures, and cultural protection. But it is the most comprehensive set of measures ever proposed to enlarge investors' rights and has immediate consequences for national governments in many policy domains.

Compiled by Daniel Drache from UN/UNCTAD, International Investment Instruments: A Compendium (New York and Geneva, 1996).

vana Charter was that countries would have to make national adjustments to international forces when international trade was expanding rather than contracting. This made impeccable economic sense as well as smart statecraft. When economic growth stalled, few countries would ever accept the dictates of crude market logic to open their economies regardless of costs and despite the consequences. Thus, they had to settle not for the abstract doctrines of free trade but for the more powerful notion of trade liberalization that required the nations of the world to dismantle their tariff walls while restructuring their economies.

For extreme advocates of laissez-faire internationalism, the Charter transgressed the fundamental notion that trade was principally organized for private gain and profit and that liberal trading principles were incompatible with broader social goals.

In the imperfect world of the late forties (much like our own), countries everywhere employed export subsidies, quantitative restrictions, and commodity agreements for commercial ends. For instance, the U.S. had its special deal in agricultural products and the U.K. relied on the Imperial Trading Preferences and other "special" relationships, both undermining the global trad-

ing system. So the challenge of five decades ago was to adopt principles of conduct such that countries would be able to "establish a system of balanced mutual advantage".

THE CRITERIA OF SUCCESS

Of its six principal objectives, only one concerned directly the way in which trade should be conducted and organized: "To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce".

One concerned exclusively economic development: "To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment". Two dealt with the founding principles of the world order: "To further the enjoyment, by all countries on equal terms, of access to markets, products and productive faculties which are needed for [members'] economic prosperity and development; and to enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress".

Finally, Article I had a sixth objective: "To facilitate through the promotion of mutual understanding, consultation and cooperation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy".

The preamble to the Charter provides an Olympian

benchmark of setting high standards for this or any subsequent international trade and investment regime. The first set of principles spelled out the relationship between states, the commitment "to maintain full and productive employment" as international concerns, and the need for commercial policies that permit the full development of trading policies and domestic labour standards.

The House of Commons Standing Committee on Foreign Affairs and International Trade in its detailed report urges 17 substantial changes that have to be addressed by Canada's negotiators as a pre-condition for signing, including an effective cultural exemption clause, an open and transparent procedure for dispute resolution, a clear definition of what constitutes expropriation, and the need for a strong statement on ILO core labour standards.

The second set of principles was focused on one sole theme: the importance of international market forces as regulators of international life. Trade barriers had to be reduced and, wherever possible, eliminated. Those that were

justified had to be administered in a non-discriminatory manner consistent with most-favoured nation principle.

The third group of principles addressed the issue of protectionism. The final group addressed special circumstances when a country could not implement the principles of the Charter due to a "drastic and sudden change in existing trade practices". It was entitled to relief though negotiation or to a transitional period after which conformity was required.

For extreme advocates of *laissez-faire* internationalism, the Charter transgressed the fundamental notion that trade was principally organized for private gain and profit and that liberal trading principles were incompatible with broader social goals. Williams Brown, who likely wrote the definitive account of these difficult, prolonged international negotiations, makes the critical point that "if there had not been a basic agreement on this fundamental point, agreement on the Charter as it now stands would have been impossible".

The realists of the time, many of whom worked inside the U.S. State Department, believed that such an investment regime could only succeed on the condition that countries both dismantled state-erected barriers and enforced a code regulating the restrictive practices of international business. The two went together. The key was that investors' rights could not be so broad as to limit the host country's responsibilities. In the Havana Charter, no member was precluded from enforcing any national statute to prevent what was at the time called "monopoly" practices (Art. 52).

The term monopoly practices meant something quite

explicit to the Havana negotiators. They were prepared to accept the fact that there were many trade-distorting activities that impaired markets from effective functioning.

