Regulation of Foreign Investment in Canada: The Foreign Investment Review Act and the Investment Canada Act

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Abstract

Since 1974, Canada reviews certain forms of foreign investment. First, the review procedure was based on the provisions of the Foreign Investment Review Act. In 1985, this statute was repealed and the Investment Canada Act became effective.

An economic analysis of the legislation suggests that it is at least open to question whether foreign investment regulation is a proper way of dealing with Canada's economic problems. Parliament has focused on the impact of foreign capital participation and has left aside the more fundamental regulatory problems. Since economic problems result from the activities of both foreign- and Canadian-controlled firms, the goal should be to bring Canadian and non-Canadian firms into line with domestic economic policies. This, however, requires a set of rules to cover all enterprises.

Possible measures could be the reform of Canadian competition law, the introduction into Canadian corporate law of a new regime applicable to controlling and dependent enterprises, and the introduction of workers' codetermination.

For those sectors of the economy where the economic benefits of foreign capital participation are outweighed by non-economic drawbacks, limitations to foreign capital participation could be upheld.

Résumé

Depuis l'année 1974 le Canada examine certaines formes de l'investissement étranger. Initialement la procédure de l'examen était fondée sur les provisions de la Loi sur l'examen de l'investissement étranger. En 1985 cette loi était abrogée et la Loi sur Investissement Canada entra en vigeur.

L'analyse économique de la législation révèle qu'il est au moins douteux si la régulation de 'investissement étranger est la mode propre de traiter les problèmes économiques du Canada. Le Parlement du Canada a concentré aux conséquences de la participation étrangère au capital et a négligé les problèmes régulatoires plus fondamentaux. Dès que les problèmes économiques résultent des activités aussi bien des entreprises sous le contrôle étranger que celles sous le contrôle canadien, il devrait etre le but d'accorder les entreprises canadiens et non-canadiens avec la politique économique du pays. Mais cela exige des règles comprenant tous les entreprises.

Des mesures possibles peuvent être la réforme du droit de concurrence canadien, l'introduction au

droit des sociétés d'un régime applicable aux groupements d'entreprises et l'introduction de la cogestion du personnel.

En ce qui concerne les secteurs de l'économie où les profits économiques sont prédominés par les inconvenients non-économiques, les limitations pourraient être maintenues.

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Introduction

The Canadian Foreign Investment Review Act (FIRA) became law on April 9, 1974.[1] It was enacted "in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern" (subsec. 2(1) FIRA). Under the Act, the acquisition of control of a Canadian business by foreigners needed government approval which was only given if the investor could prove that his investment was or was likely to be of "significant benefit to Canada" (subsec.2(1) FIRA).

After having been in existence for eleven years, the Foreign Investment Review Act was repealed and replaced by the Investment Canada Act (ICA). The new statute came into force on July 1, 1985.[2] The changes in the Canadian regulation of foreign direct invest-

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1 Foreign Investment Review Act, S.C. 1973-74, c. 46, as am. S.C. 1976-77, c. 52; S.C. 1980-81-82-83, c. 107.

2 Investment Canada Act, S. C. 1985, c. 20.

ment which the new legislation has brought about are significant.

Under the new regime, foreign investments fall under one of three categories:

- investments subject to review (part IV of the Investment Canada Act);
- investments which require notification (part III of the Investment Canada Act); and
- investments which are exempted from both notification and review (part II of the Investment Canada Act).

The establishment of a new business and the take-over of an existing Canadian business with less than $ 5 million of assets is no longer subject to review but requires only notification of the agency responsible for the administration of the Act.[3] An exception exists only in cases of foreign direct investments which fall "within a prescribed specific type of business activity that, in the opinion of the Governor in Council, is related to Canada's cultural heritage or national identity".[4] Investments in this

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3 Subsec. 11 (a) and (b); subsec. 14 (1) and (3) ICA.

4 Subsec. 15 (a) ICA.

area require review if, within 21 days after notification, the foreign investor has been notified that the cabinet has decided to review his investment.[5] Beside this, only take-overs of major Canadian businesses by foreigners are subject to review under the new Act.[6]

The criterion by which reviewable investments are now tested is whether or not they are likely to be of "net benefit to Canada" (subsec. 21(1) ICA). Section 2 of the Investment Canada Act states that "increased capital and technology would benefit Canada". It is the express purpose of the Act "to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada" (sec. 2 ICA).

