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Globalization and New Normative Frameworks

The Multilateral Agreement on Investment

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Although “the establishment of the World Trade Organization can be seen as one of the outstanding international achievements of the decade, as important today as was the foundation of the multilateral system in its time» (WTO, 1996, p.5), the negotiations surrounding the Multilateral Agreement on Investment (MAI) were, up until now at least, conducted under the auspices of an altogether different international organization, the Organization for Economic Cooperation and Development (OECD).[1] Launched in May, 1995, the stakes of these negotiations are high since the end result would be a legally binding agreement whose scope must be extensive enough to give investors and their investments the best possible access to markets, the greatest degree of protection, and a treatment by the host country equal to that afforded to local investors.[2] To bolster these priorities, the draft agreement provides for a compulsive and highly unusual dispute settlement mechanism.[3]

The agreement, if signed, would govern a field of international economic relations that, until now, has been covered only by bilateral or regional accords. As such, it would inevitably raise the problem of how these accords relate to the MAI, and by the same token, how the MAI relates to national frameworks, since the treatment of foreign investors has, up until now at least, fallen under national jurisdiction.

From this perspective, the agreement is nothing short of innovative, especially given that economic actors other than States would gain *de facto* international legal status, thus seriously limiting the scope of public intervention. Furthermore, even if the MAI includes certain ‘general exemptions’, and authorizes contracting parties to resort to temporary ‘safeguard’ measures, as is the case with other international agreements, it would be the first agreement to cover all areas

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[1] · The G-7 gave its support to the process at the time of the Halifax Summit in June 1995. One must note that preliminary deliberations had already been undertaken in 1991 by two committees of the OECD : the Committee on International Investment and Multinational Entreprises (CIIME) and the Committee on Capital Movements and Invisible Transactions (CCMIT). The Joint Report was presented to the OECD in May 1995.

[2] The rules are mainly intended for expropriation, privatization, monopolies and State-owned corporations, investment incentives as well as performance requirements.

[3] .This is one of the provisions that was the object of the greatest number of criticisms. First of all, because there are no mechanisms nor any single rule concerning arbitration; second, because in a dispute between an investor and a State, parties can either submit to the arbitration of the Centre for the Settlement of Disputes Relative to Investment or to the International Board of Trade, or indeed to any other appropriate institution; finally, because, a firm could enter into proceedings against a State or its authorities.

except for those coming under any specific 'reservations' agreed upon.[4] Finally, the agreement is an «open» one, in the sense that countries outside the OECD could, and in fact are invited to join it. However, member countries of the OECD represent 85% of outward Foreign Direct Investment (FDI) in the world and 60% of inward FDI, [5] which reflects existing tensions on the international scene between developed and developing countries : whereas the former would prefer to adapt the international economic order to the new realities of the global economy, the latter would rather preserve their sovereignty over their national economies in a post Cold War context in which economic security overruns traditional strategic factors. However, even though it would have seemed easier to negotiate such an agreement between a fewer number of actors, it quickly became clear, especially on the topic of exceptions, [6] that dissention was strong enough to bring about the postponement of the negotiations on three occasions : first in May of 1997, then at the end of April of 1998, and finally, in October of 1998, when the French Government withdrew its negotiating team. These postponements show how difficult it is for developed countries to decide between investor rights and their own economic security.

Furthermore negotiations were conducted behind closed doors, as is the case with all negotiations of this nature, and relied on consultations namely with the Business and industries Advisory Committee (BIAC) on the one hand, and the Trade Union Advisory Committee

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[4] The reservations appears in Chapter IX of the draft. In its last version, dated April 1998, the term 'reservation' was replaced by that of 'exemption'. A list of Canadian reservations was presented to the OECD in November of 1997 in a document entitled : *Canada : Revised Draft Reservations*. The general exemptions include everything related to national security (international peace-keeping and public order), as well as temporary exemptions for countries with financial difficulties. At the request of the IMF, prudential financial measures are also authorised to ensure the stability of a national financial systems.

[5] One can imagine that it will effectively be so. One can take what happened in the case of banking solvency rules that were adopted in 1988 by the Bank for International Settlements (BIS). Canada, to take the case of this country, very quickly applied the norms and abolished, in 1991, the restrictions regarding primary and secondary reserves that the Bank of Canada imposed on Canadian Chartered Banks. What is even more interesting to raise is the fact that the relaxing (softening) that was introduced in the Bank Act in 1993, particularly concerning the conditions fo implantation of foreign banks in Canada, were accompanied with the obligation according to which these banks should have in their home country a consolidated (strengthened) regulation and compliance with international regulation standards, with those of the BIS in particular. So it just shows that the scope (range, reach, impact, import, significance, consequences) of international agreements are not limited to the signatory countries alone.

[6] Negotiators were inundated with reservations. The Canadian list covered the following issues : the review of large mergers and foreign acquisitions under the terms of the Canada Investment Act, the protection of culture and cultural industries, the restrictions on foreign ownership in certain sectors such as transportation, minerals, communications or energy, the integrity of the health system, the restrictions on foreign ownership, the respect of requirements concerning employment and research when aid to investment it novided, research and development, the respect of national environmental standards, as well as labour, health and security, zoning, natural reserves, protection of Native populations, standards, among many others.

(TUAC), on the other. Nevertheless, negotiations were criticized by actors far removed from each other in ideological and political terms, for instance the Western Governors' Association, the Public Citizens' Global Trade Watch and the Sierra Club in the United States, the Council of Canadians, the Institut Polaris and Solidarité Populaire Québec in Canada, to name but a few. [7.] In fact, rarely has an agreement given rise to so much passionate debate and stirred up such a general outcry [8] so much so that the OECD Council, in its press release of April 28, 1998, found it necessary to emphasize, that the MAI ought «to be consistent with the sovereign rights of governments to determine national policies». In line with another requirement made by the French government, the Council also admitted that «the MAI is at the heart of a larger public debate on the consequences of globalization. Non-governmental organizations as well as representatives of unions and employers [9] organizations must be consulted». In fact, if negotiations pitted States rights against the emerging rights of corporations, popular opposition to the MAI reflected the conflict between the need to adapt national law to the evolving global market on the one hand, and the need to maintain social cohesion as well as the integrity of the public sphere, on the other.

We will come to the issue of this dual tension later, but for the moment, we want underline a few points. First, the MAI carries two original features : it grants 'investors' the power to seek redress from States, and it furthers a 'positive' approach in the sense that the agreement has to be universal in its applications. [10] Second, the MAI has profound implications for public authorities and the protection of a public sphere. In this regard, the MAI would have implications for a given legal order where transnational private relations and national social practices are played out, and would therefore lead to the setting up of new norms for both private and public sectors.

Our analysis will be divided into two parts : the first part will cover the new economic context of the draft agreement, and the second will tackle institutional changes whereby a more liberal, transparent, secure and predictable international regime for investors would be established.

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[7] Opposition to the MAI is without doubt a case that illustrates well the new power of the Internet. A good synthesis of the arguments put forward against the draft can be found in the work published under the editorship of Andrew Jackson and Matthew Sanger (1998). See also CSEC (1997).

[8] The agreement concluded by the WTO on financial services on December 12 1997, did not lead to any kind of critics in public opinion.

[9] The notion of double tension was introduced by Putman (1988). See also Milner (1997).

[10] As Fatouros notes (1996), lawyers and jurists have relinquished theoretical debates on principles of law in favour of a pragmatic definition of frameworks furthering better circulation of capital.

In our concluding remarks, we will touch upon a few theoretical challenges.

1.The New Context: From International Economy to Global Economy

Recent studies have emphasized the phenomenal growth of foreign investment over the last few years and the increasing presence of transnational corporations (TNCs) in the global economy.

Available data bear both these points. There are 40,000 TNCs "parent corporations" and 280,000 foreign affiliates according to United Nations Conference on Trade and Development estimates (UNCTAD, 1977. [11] Total sales fall short of 7,000 billion dollars and direct investments of 3,200 billion dollars. For comparative purposes, global GNP totals 30,000 billion dollars (table 1).

At the same time, growth of FDI has been impressive. [12] If, by comparison with the 1980s, this growth of FDI has slowed somewhat over the first half of this decade, for reasons that stem largely from the impact of the crisis of 1991-1993 on the world economy, [13] the fact remains that the growth rate of FDI is still, on average, much greater than the growth of international trade [14] and, predictably, of world production. [15] Furthermore, since 1985, the rate has definitely accelerated over the long term, a phenomenon linked to the increased openness of markets and the attraction of strong economic growth in 'emerging' countries. Moreover, TNCs are now responsible for two-thirds of world trade,[16] one third of which is intrafirm trade. TNCs [17] are also at the heart of economic activity within countries. [18]

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[11] The number of TNCs located in the fourteen most industrialized countries rose from 7 000 at the end of the sixties to 26 000 at the beginning of the nineties. It is interesting to recall that Dunning (1983) estimated at about 3 500 the number of affiliates in the manufacturing sector between 1946 - 1961 (UNCTAD, 1994). Out of the 280 000 foreign affiliates itemized by the UNCTAD, 94 000 were located in developed countries and 130 000 in developing countries.

[12] An important percentage of FDI is made through local reinvestment of profits. In Canada, 50% of profits are reinvested by foreign corporations.

[13] We should underline the strong growth of portfolio investments during the period.

[14] Between 1973 and 1995, direct investment was multiplied by 12, whereas world exports were multiplied by 8.5.