Conceptually, the MAI is the extreme opposite of the Charter. It is a prototypical agreement of a corporate age. It calls for transparency in state behaviour but advocates a secret dispute resolution mechanism. It places many new obligations on governments, but does not have many specifics on how it will protect such sensitive areas as culture, the environment, and public and social services at all levels of government. It champions a level playing field across the globe, but advocates its own sui generis form of beggar-thy-neighbour protectionism for global capital that confers special rights on international business.

Some were state-centred; many more came from international business. What was needed was a framework for a new investment regime with a strong pro-active capacity to hold foreign direct investors and multinational corporations

accountable internationally.

This was a pivotal idea for the times. Even if all their recommendations were not as strong as they might have been, the Havana negotiators went so far as to identify some of the key areas of the economy where monopoly would likely prevent the orderly development of the international system. As in our own day, it was the concentrated financial services sector, multinational business that was connected to capital-exporting activities (telecommunications, insurance, banking, mining, and pharmaceutical sectors). Here too states had to be able to act to defend their interests and use their power to expropriate and pay compensation.

FORWARD INTO THE PRESENT

So what lessons does the Havana Charter hold for the aggressive coalition of forces pressing for passage of the MAI? The legacy of Havana presents a challenge of epic proportions for triumphant liberalism.

Conceptually, the MAI is the extreme opposite of the Charter. It is a prototypical agreement of a corporate age. It calls for transparency in state behaviour but advocates a secret dispute resolution mechanism. It places many new obligations on governments, but does not have many specifics on how it will protect such sensitive areas as culture, the environment, and public and social services at all levels of government. It champions a level playing field across the globe, but advocates its own sui generis form of beggar-thy-neighbour protectionism for global capital that confers special rights on international business. Most worrisome is the way it gives foreign firms a leg up over national enterprises. Definitions are so broad that public government faces a serious diminution of

its authority in many areas of public policymaking.

In contrast to the Havana Charter, there is no general consensus in favour of the MAI. The legal text is a source of bitter wrangling among scholars and experts. If the overall objective of the new regime is to provide transparent and flexible rules designed to sustain investment flows, the existing text raises many controversial issues about basic principles such as the right of establishment, national treatment, transparency, expropriation, and non-discrimination. If the intent was to produce a model "high standard" agreement on global rules, it has failed.

Elites the world over have rallied around the flag of global free trade and the self-regulating transnational corporation, but support on the ground, where it counts most, is thin. There are so many dark ambiguities that moderates such as Sergio Marchi, Canada's Minister in charge, insist on significant changes to the existing draft. The House of Commons Standing Committee on Foreign Affairs and International Trade in its detailed report urges 17 substantial changes that have to be addressed by Canada's negotiators as a pre-condition for signing, including an effective cultural exemption clause, an open and transparent procedure for dispute resolution, a clear definition of what constitutes expropriation, and the need for a strong statement on ILO core labour standards.

On the Internet, too, there are dozens of anti-MAI Web sites giving round-the-clock analysis of the dangers of the draft Agreement. No one could have anticipated the appearance of the "virtual" global citizen, very local and highly vocal. This highly visible international body of public opinion is insisting on a dif-

ferent kind of international investment regime. They ask one hell of a good question: why are TNCs entitled to so much legal protection?

As states everywhere feel the adaptive pressures from the new international agenda for deep integration, they would do well to take a long hard look again at the Havana Charter for both its strengths and shortcomings. It was a potent international instrument that could have established new standards. It was also a highly normative exercise in trade politics, one which recognized that foreign direct investment was indispensable for the stability of the international economy. But it was resolute that foreign direct investment was not an absolute, but had to be acceptable to the host country.

With capital more mobile than ever, building counterweights has to be at the top of the agenda today. Developed countries have always favoured national controls over their own resources and strategic sectors, and have never abandoned state aids and subsidies to support their home industries. This is why there have been so few successful global efforts to protect foreign investors' rights from the reach of nations. Happy 50th birthday, Havana. 🍁

Daniel Drache is Director of the Robarts Centre for Canadian Studies and Professor of Political Economy at York University.