The salient reason for repealing the Foreign Investment Review Act and for introducing the Investment Canada Act was the real or assumed negative impact which the Foreign Investment Review Act had on

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5 Subsec. 15 (b) ICA.

6 Sec. 14; 28 ICA.

potential foreign investors. High unemployment rates and increased international competition for direct investment induced Canadians to reconsider their country's approach toward the problem of foreign control of domestic firms. The new Progressive-Conservative Government was of the opinion that the old Act constituted a major obstacle to the inflow of much needed foreign capital. In 1985, Sinclair Stevens, then Canadian Industry Minister, expressed the belief of the Mulroney administration that "Canada's interests will be advanced by encouraging Canadian and non-Canadian investment, not by discouraging it".[7] It was the objective of the new legislation to remove this obstacle and to restore the confidence of foreign investors in Canada as a host country for foreign capital.[8]

While the Foreign Investment Review Act was based on the idea that potentially every foreign direct

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7 Statement by the Honourable Sinclair Stevens following the tabling of the Investment Canada Bill, Investment Canada, Statements and Speeches (Ottawa, December 7, 1985) at 1.

8 According to J. Coté, "Canada's New Legislation on Foreign Investment" [1985] Int'l Bus. Law. 279, the Canadian government hopes that the Act will be a major step in changing the perception in the international community that Canada is not interested in foreign investors.

investment might harm Canadian interests and, thus, required government screening, the new legislation emphazises the benefits which result from an increased amount of foreign capital in Canada. Only major investment proposals and foreign control of businesses in sensitive areas are considered to be potentially harmful and subject to review. A step toward the restoration of a free flow of capital has been made. According to the Canadian government, only 10 percent of the cases reviewable under the Foreign Investment Review Act are also reviewable under the new Act.[9] This figure is upheld by an application of the Investment Canada Act to the 888 cases which were reviewed in 1984 under the Foreign Investment Review Act: The number of reviewable investments would have declined by 92 percent to 75 cases.[10]

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9 Investment Canada, News Release, December 7, 1984, at 2: "Although Investment Canada will continue to review important acquisitions, the total number of investments subject to review will be reduced by about 90 percent ...". See also P. R. Hayden, "Investment Canada Act Causes Problems for Applicants under FIR Act", in Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition, December 1984), at 2181. The threshold figures have been changed essentially, making most investments not reviewable. For details see infra, 169 ff.

10 "New Agency Opens its Doors", in Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition, July 1985), Report Bulletin No. B 15-1.

Both the Foreign Investment Review Act and the Investment Canada Act, however, start from the assumption that foreign investment, in one way or the other, may harm Canadian interests and that, in any event, Canadian investment is preferable. Both pieces of legislation assume that Canadian investors are more likely to act in the interest of Canada than are foreign individuals or corporations. The major difference between the two statutes lies in the degree to which they are prepared to admit that Canada also benefits from the inflow of foreign capital.

Though many factors indicate that the Canadian government cannot be as demanding as it could have been under the old Act, the requirement of government approval still is relatively broad. It is of particular importance that the factors of assessment have not been changed materially.[11] Thus, it remains to be seen what standard foreign investors will have to meet. Shortly after the new Act had come into force, the federal Government of Prime Minister Brian Mulroney launched a global campaign to attract

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11 Cp. subsec. 2 (2) FIRA with subsec. 20 (a)-(e) ICA.

foreign capital.[12] It seems to be possible, however, that a new administration, following a different policy, will again change Canada's official attitude toward foreign capital flowing into the country. What has been said about the Foreign Investment Review Act may also be true with regard to the Investment Canada Act: Investment Canada may be turned "from a paper tiger to an angry Canadian bear".[13]

The purpose of this essay is to examine the problem of direct foreign business investment in its Canadian context. In particular, the validity of the basic assumptions underlying both the Foreign Investment Review Act and the Investment Canada Act will be scrutinized. Generally, there are two ways to minimize the costs and to maximize the benefits of foreign investment: Legislators can try to bring foreign companies on a par with domestic firms or

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12 See P. Cowan, "Investment Canada plans drive for offshore dollars", The [Montreal] Gazette (August 17, 1985) A-11.