[15] The ratio of growth rate of trade to that of production was, on average, 1.6 since the War. It was 1.4 between 1950 and 1964, 1.6 between 1964 and 1976, 1.2 between 1974 and 1984, and about 2.7 between 1984 and 1994 (WTO, 1996).

[16] Goods represent about 80% of world trade, and services, around 20%. Trade in manufactured products represents around three quarters of that in goods.

[17] Percentage of intrafirm trade of canadian exports to United States is 46 % ; that of total imports 50 %. (Deblock and Brunelle (1997; 1998). In the present analysis, we will alternatively use the expressions 'multinational corporations' or 'transnational corporations'.

[18] In the long term, the stability of intrafirm trade is a result of substitution of investment to trade, since corporations tend to increase local production. Studies show that, if there is a correlation between local production

There are four simple ways to evaluate the importance of TNCs on a quantitative level. The first is to establish the proportion of production by foreign subsidiaries to a country's GNP ; the second, the proportion of investment to gross fixed capital formation ; the third, the ratio of international investment stock to GNP ; and the fourth, the proportion of sales of foreign subsidiaries to exports. Tables 2, 3 and 4 summarize results for these indicators. They show the extent to which TNCs have become major economic players, particularly in developing countries, and they show to what extent the globalization of TNC activities is a widespread and deep-rooted process. If we grant that globalization is an irreversible process evolving out of capitalism and, ultimately, affecting all countries, including those that had remained outside the world economy, it is also true that globalization brings profound qualitative transformations to the international economy, both in terms of structure and integrative dynamics.

The transnationalization of corporations is hardly a recent phenomenon, [19] since it is rooted in the very dynamic of capitalism, as Marx pointed out one hundred and fifty years ago. Nevertheless, this process has gained momentum in the post-war period, with American corporations' world expansion on the one hand, with the strong multilateral commitment for trade-liberalization within the Western World on the other hand, TNC's are still at the heart of globalization today, just as the United States are still, and by far, the main source of FDI. [20] The UNCTAD data allow us to make a strong case here. According to these data, the five largest American TNCs control 19% of world FDI, the first ten, 33%, and the first fifty, 63%. [21] In other words, a quarter of global direct investment comes out of the United States (Table 5). And, just as investments are nowadays closely related to trade, their geographic location is closely tied to the economic development level of receiving countries. However, important as these factors may be,

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and growth international trade, this correlation is not, according to the UNCTAD and the WTO, very significant, save in the case of developing countries. However, a recent study by the OECD (1998) points to the existence of a much closer link between direct investment and international trade. According to it, each investment dollar generates two dollars in additional exports.

[19] On the historical background, see Maddison (1989), Panic (1988), Dunning (1993-a, 1993-b), Bairoch (1994, 1997), Wilkins (1975) and Michalet (1969, 1985). Chapter III of the *World Investment Report* (1994) provides an excellent historical summary of the transnationalisation of corporations and of the globalization of markets and production.

[20] Applying the theory of life cycle of product to the phenomenon, Hirsch (1967) and Vernon (1966, 1971) were the first to deal with the multinationalisation of corporations.

[21] Data are for 1995. For Canada, the figures would be : the five largest corporations control 22.6% of canadian direct investment abroad, the ten largest corporations 33.5% and the fifty largest 64.4%. From one country to the

the transnationalization process of corporations carries its own dynamic, a dynamic sustained by both the economic environment of the home country and that of the host country (Dunning, 1996). In fact, this process is linked to the manner in which corporations can capitalize on differences between national economies to further organize and divide their activities among production units within their own global networks. This process is what Michalet has labelled the «dialectic of homogenization and differentiation». [22]

In line with others, we note three major trends. First, FDI flows are increasingly interwoven within developed countries and, at the same time, considerably more diversified than trade in terms of geography (UNCTAD, 1997). Canada provides an interesting example in this regard. Long considered as a "branch-plant economy", it has seen 'its' corporations invest massively abroad, with the result that, today, Canadian direct investment abroad is roughly equal to that of foreign investment in Canada (Graph 1). Although Canada may be more dependent than ever on the United States economically, it is less so in terms of direct investment than it is in terms of trade.

Concerning the second trend, if 70% of total inward direct investment in the world is still concentrated in developed countries, and if they account for more than 90% of outward direct investment [23] (table 6), nevertheless, things are changing rapidly. Table 5 [24] shows the geographic distribution of international direct investment according to origin and destination. Between 1991 and 1996, roughly a third of all investment flows were directed towards developing countries mainly South East Asia and, to a lesser degree, Latin America. Of course these investments remain concentrated in a handful of countries, and the strength of these trends over the long term remains to be seen, meanwhile a growing number of developing countries are, presently being integrated into the world economy. We are witness to a form of economic catching-up by a few countries, a

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other, percentages vary. Nevertheless, according to UNCTAD, in all countries, the degree of concentration and of control of foreign direct investment is very high. (*World Investment Report*, 1997, p. 34).

[22] Michalet is one of the first to have emphasised the importance of considering the dynamic of the world economy in this perspective.

[23] Trends in foreign direct investment follow trends in trade, at least until the 1980s. This phenomenon should be interpreted against the backdrops of the marginalisation of developing countries during the entire period, running from the Second World War to the debt crisis of the 1980s.

[24] For methodological reasons, particularly in the case of developing countries. The data in these tables should be interpreted with caution.

fact that should prevent us from referring to outdated images of a world economy divided between a centre and a periphery, between North and South. [25]

The third trend concerns the very nature of globalization. [26] Statistics referred to above measure the growing importance of TNCs in the economic life of nations, as well as the transformations in the world economy brought about by the deployment and redeployment of TNC activities. However they shed no light on the new forms of integration within the global economy. While some equate globalization with universalism [27], surely an improper equation, we cannot deny this observed fact that nowadays increasing economic interdependence is not so much tied to the free circulation of goods, services and capital, but to the expansion of TNCs and to the broadenning of their field of activities, which redefine the very terms of the relationships between national economies and how they are "embedded" in this new world economy. [28]

In two different, yet complementary, studies, the OECD (1992) and the UNCTAD (1997) attempted to show how globalization had ushered in a new stage in the internationalization of production. [29] This phenomenon cannot be dissociated from two equally outstanding developments, the first being the continuous liberalization of trade since the Second World War, and the second, technological development in the areas of information and communication. The liberalization of trade has reinforced economic interdependence and created a favourable normative context for the internationalization of corporate activities. In much the same way, recent technological changes have not only reduced the costs of setting up in a foreign country, but have also profoundly transformed management, production and organization practices of large

[25] In fact, what we are witnessing more and more is a division of the world into three categories : the first is made up of countries that are at the heart of globalization, push for it and draw many advantages from it; the second, the followers, tend to react to the effects of globalization; and the third, is made up of countries either on the fringe of the integrative process, or that are excluded from it, and, as such, submitted to its negative effects.

[26] The notion of globalization takes on different meanings as Streeten (1994) and Boyer (1997) have shown. This depends on whether we refere to corporations or to the national sphere. In the first case, globalization covers the dynamic of internationalization of production. In the second case, globalization refers to the more contentious issue of growing interpenetration of societies.

[27] For a critical interpretation, albeit economic terms, see Berger and Dore (1996), and, in particular, the contributions by Boyer and by Wade.

[28] As Harris (1994) notes, a most direct political consequence of globalization is the difficulty of delineating the area in which national policies should apply because of their effects on corporate strategies.

[29] Some authors associate globalization with the growing circulation of goods and capital. This approach is tied to the classical theory of comparative advantages. Instead of putting emphasis on nations defined in terms of ‘endowment’ of factors of production, our own approach insists on production networks and value creation chains. An interesting discussion of globalization is presented by Streeten (1994). See also the definition of the concept ‘global industrial system’ proposed by Marc Humbert (1990).

TNCs. The result has been the emergence of both a new model of TNC, the global corporation and, a new model of economic integration. [30] In fact, what these and other studies discuss at length is not so much the factors of 'globalization', but the new forms of economic integration through the global expansion and reorganization of TNC activities.

According to these studies, the evolution of an integrated production system is linked to two main causes. The first cause is the interconnection between different subsidiaries of transnational groups whereby each unit is fitted into the system according to increasingly global management, production and investment strategies on the part of dominant groups. The second cause is the increasing complexity of the networks themselves, with the result that it has become more and more difficult to adjust technical boundaries to normative ones, so interwoven and entangled are these networks.

From this, we can draw three conclusions, the first being that corporations seem to be transferring to the international scene the kind of corporate model of integration that was prevalent within their own national boundaries. Secondly, the ways and means of integration on the part of national economies are increasingly determined by the place that their own TNCs occupy within this new global system of production. Finally, a new model of organization and economic integration is now about to dominate the global scene. UNCTAD opposes this model of ‘deep integration’, to the earlier model of ‘shallow integration’, as one that reflects the transition from integration through trade, to an integration through international production chains and TNC networks.