13 A. M. Rugman, "Canada: FIRA Updated" (1983) 17 J.W.T.L. 352 at 352. See also G. C. Glover, D. C. New & M. M. Lacourcière, "The Investment Canada Act: A New Approach to the Regulation of Foreign Investment in Canada" (1985) 4 Bus. Lawyer 83 at 98: "Notwithstanding the current government's velvet-glove approach to attracting foreign investment capital into Canada, there remains within that glove a potential iron fist ...".

they can introduce a screening procedure for all or certain foreign investments. Canada has chosen the second way. One needs to examine whether or not this opting for the screening procedure will prove to be the most efficient solution. Part I of this essay will analyze the impact of foreign investments on the Canadian economy and the development of Canadian investment needs. Part II will deal with the Canadian legislative responses to foreign direct investment. Finally, Part III will attempt to show alternatives to the statutorily required general screening procedure.

Part I: Foreign Investment in Canada

Chapter 1: Historical Overview of Foreign Direct Investment in Canada

Foreign investments have always played an important role in Canada's economy.[14] Since the early days

14 M. Bliss, "Founding FIRA: The Historical Background", in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronoto: Butterworths, 1984), 1; C. A. Barrett, C. C. Beckman & D. McDowall, The Future of Foreign Investment in Canada, Study No. 85 (Ottawa: The

of pioneer settlements the country has attracted foreign capital, first from France and the United Kingdom, then, since the end of the nineteenth century, mainly from the United States of America.[15] Until the end of the 19th century, portfolio investments (coming in the form of debt securities like bonds or debentures) were the dominant form of capital flows to Canada.[16] As the Canadian economy matured, the pattern changed and direct foreign investments, i.e. investments which involve an equity position and give the investor legal or de facto control (establishments or take-overs of plants in Canada), began to supersede portfolio investments.[17]

Conference Board of Canada, 1985) 3 ff.

15 Barrett, Beckman & McDowall, ibid., 4 f.; Bliss, ibid., 2.

16 Barrett, Beckman & McDowall, ibid.; T. Hadden, R. E. Forbes & R. L. Simmonds, Canadian Business Organizations Law (Toronto: Butterworths, 1984) at 79; T.M. Franck & K. S. Gudgeon, "Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice" (1975) 50 N.Y.U.L.Rev. 76 at 85. The distinction between portfolio and direct investment is not always an easy one. Cp. only K. P. Grewlich, Direct Investment in the OECD Countries (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978) 2. Generally speaking, if the net effect is to vest substantial control in the investor, one will call the investment a direct investment. Cp. C. H. Fulda & W. F. Schwartz, Regulation of International Trade and Investment (1970) at 567.

17 Bliss, supra, note 14, at 2.

Although the relative position of foreign direct investment in Canada has declined over the last two decades, it is still an important factor in the Canadian economy.[18]

Canada's attractiveness for foreign investors had several reasons. First, an abundant supply of natural resources promised high returns on the capital invested in their exploitation.[19] Secondly, Canada offered stable political conditions and, thus, was an interesting place for those who sought long-term investment opportunities. High tariff barriers from the end of the 19th century to the 1960's led foreign manufacturers to set up Canadian branch plants in order to gain a foothold on the Canadian market.[20] Commonwealth preferences and the proximity to the

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18 Barrett, Beckman & McDowall, supra, note 14, at 3.

19 Ibid., at 5: "The crucial point was that Canada's natural resources and growing affluence as a market uniquely favoured it in the eyes of foreign investors."

20 Ibid., at 4. See also Bliss, supra, note 14, at 2; J. Albrecht, "Canadian Foreign Investment Policy and the International Politico-Legal Process", in The Canadian Yearbook of International Law 1982 (Vancouver: The University of British Columbia Press, 1984) 149 at 152; Government of Ontario, Report of the Interdepartmental Task Force on Foreign Investment (Ottawa, 1971) at 7. Details infra, 47 f.

huge market of the neighboring United States created further motives to invest in Canada.[21]

Whatever the reasons might have been that made Canada an attractive place for investments, the country could not have become a major host country for foreign capital if it had not been for the fact that Canada's investment needs were greater than domestic funds.[22] As a country with a large territory and full of natural resources but small in population, capital imports were necessary to exploit and to sell domestic raw materials and to develop a Canadian manufacturing industry.[23] The creation of the national railway network as well as other huge-scale projects were only possible because of foreign capital participation.[24]

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21 A. Gillespie, "Objectives of the New Legislation", in Canadian Foreign Investment Review Seminar - Texts of the Addresses Given by the Principal Speakers (Toronto: De Boo, 1974) 61; Franck & Gudgeon, supra, note 16, at 85.