Although globalization in these terms is, as one author puts it, only «vaguely understood» (Michalet, 1994, p.14), increasing transnationalization of corporate activities is changing both the nature of relations between States within the world economy, and the way national economies are integrated in TNCs' activities. These trends provide in turn a powerful incentive to reform the

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[30] The notion of global firm, as defined by Levitt (1983), is not new. Back in the 1980s, Dunning and Michalet drew attention to this trend. However, until then, the phenomenon still seemed limited. Most of the studies at the time revolved around the reasons that pushed corporations to internationalize their activities, and the forms of internationalization, either through exports, direct investments, sub-contracting, licenses, alliances, etc. They also focused on the links between internationalization of production and financial institutions. Two broad conclusions were then drawn : the first, about types of subsidiaries, according as they were centered on the exploitation of a particular comparative advantage, or, as miniature replicas, on direct penetration of a market ; the second, about a trend in favor of integrated management of production on a global scale within the TNCs. Levitt’s article is without doubt the first to have insisted on the emergence of a new reality : standardized global production for standardized global consumer tastes. However, as a matter of fact, this argument lacks of proof till now.

normative frameworks that have governed international trade to date, even though the process of reform itself is far from linear, contrary to what a functionalist conception of international economic cooperation might lead us to believe. [31] Indeed, not only must we take into consideration States, as they are affected by two contradictory forces — one emerging from the international economic system itself, and the other from the role that States play in relation to their own civil societies [32] — but we must also take into account the complex interactions between the pro-competitive strategies that governments apply to ensure growth in an open economy, as well as those that corporations take up to ensure their own profitability within the global system. While openness gives more freedom to TNCs, it also imposes altered forms and modes of competition. [33]

2 A. Fair Competition in "Contestable Markets?"

According to some economists, the general principle that should henceforth prevail is that of fair competition in "contestable markets." [34] This principle must apply equally to corporations and States, and follows from a strict requirement to divide private and public sectors. This separation is the foundation of modernity, at least within national boundaries. The challenge at present is how to transpose this separation into the international arena, and in so doing, to construct the legal framework for a global civil society emerging out of open borders and the transnationalization of economic activities. [35] In this sense, we are now seeing liberal modernity

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[31] As Allais (1997) rightly notes, debates on globalization have the merit of reminding us that the world of the corporations and that of nation-States obey to different rationalities ; these two worlds are, at the same time, antagonistic and indissociable. Stopford, Strange and Henley (1991) go even further reminding us that States do not compete between each other to 'produce power', but to create wealth. This is what the new triangular negotiations are all about : be then between governments, between governments and corporations, or between corporations. And if the rules of the game are the same for all, the capacity of States to master these rules is far from being equally distributed.

[32] We are referring here to the 'two level game' concept introduced by Putnam (1988).

[33] Concerning these new interactions, see in particular Stopford, Strange and Henley (1991), Cerny (1997), Wade (1997) and Sachwald (1994).

[34] The notion of 'contestable market' was introduced by Baumol (1982). See also Tirole (1990). This notion is central to the management of competition policies in most industrialized countries. It is also being part to use as a theoretical support for discussions on the elaboration of codes of competition, on the part of the OECD and that of the WTO as well, since member countries agreed at the ministerial meeting held in Singapour in December 1996, to establish a work group on interactions between competition policy and trade. A market is said to be "contestable" when there are no legal or artificial barriers to entry or exit, when corporations have access to the same technologies, and when information is available and transparent.

[35] Regarding this debate, see Kipschutz (1992), Marden (1997), Cable (1994). For a more critical analysis, see Arnaud (1998) and Lévy (1997).

with its principle of separation between private and public spheres, overextending the framework within which it has operated until now.

Since the Second World War, the legal foundations of the global economy were entrusted to States. This approach, based on reciprocity, set the stage for the reconstruction of the international economy, but it has become too cumbersome and, more importantly, has adapted poorly to the "demands" of the new world economy where corporate activity is paramount. The question now is how to provide this private sphere with a normative framework adapted to its needs and challenges. Global economic integration should therefore not proceed through States but through markets and national laws should sanction this. Economic actors should then assume a single universal obligation based on results, or profit-making, and this exigency should be the main focus of negotiation on reciprocal rights, duties and responsibilities between States. In this case, a "demand" for institutions would come from within the system itself,[36] and it would fall on public authorities to meet this demand so that the system would operate in the most efficient and propitious manner for the sake of social and economic progress [37]. The MAI is the prototype of such a framework, and as such open to much criticism [38] not only, as we will see, because States are sovereign players in international relations [39] (Howell and Woods, 1994), but because the framework challenges the Welfare State. [40]

From Bretton Woods to the MAI

[36] An argument often advanced to support this thesis is that political decisions are taken by choosing between the demands of socio-economic actors. A pro-free-trade policy would therefore be that much easier to adopt because economic actors who benefit from globalization are more numerous than those who suffer from it. See Keohane and Milner (1996). For a critique of the theses of convergence, see for instance Berger and Dore (1997).

[37] This implies three things : firstly, that the principle according to which private actors must be able to operate in complete freedom be established by rule of law; secondly, that institutional mechanisms of control and regulation should anticipate, prevent and eliminate all abusive, predatory or discriminatory behaviour on the part of private players who interfere in one way or another in the normal functioning of the market; and thirdly, that any kind of State intervention in the markets be prohibited, except the ones that monitor compliance with competition rules. For an analysis of the debate on competition, see Bianchi (1991-92) and Jacquemin (1989).

[38] We should recall the opening remarks in Keynes "Concluding Notes" of his *General Theory* : “The outstanding vices of the economic society in which we live are its failure to provide for full employment and its arbitrary and inequitable distribution of wealth and incomes.”

[39] According to Pellet : "Internally, sovereignty is absolute, externally it is neutralized by the pretentions of States to equality" (Pellet, 1997, p. 97).

[40] This observation is made by numerous scholars. As Cowhey and Aronson already wrote in 1993, it is the very principle of multilateralism, as well as that of separation between national and international markets, two principles upon which the post war order was constructed that are directly put into question (Cowhey and Aronson, 1993).

At the risk of oversimplifying, one can contend that the post-war international economic order was constructed, or rather reconstructed, around a dual commitment on the part of States: to favour economic and social progress through full employment and income security, and to discipline and regulate the opening of international markets. [41] This dual commitment formed the basis of the Welfare State, as well as of the major international economic institutions, both based on a compromise between socioeconomic actors at the national level and, between the great powers, with the exception of the U.S.S.R., at the 'inter-national' level. Two distinct systems of negotiation were resorted to : at the national level, a tripartite system involving the government, employers' associations and unions, where as, on the international level, apart from the ILO which operates under a tripartite mechanism, there prevented a multilateral and somewhat heterogeneous system involving States first and foremost. These alliances and compromises were responsible for the implementation of national solidarities and international cooperation, and, in so doing, they did further growth and international trade.

Where did international investment fit into this new order? When Keynes presented the final version of his 'plan' for an International Clearing Union in 1943, he felt that control of the movement of capital, both internal and external, should, for the sake of political and financial stability, be a «permanent feature of the postwar system» (section VII, points 32 to 33). For Keynes, this was not a question of restricting international investment. On the contrary, it was a matter of finding a way for international investment to contribute to the development of national economies and to control short-term speculative movements. Control of international capital flows had been the subject of numerous debates ; for example, during bilateral negotiations between the United Kingdom and the United States leading up the signing of the Bretton Woods Agreement or, again, during negotiations of the Havana Charter in 1948. [42] However nothing concrete resulted from these debates and, for all intents and purposes, the whole issue remained the responsibility of States. Of course, it could have turned out differently, as Keynes had hoped it

[41] See Brunelle (1997) and Deblock (1997).

[42] The Havana Charter carried several clauses on foreign investment, notably articles 12 and 15, in chapter 3 dealing with economic development and reconstruction. Let us recall that this chapter was written up at the request of developing and European countries. These clauses did not so much strive to protect investments and investors, but rather to allow member States to take appropriate measures to ensure that foreign investment were not a source of interference in their domestic affairs or national policy. It is essential to understand the full meaning of these clauses, and not fall into the false interpretation giver by the WTO in its report of 1996.

would. [43] It is important to realize, however, that the issue was all the more controversial at the time, as it directly affected not only property rights, but the rights of States to legislate and regulate in economic matters, rights that they had every intention of exploiting, as they intervened more and more directly in the economy. Moreover, along with how to control the movement of capital, arose the issues of what mandates to give the International Monetary Fund (IMF), particularly in terms of its involvement in the foreign exchange market, and the International Bank of Reconstruction and Development (IBRD) as far as its financing of development was concerned. Finally, the founding of an international system to address the controversial issues of investment and capital flows did not count as one of the United States' priorities, or to be more precise, the United States was not willing to address the issue on the same terms as their European and South American counterparts. This attitude would ultimately bring an end to the debate.

Does this mean that nothing at all was retained from these confrontations? Not quite. Several attempts were made to build a normative framework around capital and investment flows, but most of them failed. And when they did produce results, for instance with the two Codes of Liberation that were signed in 1961 by the member countries of the OECD (one on capital circulation, the other on invisible transactions), the agreements established a moral, rather than legal, obligation. When, on the other hand, an agreement was legally binding, its scope tended to be limited, either geographically, as was the case with clauses of the 1957 Treaty of Rome, which were renewed, reinforced and broadened in later treaties, [44] or by sector, as was the case with two Agreements signed under the auspices of the World Bank, the first in 1965, concerning dispute settlement mechanisms relative to investment disputes between States and foreign citizens and the second, in 1985, that brought about the creation of the Multilateral Investment Guaranty Agency (MIGA). In the end, two fundamental issues have always prevented the signing of what would or could become a MAI. The first relates to national economic concerns that prevailed in most countries from the Second World War to the beginning of the 1980s. The second has to do with

[43] See Meltzer (1981) and Crotty (1983).

[44] Most of these regional economic agreements contain clauses relative to the movement of capital and freedom of establishment. However, in most cases, with the notable exception of the EU, either the clauses in question were not applied or, if applied, they were followed by reservations. Again, with the notable exception of the EU, most agreements hardly contained clauses relative to the protection of investments nor specific dispute settlement mechanisms. Presently both the EU and NAFTA have a comprehensive regime in these matters. In fact, NAFTA norms on investments have resurfaced in the MAI. Proceeding through successive stages, the US and Canada have moved from the FTA to NAFTA, and to the MAI and eventually to the WTO.

animosity, incompatibility and frictions between the North and South, from the 1950s through the 1980s.

As far as the industrialized countries are concerned, the issue of monetary flows control was resolved with the return of currency convertibility at the end of the 1950s, then with that of floating exchange rates in the 1970s. The issue of foreign direct investment, however, would long remain a point of contention, or at the very least, a highly sensitive issue. For all countries, with the notable exception of the United States, retaining control over foreign investment was a means of safeguarding their economic independence. Furthermore, the need to reinforce macroeconomic policies, then oriented towards full employment, led to the implementation of policies dealing with industrial and regional concerns. Although, in practice, these goals were generally pursued through State and industry funding, they were also advanced by imposing controls on foreign investment.[45] Justified in the name of national interests, the extent of these controls varied greatly. This did not prevent a given state from furthering its image as a haven for foreign investment, and thus taking advantage of the know-how, capital, or technology of TNCs. The case of Canada, in this respect, is once more exemplary since the government achieved a delicate balance between receptiveness to foreign investment and control during the entire period stretching roughly from the beginning of the 1960s to the mid 1970s. This strategy would help it stimulate strong economic growth and catch up to its powerful neighbor through gains in productivity.

As far as the developing countries are concerned, the problem was of a different order since they had a specific goal, over and above that of protecting their national economic independence, one which involved industrialization through import substitution. Introduced by these countries in the post-war period, this model was designed to remedy their skewed development, the result of their dependence on export-oriented production, their dependence on natural resources as the lion's share of their exports, and the presence of multinational corporations enjoying monopolies in their territories. Here again the situation was paradoxical insofar as such a model required a strong presence on the part of the State, as well as continuous

[45] Such control goes through multiple channels. At least four can be identified : i) a reinforcement of national controls and a limitation on foreign of capital in vital sectors or those having priority from an economic, cultural or strategical point of view; 2) the creation of State-owned corporations, either in sectors having priority or in sectors where the market ; 3) the imposition of regulations and sectorial restrictions, of performance requirements on enterprises and on foreign investors ; and, 4) in general, a direct or indirect control, either on the inflow of capital (mergers-takeover, implantation and/or localization of new investments) or on the outflow of capital profits.

support for national producers, but also depended on foreign investment to contribute to economic development. Contrary to what occurred in developed countries, however, these two conditions were never really met. National markets were effectively protected, but economic development suffered greatly from bureaucratic sluggishness, the poor productivity of local industry and, lastly, from the relative lack of interest in these markets on the part of TNCs. [46]

During this period, the prevailing attitude of some segments of the population in the North and the South was one of open hostility towards TNCs, as the abundance of critical literature well attests. Critics sought to link discussions on international investment to the establishment of codes of conduct for multinational firms. However, beyond this hostility, which was for the most part rooted in negative perceptions of corporations as multinationals, and moreover as American ones, [47] the debate on international investment itself, as far as developing countries were concerned, was tied to a larger one on the New International Economic Order. [48] During the 1970s, when the pressure to establish such an order was mounting and debates on the subject became polarized, initiatives aimed at defining new rules of law grew in number and intensity. As a case in point, a short while after the United Nations adopted, with great difficulty, the Declaration and the Action Plan on the Establishment of a New International Economic Order on May 1, 1974, and, with more difficulty still, the Charter of Economic Rights and Duties of States on December 12 of that same year, member States embarked on another set of negotiations that would last from 1977 to 1983, with the aim of drawing up a code of conduct for TNCs. [49] These negotiations failed [50].

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[46] Concerning the case of developing countries see Haggard (1990) and Haggard and Kaufman (1992).

[47] As such, the word 'transnational', more recent than 'multinational', carries with it the idea of a process operating through territories and would therefore pose a threat to sovereignty.

[48] The expression 'New International Economic Order' dates from the seventies. It appeared in a document of the FAO in 1964. But it is the Program of Action and the Declaration on the Establishment of a New International Economic Order that fixed its usage. (Stern, 1983, p. 3). The Declaration set out twenty principles and was accompanied by a Program of Action in ten. These ten points are : (1) the problems posed by raw materials and primary products in the context of trade and development; (2) the international monetary system and the financing of developing countries; (3) industrialization; (4) the transfer of technologies ; (5) the regulation and control of transnational corporations; (6) the Charter of Economic Rights and Duties of States; (7) the promotion of cooperation amongst developing countries; (8) the assistance to States in the exercise of sovereignty over their natural resources; (9) the reinforcement of the role of the United Nation's organizations in international economic cooperation; (10) the establishment of a special program to alleviate difficulties encountered by developing countries most seriously hit by the economic crisis. The two Resolutions were adopted by consensus, but reservations were also formulated. See Stern (1983).

[49] Following France's initiative, a conference on International Economic Cooperation was held in Paris, from the May 30 to June 2nd 1977, in an attempt to bring the North and the South closer together. Previously, against the backdrops of the petroleum crisis of 1973, the France's President, Giscard d'Estaign, was host, in November of

Meanwhile, within the International Labour Organization, member States had finally managed to reach an agreement on a tripartite Declaration of Principles concerning Multinational Corporations and Social Policies (1977), and, in the same vein, UNCTAD, in 1980, adopted a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices [51]. Nevertheless, these two declarations had moral significance rather than a real impact. The Declaration on International Investment and Multinational Corporations, along with its Decisions, signed in 1976 and revised in 1991 by the member countries of the OECD has had nevertheless some impact. They now await ratification as an annex to the draft of the MAI.

4. New Consensus or New Systemic Competition?

According to the WTO, the last two decades have witnessed «the emergence of a virtually global consensus on the fundamentals of trade policy» (WTO, 1996, p.4). [52] National trade policies are part of a new political economy set up to redefine the parameters of global economic integration and the framework of State intervention in a field where national interests have long been fiercely defended. In this context, it has become all the more difficult for governments to revise and shift their policies because multinational corporations are taking advantage of the opening economy by considerably broadening the field of their operations and, because these same governments are caught up in the trappings of liberalization, and subject to increasingly fierce competition among each other. [53] Furthermore, when a public policy encourages trade liberalization and capital movement within borders, a State cannot but commit itself along the same lines at the international level. [54] In this sense, the redirection of public policy towards free

1975, of the first Economic Summit of the five most industrialized countries, later known as the G-5, in Rambouillet. Nothing specific came out of the Paris Conference.

[50] See Stern (1983).

[51] Negotiations on the establishment of an international code of conduct for the transfer of technology ended inconclusively.

[52] This comment does not apply to trade policy alone, but to all economic policies. Williamson wired the expression "Washington Consensus", later taken up in specialized literature. Actively, Dani Rodrik (1997) is much critical about it and its effects in developing countries.

[53] This is what Baldwin (1997), transposing a rationale applied to regionalism, calls the "domino effect". In this instance, it is a matter either of avoiding being caught off guard by measures of liberalization adopted by others, or more strategically, of taking advantage of being first. The net result is that in either case the process of liberalization is accelerated.

[54] The notion of trade policy is used nowadays in a larger sense, covering as it does the entire field of international economic relations. The expression ‘international economic policy’ would be, in our opinion, more appropriate.

trade illustrates to what extent States are attempting to turn globalization to their advantage,[55] a strategy that generates new systemic rivalries.[56]

In this regard, four facts are particularly noteworthy. The first, and most revealing, points to how governments perceive the role that foreign investment should play in national economic growth. As Dunning notes (1994), in a relatively short time span, governments have gone from an attitude of open hostility towards TNCs, to an attitude that could not possibly be more receptive. Not only is any new foreign investment now considered good news for the economy, but in terms of procedures, regulations and obligations, every effort is made to facilitate their entry. It is a curious reversal of fortune to see governments running after 'foreign' investment and rolling out the red carpet for TNCs.

Two related motivations lay behind this change of attitude : one is to improve competitiveness, growth and economic performance in general, through foreign investment ; the other, to link national economic growth to the growth of international markets through exports with the increased presence of national producers in foreign markets. As vectors of globalization, TNCs are generally perceived as more dynamic, competitive and innovative than companies that produce solely for the domestic market. The breadth and depth of their networks also render them more likely to make the national economy contribute to the growth of the global economy. It is therefore as much a question of supporting one's own national investors in foreign markets as it is of taking advantage of the presence of foreign investment in the national economy,[57] either directly by bringing capital, new technologies, know-how, better management, etc., or indirectly through gains in efficiency, spill-over effects on national industry, or economies of scale.

The second notable fact is that, in their quest to make national economies more competitive in international markets, governments have become decidedly more sensitive both to the effects of their macroeconomic policies on corporate strategies of local investment, and to the

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[55] See the excellent work of Douglas A. Irwin (1996).