22 Gillespie, ibid.; Barrett, Beckman & McDowall, supra, note 14, at 13; P. R. Hayden, J. H. Burns & G. W. Kaufman, Foreign Investment Review Law in Canada: A Guide to the Law (Scarborough: Prentice-Hall, loose-leaf edition) at 5002.

23 Bliss, supra, note 14, at 2.

24 Ibid.

Most Canadians were aware that their desire "for rapid economic development required human, technological and capital resources far in excess of those available locally."[25] Foreign investments were welcomed and, for most of Canada's history, barriers affecting the free flow of capital did not exist.[26] It has always been the economic policy of most federal and provincial governments to encourage actively foreign capital investments.[27] This policy has long roots in Canada. It was only shortly after the modern Canada was created, that the so-called "National Policy" of the Conservative Government of Sir John A. Macdonald used high tariff barriers as an instrument to protect Canadian manufacturing, in the hope that tariffs would attract foreign investment to Canada. At that time, the creation of Canadian branch plants was considered to be of benefit to Canada since it helped to create employment opportunities for Canadians.[28]

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25 Gillespie, supra, note 21, at 61.

26 Bliss, supra, note 14, at 1 f. Cp. also Government of Ontario, supra, note 20, at 7.

27 Gillespie, supra, note 21, at 61.

28 Bliss, supra, note 14, at 2. See also D. S. Macdonald, "Canadian Industrial Policy Objectives and Article III of GATT: National Ambitions and International Obligations" (1982) 6 Can. Bus. L. J. 385 f.

Nationalist concern among Canadians about the economic and political impact of foreign investment in Canada upon the country is of relatively recent development. Before the 1950s, there had been no serious objection to foreign investment in Canada.[29] Neither was there serious concern about possible foreign domination of Canadian industry.[30] By the late 1950s, however, more than sixty percent of Canada's oil and gas industry, more than fifty percent of her mining industry and almost fifty percent of all her manufacturing industries were controlled by foreigners.[31] A substantial part of this investment had come into Canada from the United States after the World War II at a time of rapid economic growth.[32]

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29 Bliss, supra, note 14, at 1 ff.

30 Only the Railway Act, S.C. 1904, c. 32, s. 5, as amended by S.C. 1919, c. 68, subsec. 113 (3), presently found in R.S.C. 1970, c. R-2, subsec. 53 (3), required that a majority of the directors of all railways receiving federal financial assistance be British subjects.

31 Bliss, supra, note 14, at 3.

32 2/3 of all foreign investment in Canada originate in the United States of America. Cp. B. M. Fisher, "Canada's Foreign Investment Review Act as a Model for Foreign Invetment Regulation in the United States" (1984) 7 Foreign Inv. Rev. 61 at 78.

Not surprisingly, part of the Canadian business community became suspicious of foreign-owned firms, in particular if they were competitors. The first to express the concern of these Canadians was probably Walter Gordon, a Toronto management consultant.[33] He became chairman of a federal Royal Commission on Canada's Economic Prospects which for the first time dealt in detail with the foreign ownership question.[34] The Commission's summary of the situation has been called a "remarkable anticipation of the thrust of sentiment that ultimately culminated in the creation of the Foreign Investment Review Agency".[35] The Commission wrote:

> "Many Canadians are worried about such a large degree of economic decision-making being in the hands of non-residents or in the hands of Canadian companies controlled by non-residents. This concern has arisen because of the concentration of foreign ownership in certain industries, because of the fact that most of it is centred in one country, the United States, and because most of it is in the form of equities which, in the ordinary course of events, are never likely to be repatriated."[36]

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33 For details see Bliss, supra, note 14, at 3.

34 Government of Canada, Report of the Royal Commission on Canada's Economic Prospects (Ottawa: Queen's Printer, 1958).

35 Bliss, supra, note 14, at 4.

36 Government of Canada, supra, note 34, at 390.

It is interesting to note that in the eyes of the Commission the rising debate over foreign ownership was not so much a result of serious economic problems resulting from foreign investment but of Canadian nationalism:

> "At the root of Canadian concern about foreign investment is undoubtedly a basic, traditional sense of insecurity vis-a-vis our friendly, albeit our much larger and more powerful neighbour, the United States. There is concern that as the position of American capital in the dynamic resource and manufacturing sectors becomes ever more dominant, our economy will inevitably become more and more integrated with that of the United States. Behind this is the fear that continuing integration might lead to economic domination by the United States and eventually to the loss of our political independence."[37]

The Gordon Commission recommended that foreign-controlled firms should give more job opportunities to Canadians and that the number of Canadians on the boards of foreign-owned firms should increase. In addition, measures were recommended to increase the Canadian ownership rate.[38] At that time, however, these recommendations had little influence on any of the provincial governments or the federal Government.