[56] We deliberately prefer to speak of systemic competition, and not, as Sylvia Ostry (1991, 1992) has proposed, of 'systemic frictions'. For the proponents of the thesis of convergence, the emergence of a global civil society lies in the very dynamic of globalization, with its ensuing and growing integration of national economic units.

[57] It can be about financial incentives, like investment grants or subsidised credits points, tax incentives, like tax holidays or exemptions from import duties, property incentives, like providing land or rent at less-than-commercially changed prices, or again investment reduction regarding designated infrastructures. Regarding the costs of competition between States, see Low (1995). As the WTO asserts in its 1997 report : "Getting drawn into competitive bidding for an FDI project is like sending a government official to an auction to bid on an item, the actual value of which is largely a mystery to the country." (WTO, 1996, p. 60)

multiple interactions that exist between the performance of corporations in international markets and the environment in which they evolve. The microeconomic notion of competitiveness raises multiple theoretical problems when it is extended to the scale of a nation. [58] Nevertheless, it is now recognized that the competitiveness of a firm depends not only on the resources and dynamism that it draws from its own organization, but also on the external economies that it draws from its environment.

Taking external constraints into account when developing macroeconomic policies, or external economies when developing industrial policies is not new. What is new is the fact that, in a context where corporate strategies must internalize national differences and, consequently, national economies are placed in competition with one another, competition in international markets is no longer the concern of corporations alone, but of States as well. [59] And States, through their macroeconomic policies and policies in matters of infrastructure, human resources, research and taxation, in short their social policies,[60] find themselves interfering more and more in markets as they become more involved as actors in globalization.

The third notable fact is legal and institutional in nature. It is undeniable that the proliferation of international agreements on FDI, whether on a bilateral or regional basis, has been one of the most conspicuous trends on the international economic scene these last few years. [61] More than half of these agreements have been signed since 1990 and, in most cases, they are

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[58] See Rapkin and Strand (1995).

[59] Québec, for example, recently gave itself the objective of being ranked, between now and 2006-2010, amongst the ten most competitive in the world. The reference to the 1997 World Competitiveness Report is based on a multicriteria analysis of competitiveness. (Québec, 1998)

[60] The issue concerning the inclusion of social and environmental clauses in trade agreements has been one of the most contentions ones these past years. If most governments agree on the fact that countries should not lure investments by relaxing norms, the inclusion of specific clauses on environment and labour faces strong objections. According to some, the inclusion of such clauses would lead to an increase in production costs, which in turn, would lead to a decrease in competitive advantages ; for others, including the United States government, social clauses could put into question public financing of established social programs ; for others still, inclusion of social clauses in trade agreements constitutes an interference in the functioning of markets and hinders business concerns. Regarding these debates, see Benessaieh (1998).

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between industrialized countries and developing countries, where national regulations on foreign investment remain very restrictive. A parallel could be drawn here between the decreasing number of agreements on investment and the proliferation of regional economic agreements that incorporate precise rules on investment. [62] Be that as it may, while these agreements attempt to establish an institutional framework that is at once more secure, more transparent, more predictable and more favorable towards international investment (Julius, 1994), these agreements also reflect the strategic concerns of the States that sign them. In this sense, to speak of «merchant diplomacy» is revealing, insofar as governments openly support 'national' corporations in their efforts to conquer new markets, either through trade or by establishing themselves locally. In the meantime, this support tends to take on questionable forms, from the point of view of competition law, as is the case, for example, with export agreements or mergers that are *de facto* justified in terms of efficiency and international competitiveness. [63]

The fourth, and last, notable fact is the paradoxical effect that globalization has on competition policy, which is progressively being transformed into nothing less than a strategic industrial policy. [64]

Traditionally, competition policy falls under State jurisdiction. But even if we grant the need to establish universal, pro-competitive rules in international markets, this is proving to be a very difficult task. On the one hand, corporate practices have become all the more difficult to regulate now that they have a crossborder dimension that tends to escape the jurisdictional power of States. On the other hand, for the sake of international competitiveness, governments have watered down their legislation and are adopting a much more tolerant attitude than in the past

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[62] This question is tackled, in the case of North America, by Lorraine Eden (1996). In her study, the author shows how measures on investment in NAFTA establish a regime adopted to the new realities of "deep integration". She also shows how these clauses can be used to establish a frame of reference at a multilateral level. See also Lawrence (1996).

[63] Thus, in Canada, the recent creation of Team Canada Inc. aims at improving what the Department of Foreign Affairs and International Trade (DFAIT) calls "horizontal management" through a single, integrated business plan and regular meetings across the three core international business development departments: the Department of Foreign Affairs and International Trade (DFAIT), Industry Canada and Agriculture and Agri-Food Canada" (Canada, DFAIT, 1998). Québec, for its part, has not remained passive in this regard. On the presentation of the budget, in March 1998, Vice-Premier and Minister of Finances, Bernard Landry, announced the creation, under his direct responsibility, of a new crown corporation, Investment Québec, with a mandate parallel to that of Investment Canada, to attract large investment projects, to offer integrated services to investors, to promote Québec abroad and to assume a role of coordination of governmental actions concerning the reception and support of the financing of major investment projects (Québec, 1998).

[64] See the section of the WTO 1997, *Report on trade and competition policy*.

towards mergers and strategic alliances. [65] Their tolerance is greater still when it can be shown that these mergers and alliances are a means for corporations to improve their productivity, research and innovation, as well as their access to foreign markets. [66] At the same time, goverments assume that competition on the part of foreign corporations will act as a healthy incentive in domestic markets. We see this rationale taken up by the courts as well, where in cases involving mergers and alliances, tribunals cannot decide 'objectively', they are inclined to decide pragmatically using the notion of 'potential competition' in the marketplace. [67] As long as markets remain potentially open to international competition and institutional entry barriers are lifted, the preferred course is to rely on the 'rule of reason', for lack of anything better, and decide on a case by case basis. The alternative is to follow the principle of courtesy at the international level, according to which a State should voluntarily refrain from taking action when its actions are likely to threaten the interests of another State. [68]

In short, what we have tried to emphasize with these few observations, is that, although there does exist a 'virtually global consensus' on principles of investment policy and, by the same token, a strong incentive to endow the world economy with a normative framework that is favorable to investment, competitiveness has become what one author has called a 'dangerous

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[65] The Canadian Competition Act, modified in 1986 (Bill C-91), is, in this regard, quite indicative of this change of approach since it ranks the interest of the consumer as fourth in order of importance amongst the objectives pursued, which are : (1) stimulate the adaptability and the efficiency of the economy; (2) improve of Canadian participation in global markets, taking into account the role of foreign competition in Canada; (3) ensure that small and medium sized businesses have an honest chance of participating in the Canadian economy; and (4) secure competitive prices and product selection for consumers. The changes introduced by the Act reflect the fact that economic priorities are oriented towards growth of exports and presence of Canadian corporations on international markets, without causing adverse effects either to trade partners or Canadian consumers.

[66] An argument often put forward in order to jusitify a 'cautious' intervention, as Krugman would put it, on the part of public authorities, has to do with scale economies. This argument was also developed by Brander and Spencer. International specialization does not rest on comparative advantages alone, but on the ability of countries to take advantage of the dynamic effects of economies of scale and differentiation of products. Public authorities intervene to assist national producers reaching a dimension or international efficiency size such that they should successfully compete on international markets.

[67] Competition policy lends itself well to a 'prisoners' dilemma' type of situation.

[68] We should quote two excerpts from the WTO Report, to illustrate the gap that separates theory and fact : "There is no all-encompassing model of imperfect competition that can guide the actions of competition authorities in all circumstances. (...) The analysis has to take into account both potential as well as actual competitors, possible efficiency gains from restrictive trade practices, duplications of competition policy decisions for economic growth, and so on. Indeed, while certain kinds of blunt anti-competitive behaviour, such as price fixing and horizontal market segmentation should, according to most observers be prohibited per se, much adjudication has to rely on the rule of reason." (WTO, 1997, p. 48). "The risk of decisions which are harmful to the welfare of trading partners is particularly strong where total national welfare approach is taken, which allows national producer efficiencies to

obsession' (Krugman, 1994). [69] In effect, this preoccupation is so present in public policy that it has become the source of tension and dissention between States that are nevertheless expected to lay the foundations of a normative framework that will not only 'free' investment from national restrictions to its circulation, but also establish conditions for fair competition to be applied to corporations as well as to States themselves. [70] In this respect, the MAI represents an interesting 'mixture' of contradictions, as it is in the very name of 'fair competition' that States are prepared to limit their own sovereignty over investment in order to further the national economy's integration into the new global economy.

Markets and the Transnationalization of Rules

We have seen that, within the general outline of globalization, not only are corporations increasingly transnationalizing their activities, but transnationalization is having profound effects on how different national economies are integrated, and consequently, how private and public sectors intersect. The globalization of markets has blurred the distinction between the national and international levels of integration, and put in question the classic distinction between national and international economic policies. States have therefore abandoned Keynesian parameters in favour of new parameters centred on the competitive integration of national economies into the world economy. This could result in national economic policy and international economic policy fusing into one (Cerny, 1997). [71] Also, globalization is leading to new and unforeseen consequences on the processes of integration themselves. Integration is becoming less and less manageable within an institutional framework that was initially conceived not so much to structure world markets but to further economic liberalization and development. In this sense, international economic cooperation today is not oriented towards the institutionalization of supranationalism — as was

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affect consumer costs. But even where national consumer welfare is the predominant consideration, a divergence between national and foreign welfare can arise, the most obvious case being export cartels." (WTO, 1997, p. 37)

[69] Krugman, past supporter of 'cautious intervention', today backs free trade, a 'second best' option, according to him, preferable to state intervention whose motivations and effects are questionable.

[70] As a case in point, we should mention Canada's official position during negotiations, which rests on three considerations : First although previously receptive toward foreign investments which, in turn, have played an important role in the development of the country, Canada is now confronted to the decline of its share of international investments; a second consideration has to do with the strong growth of Canadian investments abroad with the result that security of access and dispute settlement mechanisms have taken center field. Finally, national rules should be applied without giving rise to indirect competition and allow for the carrying out of national policies in sensitive areas such as culture, transportation, minerals, health, etc. (Source, DFAIT).

[71] Cerny uses the concept of 'Competitive State'. See Cerny (1990, 1994).

the case with the post-war model centred on the State, or that of the European Union — but rather towards a transnationalization of rules, e.g. towards the emergence of economic norms that each State would sanction and enforce within its own boundaries.

As Fatouros points out (p.47, 1996), historically, debates on or about FDI regulations covered three issues : first, to what extent did international law impose limits on the powers of States over foreign citizens and foreign-owned corporations? Second, under what conditions could the State of origin appeal to international authorities in case of real or potential prejudice? And third, to what extent were the different national regimes compatible with one another?

The rapid growth of FDI, new TNC activities, changes in attitude, reforms of national policies relating to FDI, these factors, among others, have had the effect, according to Fatouros, of pushing jurists and government officials to reorient the debate away from the definition of 'fair' rules and principles as a means to meet challenges, and towards determining specific policies and rules likely to promote the circulation of capital and ensure the best possible protection for investors and their investments. «This new approach has placed the emphasis on international agreements as the principal source of relevant legal regulation» (Fatouros, 1996, p. 48).

If sovereignty itself is not challenged, the purpose of collective international negotiations between States has changed significantly. It is no longer a matter of starting on the national level and, by mutual exchange of concessions, making national standards converge towards the development of universal standards. Rather, the objective of current negotiations is to establish international regulatory measures that, from above, may govern and structure three types of relations: relations between States, between corporations and States, and between corporations. In short, the international extends itself downward in the realm of the national sphere. As Ostry noticed, "international cooperation is infiltrating national borders to affect domestic policies» (Ostry, 1993, p. 81). [72]

This process carries with it three consequences : first, this new regime should treat domestic private and public investments equally; second, international standards should replace national standards; and third, local markets would no longer be subject to national law, but to transnational law.

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[72] See the excellent critical article by Ruggie (1994). Concerning private international law and the criticism of liberal thought, see Cutler (1995).

As a case in point, the MAI provides the following innovations : 1) an extensive protection for foreign investors and their investments, which limits expropriation rights considerably; 2) an elimination of constraints on investors, [73] 3) strong restrictions on States' power to intervene except in domains defined in the agreement and included in the reservations; [74] and lastly, 4) an innovative dual dispute settlement mechanism.

Under such conditions, the question is not one of convergence towards a universal model, rather, it is a question of multilaterally defining a normative framework that is sufficiently restrictive to counter the individual 'go it alone' strategies of States, sufficiently coherent to fit in with other agreements, such as the WTO, and finally, sufficiently broad in its application to be able to restrict corporate practices liable to distort the 'normal' functioning of the market. This being said, the development of such a framework raises a certain number of issues that remain perplexing.

First of all, governments and corporations have agreed to work things out between themselves, without feeling compelled to involve civil society other than through consultation mechanisms that are decidedly undemocratic. [75] This democratic deficit is tied to the inadequacies of the consultations *per se*, and to the legitimacy of an «executive democracy» according to which a given political regime is less and less connected to the expression of the citizens' will and more and more connected to power broking at the global level. [76]

Next, if corporations are given preference in the elaboration and implementation of domestic policies, as well as in the establishment of international normative frameworks, interactions between corporations and governments illustrate the difficulty of regulating anti-competitive practices as far as they impact on the labour market and on the well being of

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[73] This part of the agreement is, as was the case with NAFTA, quite detailed. A country would not be able to impose, apply or maintain requirements regarding exports or imports, local content, purchase or sale of goods or services, transfer of technology, location of head office, exclusive production, research and development, hiring of personnel, copartnership or joint ownership, reinvestment of profits, distribution of dividends, or participation in management positions.

[74] This approach may be called 'positive' or 'from above', since measures must be applied to all areas of the economy, except those specifically covered by reservations. All measures that do not comply and are not provided for in the reservations cannot be maintained.

[75] Although we must recall, in this regard, the existence of the Trade Union Advisory Committee (TUAC) which acts as the official consultant for the OECD. Its function parallels that of the Business and Industry Advising Committee (BIAC). TUAC's role is to further union demands, but with little success up until now. This being said, TUAC's role has neither been much publicized nor very democratically defined.

[76] See Keohane (1998).

populations. In the meantime, globalization increases inequality in wealth distribution, economic insecurity, as well as social marginalization, which in turn have deleterious effects on the cohesion of societies. Faced with these challenges and concerns, the promulgation of codes of conduct by TNCs undoubtedly constitutes a step in the right direction, but it is far from enough in a context in which corporate practices increasingly escape government control and governments betray a certain complacency towards corporations.[77]

Finally, while developed countries operate within a sociopolitical framework in which economic and social rights are recognized if not promoted, the effects of these readjustments on less developed countries are likely to prove destabilizing due to the very importance of TNCs and foreign investment to their economic development. Destabilizing, because their democracies are weak, their economies fragile, and their economic and social rights, precarious. Deleterious, because of the dilemma public authorities in these countries are faced with when they must choose between protecting investors or protecting their population.

Conclusion: The MAI, as a Challenge to the Theory of International Relations?

We have attempted to shed light on some of the distinctive aspects of the MAI. It remains to be seen how this draft agreement relates to a few main currents of thought in international relations theory. In this regard, there is no doubt that the MAI is innovative in several respects, and as such, reflects the desire of its proponents and defendants to break down institutionalized normative frameworks, a desire bolstered by the inherent limits of the existing institutions themselves.

In this sense, the MAI raises an interesting theoretical challenge in international relations' theory regarding the pre-eminence of the State, and the challenges presented by the transnationalization of corporations. As long as States cooperated more or less eagerly in the gradual opening of national markets, we could believe, and lead others to believe, that they were only following up on obligations that they willingly accepted in order to promote the liberalization

[77] For Robert Reich (1998), the State remains a significant and crucial actor in any democratic society, as well as an arbitrator of the social and economic cohesion of societies, of the ‘social compact’ as he calls it. But one can ask if, by becoming involved in a redefinition of normative frameworks, States are not relinquishing their powers of intervention. If this should be the case, who will henceforth represent the public interest on the global level ?

of trade in goods and services. In this sense, the negotiations have confirmed the central tenet of 'realist' approaches which tie together economy and power on the one hand, policy and security on the other.

For over three decades, debates on international relations have focused on three questions : why do States cooperate? Is the State still a key player of the 'international system'? What does the future hold for international institutions? The dominant paradigm of international relations, the 'realist' (or 'neo-realist', *à la Waltz*) paradigm, has not managed to answer these three questions in a satisfactory fashion. [78] For realists, States wield power in order to ensure their own security. While the Cold War context validated such an approach for some time, a realist paradigm is bound to fail in a world where transnationalization of corporate practices has major structural effects both on the way private and public spheres interact, and on the development of normative frameworks.

Three currents of thought within the realist paradigm sought to provide new answers to these questions. [79] Although each of them has led to interesting research, none has managed to integrate the field of economics into their analysis effectively. The first, and closest to the realist paradigm, is the theory of 'hegemonic stability'. This theory, in Gilpin's version, is defined as 'structuralist' in the sense that, approaching problems from 'above', it sets out to determine how the system will produce structures sufficiently stable and well-defined so that public and private actors can reach their objectives. Echoing Olson's idea, whereby, in the absence of any external constraints, actors are induced to cheat, the model concludes that there can be no stability in international relations unless a hegemonic power assumes the role of Great Protector vis-a-vis

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[78] According to Mearsheimer (1993-94), realism, in international relations, is tied to five ideas : (1) the world is an arena where competing States, vie for their survival ; (2) world stability rests on a balance of power, measured in terms of destructive military capacity ; (3) States are rational in their own choices, but do grasp the intentions of others ; (4) cooperation is possible, but depends on the gains obtained in terms of power distribution within the international system; (5) international institutions exist as instruments of power, but they are deprived of any autonomy, save that which is granted by the most powerful States in the system. Realism is grounded in hobbesian theory and, as such, sees the world through State power, leaving but little place to economic questions, or to international cooperation.

[79] This question was recently the object of an important debate in *International Security* (Vol. 19, No. 3 and Vol. 20, No. 1). It brought John J. Mearsheimer into conflict with Keohane and Martin, with Ruggie and with Wendt as well, to name a few. In David and Benessaieh (1997), one will find a comprehensive presentation of the debates that presently surround institutionalism in international relations. The article broaches the thorny question of the relation between interdependance, integration and security in international relations. Tackling the same question from a different angle, in *Review* (1996) Bernadette Madeuf aimed to resolve the paradox in which the researcher

established international institutions. [80] The strength and future of international institutions depend directly on the status of a pre-eminent player within the international community, on the respect and fear that it inspires among other members, and on its ability to maintain an hegemonic status in both military and economic terms.