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37 Ibid.

38 For details see Bliss, supra, note 14, at 3 f.

It was only in the middle and late 1960s that the political climate in Canada changed significantly. The involvement of the United States in Vietnam made Canadians sensitive to the fact that American and Canadian interests could diverge. Now, many Canadians began to become concerned about the United States dominating Canada economically and culturally.[39] They feared that their economy was in danger of being absorbed by the United States. In the light of these developments, Canada tried to reassess the economic and political consequences of her previous open-door policy toward foreign direct investment. The term "Canadianization" became popular, meaning the process of maintaining and increasing "the level of the participation by and involvement of Canadians in, and their control over, the economic and cultural fabric of the nation".[40]

The domestic discussion about foreign investment was fostered by worldwide concern about the growing impact of transnational enterprises on national

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39 Ibid., at 4 f.

40 R. A. Donaldson, "Canadianization", in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 93 at 94.

economies.[41] Canada was not the only country that attempted to achieve better control over foreign direct investments.[42] Even in countries strongly supporting the idea of a free flow of capital and goods, legal scholars stated that an open door policy toward foreign direct investment would fail to account for the potentially adverse effects of significant and increasing levels of such investment.[43] It

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41 See, e.g., S. Hymer & R. Rowthorn, "Multinational Corporations and International Oligopoly: The Non-American Challenge", in The International Corporation - A Symposium, ed. by C. P. Kindleberger (Cambridge, Mass.: The M.I.T. Press, 1970) 57. As to the discussion in Europe cp. J.-J. Servan-Schreiber, Le Défi Americain (Paris: Editions de Noel, 1967). For reports on the legal, economic and management aspects of the transnational enterprise see Nationalism and the Multinational Enterprise, ed. by H. R. Hahlo, J. G. Smith & R. W. Wright (New York: Oceana, 1973).

42 Cp. Bliss, supra, note 14, at 8: "The whole western world in these years was enduring a spasm of concern about whether or not the modern and mostly American multinational enterprise was susceptible to control by the citizens of the nation-state." See also Albrecht, supra, note 20, at 152; I. A. Litvak & C. J. Maule, "The Multinational Firm and Conflicting National Interests (1969) 3 J.W.T.L. 309.

43 For the United States see, e.g., Fisher, supra, note 32, at 91. More recently, Americans again started to be concerned when the USA became a net debtor, owing foreigners $ 107.4 billion more at the end of 1985 than it was owed. Cp. R. Gutfeld, "It's official: U.S. Became Net Debtor Last Year as Trade Deficit Swelled" The Wall Street Journal [Europe] (June 25, 1986) 13: "... some economists have said such a large amount of foreign investment in the U.S. carries the threat that the U.S. economy will become hostage to the whims of non-

should be added that only a little later the oil crisis, leading to a world monetary imbalance and large-scale Arab investments in industrialized countries, added to the attractiveness of foreign investment control measures in western democracies.[44]

In 1968, a special Task Force on the Structure of Canadian Industry was established which produced a study on "Foreign Ownership and the Structure of Canadian Industry".[45] The Task Force was chaired by Melville H. Watkins, a University of Toronto economist. Though the report of the Task Force admitted that it was difficult to determine the precise effect of foreign direct investment, it recommended the

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U.S. investors." In France, President Mitterand refused to sign a decree that would give a start to the process of privatizing 65 state-owned companies and banks, fearing that privatization would cause state-owned companies to fall into the hands of foreigners even though the decree said foreign companies would not be allowed to own more than 15% of a firm's capital. See T. Kamm, "Chirac Accuses Mitterand of Obstructing Government" The Wall Street Journal [Europe] (July 17, 1986) 2. As to the reaction of the European Community Commission see T. Kamm, "Chirac Rejects EC Criticism of Limits on Foreign Stakes" The Wall Street Journal [Europe] (July 22, 1986) 2.