This model carries with it a broader notion of security which includes the pursuit of wealth along with that of power. It offers an interesting explanation for the role played by the United States in the construction of the post-war order and the exceptional status it enjoys. However, unless the theory is transformed into a variant of mercantilism, a possibility that Gilpin categorically rejects, hegemonic stability can never be more than an *ad hoc* theory, essentially because it fails to explain the origin of domination or to account for the effectiveness of State intervention in economic structures. The theory remains fundamentally linked to the concept of power and the notion of economy is generally discussed only insofar as it relates to power. [81]

In the case of the MAI, it is clear that the United States play a major role in pushing negotiations forward. International economic policy has never been so «aggressive», nor have US interests been so closely linked to the interests of TNCs. [82] Should we therefore take for granted the convergence between the United States' interests as a great power and the interests of American corporations on whose behalf the administration is negotiating? How can one reconcile

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finds himself, caught between two levels of analysis, the national spheres or the global one. This article is still worth the detour.

[80] Theoreticians belonging to the school of hegemonic stability are much influenced by the theory of international collective goods developed by Kindleberger. Kindleberger has always been preoccupied by two quite troubling questions for any economist : since free-trade means of progress and well being, how can one explain the gap between the normative prescriptions of the doctrine and the content of trade policies ? How does one avoid, in the absence of any supranational institution, the drift of these policies and the emergence of distressing situation as the ones that prevailed during the interwar period ? Rejecting ignorance of economic laws as an explanation, Kindleberger turned towards pressure groups in order to answer the first question. As for the second question, he looked towards the notion of public good, a notion that he transposed into the area of international relations. Hence, the most powerful nation should ensure production, and assume the costs of world stability. Kindleberger shares the neo-realists pessimism. However, unlike neo-realism, his theory is based on the idea of an international public good, and the approach takes into account a progressive conception of history. Kindleberger has been reluctant to use notion of hegemony, preferring that of 'leadership' or that of benevolent great power.

[81] This is probably why the theory is deemed questionable in the eyes of any liberal economist because the interests of power interfere with the market

[82] This is precisely what a study commissioned by the Western Governors' Association intended to demonstrate. It clearly shows that the MAI runs counter to the constitutional rights of American States and draws up an impressive list of measures, regulations and legislations presently in force in the American States that would be affected by the MAI. See Singer and Orbuch (199&).

the Administration's objectives and the demands of civil society as represented by Congress? The theory cannot provide truly satisfying answers to any of these questions.

A second current of thought focuses on the institutional aspect of the theory of regimes. Here again, the State plays a central role. However this school of thought at times does not ignore questions of power, it prefers to turn instead to the problem of interdependence and, through it, to actors in the private sector. The underlying premise is that the tightening of links and the intensification of trade between private sector actors, first and foremost at the economic level, engender a situation of «complex interdependence», in inter-State relations according to Keohane and Nye. This situation in turn produces three effects : first, it limits national sovereignty and consequently the power of the State. Secondly, it weakens States and therefore renders them more vulnerable to external crises. Finally, it lays the foundations for cooperation towards the establishment of international regimes.

According to Young, the notion of regime, borrowed from the field of law, which covers explicit and implicit principles, rules and institutions, relies on the notion of consensus among States in a specific field of international relations. The main question, therefore, is no longer why States cooperate, but how and under what conditions they do so, in order to reduce their external vulnerability and respond to the demands of private actors. This approach is then still centred on the State and attributes regime formation to a nation's power of persuasion. Without reiterating Susan Strange's strong criticism of the notion of regime in international relations, [83] this analysis, as opposed to the idealist model, [84] does not explain the transnationalization of rules through the MAI. As indicated earlier, the issue is not one of simply adding a new regime to existing ones, as plates piled up one on top of the other, but of how to explain the foundation of a global normative framework as integrated as the different normative frameworks that currently govern corporate activity within national or even regional boundaries can be.

A third current of thought, 'constructivism', was developed through the work of Wendt, Kratochwil and Ruggie, among others. These authors have endeavoured to show how international norms represent the values and interests of actors who, through a negotiating process, 'construct' the institutions that in turn will mold their behaviour. This aproach offers very

[83] Susan Strange (1997).
[84] One finds a new version of this model with the concept of 'epistemic communities' developed by Haas.

interesting insights into institutional analysis. On the one hand, it addresses directly the problem of norms and, in so doing, goes beyond the immediate interests of public actors. On the other hand, it proposes a dialectic analysis of institutional evolutions, in the sense that legal or institutional frameworks are neither imposed from above, as the hegemonic stability theory would have it, nor built from below, as implied by the theory of regimes. What we have instead is an interchange between framework and actors, between behaviours and norms ; in a word, reality is constructed. But one question remains, however, by whom and on what basis is this done ?

Although each of these schools of thought offers interesting analytical perspectives and concepts which, like those of hegemony, interdependence and intersubjectivity are essential, the fact remains that these theories are State-centered. For sure, States are increasingly involved in the economy to the point of being in turn «embedded» in it to reverse Polanyi’s metaphor, but, more importantly, States act as vectors of global change and the results of this involvement are threefold : first, economic affairs are a priority in matters of security; second, public policies are adapted to meet the requirements of global competition; and, third, corporate strategies are a dominant variable in globalization.

The MAI is a most revealing example of these trends and evolutions. As was pointed out above, the agreement represents a new compromise on the part of States. Moreover, the agreement confirms the emergence of a new actor who will henceforth have access to international law by binding norms on an equal footing with States and who will have the power to confront governments at all levels, as well as State-owned corporations. Finally, the agreement would provide *private corporate strategies* with the benefits of *public protection* against social turbulences, or social goals even.

To establish how far we have come over the last half-century, suffice it to recall the degree to which Keynes saw public control of investment as decisive. Neither the ‘structuralist’ approach, nor the analysis in terms of regimes, nor the constructivist perspective, are able to explain this evolution for the simple reason that the intelligibility of today’s world economy depends first and foremost on the understanding of TNC strategies, and their effects on national economies. State-centered approaches cannot take these realities into full account.

Nevertheless, Kratochwil's constructivist approach offers most interesting insights into these questions. In his critique of the notion of regime, Kratochwil (1989) challenges the so-called weak interpretation of the role played by norms in international law. Because international law does not provide for sanctions the way domestic law does, 'soft law' would be essentially consensual rather than normative *stricto sensu*. Consequently, attitude and behaviour towards norms are of paramount importance and subjective interpretations prevail over objective ones. In this context, only power relations within the international order can compensate for the lack of objectivity. The hegemonic power then constitutes both a fact to reckon with, and a stratagem to endow a given norm with an ‘objective’ meaning. In contrast, in domestic law, the validity of a norm is based on an intrinsic objectivity linked to the fact that sanctions are imposed by an ‘independent’ authority, independent, that is, from the parties involved. Now, what is interesting about Kratochwil’s perspective is that, if resorting to norms is not merely a strategy to sustain or reinforce a given international order, but carries with it a specific problem-solving objective, what we have to contend with now is basically the issue presented by the hierarchy of norms.

Assuming this to be the case, what we see, beyond the tentative conclusions drawn by Kratochwil, is that the MAI signals the emergence of a much more profound phenomenon or process, which is the emergence of private property rights as basic norms in the domain of international public law. If this were the case, then an innovative dimension of the MAI is that the agreement would impose an extensive protection of investors' rights as *real property rights* which may be incompatible in the future with the promotion and the extension of social and collective rights. In short, and in other words, *the MAI would operate an internalization of foreign property rignts within a given State and would, in turn, externalize their sanction.*

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Table 1 : Foreign Direct Investments Trends
1986-1996, average annual growth rate, current value)

	1986-1990	1991-1996	1996
	(%)		(US % billions)
Foreign Direct Investments			
Inward Flows	24,4	17,1	349
Outward flows	27	11,8	347
Inward Stock	18,7	11,7	3233
Outward stocks	19,8	11,1	3178
World GDP	10,7	6,4	30142
World exportations	14,3	7,4	6111

Sources : UNCTD, World Investment Report, 1997

Table 2 : Foreign Affiliates' Production, in % of GDP
1982, 1990, 1994

	1982	1990	1994
Developed Countries	5,1	6,7	5,4
European Union	5,7	8,6	7,7
North America *	5,1	6,7	5,2
Developing Countries	6	7	9,1
Africa	4,4	7,4	8,8
Latin America	7,6	9,3	10,3
Asia	5,6	5,9	8,7
World	5,2	6,7	6

*Sources : UNCTD, World Investment Report, 1997 ; Note : * Mexico non included.*

Table 3 : Foreign Direct Investments and World Economy, Selected indicators, 1960-1996

	1960	1975	1980	1985	1991	1995	1996
(%)							
FDI Stocks / GDP	4,4	4,5	4,8	6,4	8,5	10,1	10,7
FDI- Flows / GDP	0,3	0,3	0,5	0,5	0,7	1,1	1,2
FDI- Flows / Domestic Inves	1,1	1,4	2	1,8	3,5	5,2	
Foreign affiliates sales / Wor	84	97	99	99	122	135*	

Sources : UNCTD, World Investment Report, 1994 ;1997

*Note : * : 1994*

Table 4 : Foreign Direct Investments Stocks
in % of GDP, 1980, 1985, 1990, 1995

	Inward FDI				**Outward FDI**			
	1980	1985	1990	1995	1980	1985	1990	1995
World	4,6	6,4	8,3	10,1	4,9	5,9	8,1	9,9
Developed countries	4,8	6	8,3	9,1	6,5	7,5	9,8	11,5
European Union	5,5	8,2	10,8	13,2	6,3	10,4	11,8	14,6
North America								
Canada	20,4	18,5	19,7	21,7	8,5	11,7	13,7	18,3
United Stat	3,1	4,6	7,2	7,7	8,1	6,2	7,9	9,8
Mexico	4,2	10,2	13,2	25,6	0,1	0,3	0,2	1,1
Japon	0,3	0,4	0,3	0,3	1,8	3,3	7,0	6,0
Developing countries	2,7	2,7	3,1	2,9	2,1	3,7	7,2	6,4
Africa	3,2	6,4	9,2	13,3	0,1	1,9	3,0	3,6
Latin America*	6,4	10,8	11,6	18,4	0,4	1,0	1,2	1,7
Argentina	6,9	7,4	6,2	8,7	0,1	0,3	0,3	0,2
Brazil	6,9	11,3	8,1	17,8	0,3	0,6	0,5	1,2
Chile	3,2	14,1	33,1	23,1	0,2	0,6	0,6	4,1
Asia	3,5	7,3	7,3	14,2	0,6	0,8	1,9	6,0
China		1,2	3,6	18,2			0,6	2,3
Singapore	52,9	73,6	76,3	67,4	47,7	35,3	25,8	38,4
Indonesia	14,2	28,6	36,6	25,2				0,3
Malaysia	24,8	27,2	33,0	52,1	1,7	2,4	5,3	12,6

Sources : UNCTD, World Investment Report, 1997

Note : * : Mexico included

Table 5 : Foreign Direct Investments Inward and Outward Stocks,
US $ billions and %, 1980, 1985, 1990, 1995, 1996

	Inward FDI Stocks							Outward FDI Stocks						
	1980	1980	1985	1990	1995	1996	1996	1980	1980	1985	1990	1995	1996	1996
	$	%	$	$	$	$	%	$	%	$	$	$	$	%
World	479,2	*100*	745,2	1726	2866	3233,2	*100*	518,9	*100*	690,4	1690	2811	3178	*100*
Developed Countries	372,9	*77,8*	537,7	1371	204,1	2269,3	*70,2*	507,5	*97,8*	664,2	1616	2578	2893	*91,0*
European Union	185	*38,6*	226,6	711,5	1114,8	1219,2	*37,7*	213,1	*41,1*	286,5	778,2	1230	1405	*44,2*
North America	145,3	*30,3*	238,1	540,5	746,6	845,4	*26,1*	242,9	*46,8*	292,5	514,7	815,6	908,6	*28,6*
Canada	54,2	*11,3*	64,7	113,1	122,5	129,2	*4,0*	22,6	*4,4*	41	78,9	103,7	111,3	*3,5*
United Stat	83	*17,3*	154,6	394,9	560,1	644,7	*19,9*	220,2	*42,4*	251	435,2	709,2	794,1	*25,0*
Mexico	8,1	*1,7*	18,8	32,5	64,0	71,5	*2,2*	0,1	*0,0*	0,5	0,6	2,7	3,2	*0,1*
Japon	3,3	*0,7*	4,7	9,9	17,9	18,0	*0,6*	18,8	*3,6*	44,3	204,7	306,8	330,2	*10,4*
Developing Countries	106,2	*22,2*	207,3	352,8	789,8	917,6	*28,4*	11,3	*2,2*	26,1	74,1	231,4	282,2	*8,9*
Africa	11,4	*2,4*	21,3	35,6	54,7	59,5	*1,8*	0,5	*0,1*	3,4	11,6	15	15,8	*0,5*
Latin America *	47,8	*10,0*	76,8	126,1	278,1	316,1	*9,8*	2,9	*0,6*	7,2	12,7	25	28,9	*0,9*
Brazil	17,5	*3,7*	25,7	37,1	98,8	108,3	*3,3*	0,7	*0,1*	1,4	2,4	6,5	7,4	*0,2*
Argentina	5,3	*1,1*	6,6	8,8	24,6	28,9	*0,9*	0,1	*0,0*	0,3	0,4	0,6	0,8	*0,0*
Chile	0,9	*0,2*	2,3	10,1	15,5	18,7	*0,6*	0,0	*0,0*	0,1	0,2	2,8	3,7	*0,1*
Colombia	1,1	*0,2*	2,2	3,5	9,8	12,8	*0,4*	0,1	*0,0*	0,3	0,4	1,2	1,4	*0,0*
Venezuela	1,6	*0,3*	1,5	3,9	7	8,3	*0,3*	0,0	*0,0*	0,2	1,2	3	3,6	*0,1*
Asia	45,5	*9,5*	107,5	188,3	451,7	535,7	*16,6*	7,8	*1,5*	12,4	49,8	191,3	237,4	*7,5*
China	0,06	*0,0*	3,4	14,1	126,8	169,1	*5,2*		*0,0*	0,1	2,5	15,8	18	*0,6*
Singapore	6,2	*1,3*	13	28,6	57,3	66,8	*2,1*	5,6	*1,1*	6,3	9,7	32,7	37,5	*1,2*
Indonesia	10,3	*2,1*	25,0	38,9	50,6	58,6	*1,8*		*0,0*			0,7	1,2	*0,0*
Malaysia	6,1	*1,3*	8,5	14,1	36,8	42,1	*1,3*	0,4	*0,1*	0,7	2,3	8,9	10,8	*0,3*

*Sources : UNCTD, World Investment Report, 1997 ; Note : * Mexico included*

Table 6 : Foreign Direct Investments Inward Flows

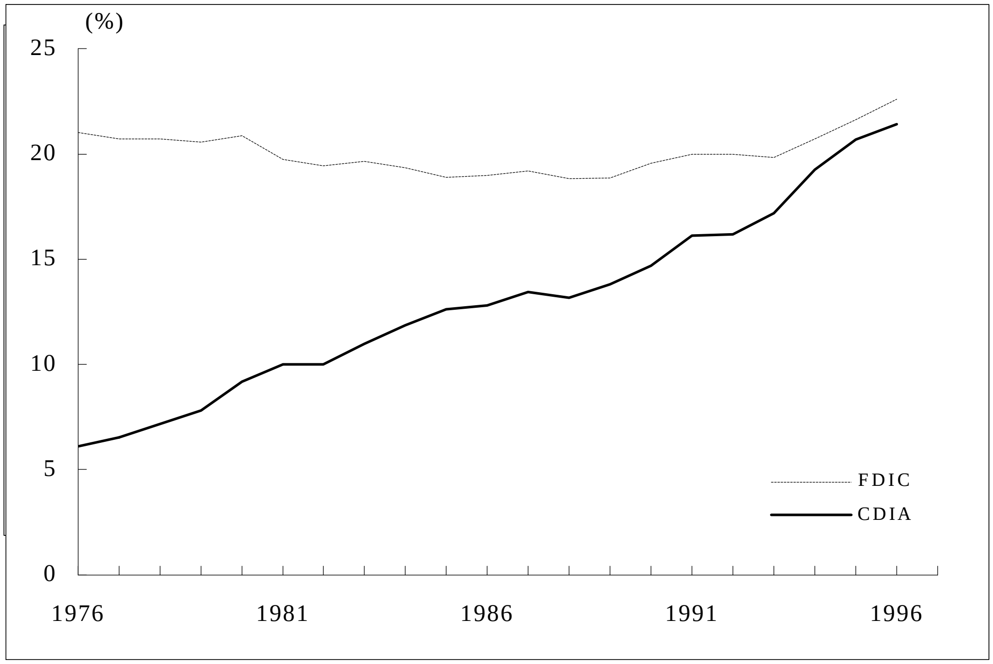
Average annual flows : 1985-1996

(US $ billions and %)

	1985-1990	1991-1996	1985-1990	1991-1996
	(US $ Billions)		(%)	
World	142	242,5	100	100
Developed countries	116,7	155,0	82,2	63,9
European Union	52,7	87,7	37,1	36,2
North America	56,4	59,4	39,7	24,5
Canada	5,2	6,2	3,7	2,5
United-States	48,6	46,8	34,2	19,3
Mexico	2,6	6,5	1,8	2,7
Japon	0,4	1,0	0,3	0,4
Developing countries	24,7	80,0	17,4	33,0
Africa	2,9	4,1	2,0	1,7
Latin America*	8,1	23,5	5,7	9,7
Brazil	1,3	3,7	0,9	1,5
Argentina	0,9	2,5	0,6	1,0
Chili	0,7	1,4	0,5	0,6
Colombia	0,5	1,6	0,4	0,6
Venezuela	0,1	1	0,1	0,4
Asia	13,5	51,8	9,5	21,3
China	2,6	25,8	1,8	10,7
Singapore	2,9	5,6	2,0	2,3
Indonesia	0,6	3,3	0,4	1,4
Malaysia	1	4,7	0,7	1,9

Sources : UNCTD, World Investment Report, 1997

Graph 1 : Canada : Foreign Direct Investments Stocks
in percentage of GDP, 1976-1996



Sources : Statistique Canada : Bilan des investissements internationaux du Canada, 1926-1996, n° 67-202-XPB

Notes : FDIC : Foreign Direct Investments in Canada ; CDIA : Canadian Direct Investments abroad.