44 See, e.g., the remarks by Franck & Gudgeon, supra, note 16, at 145.

45 Government of Canada, Foreign Ownership and the Structure of Canadian Industry, Report of the Task Force on the Structure of Canadian Industry (Ottawa: Privy Council Office, 1968).

creation of a Canada Development Corporation to prevent an increase in the number of foreign take-overs of Canadian firms. Furthermore, the Task Force supported direct action against "foreign intrusion" and called for the creation of a special Government agency "to coordinate policies with respect to multi-national enterprises".[46]

This time, the reaction to the recommendations was more favourable. The sentiment to decrease foreign, particularly American, influence was firmly entrenched among Canadians.[47] Successive Canadian Governments considered a number of policy instruments in response to the high level of foreign ownership in Canadian industry. The federal Government and provincial governments amended legislation which regulated "key sectors" of the economy.[48] The new provisions provided for a minimum percentage of Canadian

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46 Ibid., 395.

47 J. Turner, "Canadian Regulation of Foreign Direct Investment" (1983) 23 Harv. Int'l L.J. 333 at 336. See also Bliss, supra, note 14, at 7.

48 For example S.C. 1957-58, c. 11, s. 3; and S.C. 1964-65, , c. 40, s. 3 (Canadian and British Insurance Companies Act); S.C. 1966-67, c. 87, subs. 10(4), 18(3), 20(2) and s. 52-56 (Bank Act); S.C. 1954-65, c. 40, s. 38 (Loan Companies Act); S.C. 1964-65, c. 40, s. 30 (Trust Companies Act).

ownership in these areas.[49] Through ad hoc intervention by the federal and provincial governments a number of transactions were stopped to prevent foreign take-overs.[50] In 1971, the federal government created the Canada Development Corporation "as a publicly-controlled vehicle to mobilize what was popularly thought of as an effort to 'buy back' Canada".[51] The famous Gray Report[52], as it came to be called, recommended the creation of a governmental agency to monitor the activities of Canadian subsidiaries of foreign parent companies and to exercise some form of control over new foreign investment.[53] Finally, these recommendations led to the introduc-

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49 In general, these amendments require that non-resident shareholdings do not exceed 25 percent of the outstanding voting shares. Cp. R. A. Donaldson, "Foreign Investment Review and Canadianization" in Law Society of Upper Canada Special Lecturers: Corporate Law in the 80's (Toronto: De Boo, 1982) 461 at 472.

50 Ibid. at 474. See also Donaldson, supra, note 40, at 95 f.

51 Bliss, supra, note 14, at 9.

52 Government of Canada, Foreign Investment in Canada (Ottawa: Information Canada, 1972), 453 f. For a comprehensive examination of the Gray Report see Donaldson, supra; note 49, at 461 ff.

53 Government of Canada, ibid., 453 f.

tion of the Foreign Investment Review Act, which became part of the law of Canada on April 9, 1974.[54]

The Act was an attempt to reconcile two conflicting goals of Canadian economic policy, namely to attract foreign capital to meet Canada's investment requirements and at the same time to maintain effective control over the domestic economy.[55] The Act created the Foreign Investment Review Agency[56] which had as its function to examine proposed acquisitions of control of existing Canadian businesses and the establishment of a new business by a so-called "non-eligible person". Foreign investors had to file a notice with the Agency in which they had to outline the proposed business activity. Based on the Agency's report, the federal cabinet ultimately decided whether or not to approve the investor's proposal. Under the Act, an approval could only be given if the

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54 S.C. 1973-74, c. 46. It is ironical, as Albrecht, supra, note 20, at 152, points out that this sometimes so-called "New National Policy" attempted to correct the results of Sir John A. Macdonald's "National Policy" of high tariff barriers which had led to the high level of foreign ownership. See also Bliss, supra, note 14, at 2.

55 G. C. Hughes, Foreign Investment Law in Canada (Toronto: Carswell, 1982) para. 1. Cp also Macdonald, supra, note 28, at 385.

56 Subsec. 7(1) FIRA.

investor could demonstrate that his investment was or was likely to be of "significant benefit to Canada" (subsec. 2(1) FIRA).[57]

Probably no other piece of Canadian legislation after World War II attracted more interest abroad than the Foreign Investment Review Act.[58] The Act was

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57 As to the "significant benefit" concept see infra, 86 ff.

58 Not surprisingly, FIRA attracted most interest in the United States of America, since U.S. controlled firms are the major foreign presence in Canada. See, e.g., A. J. Samet, "The U.S. Response to Canadian Economic Nationalism" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 293; Turner, supra, note 47, 333 ff.; L. Bakken, "Canada: The Foreign Investment Review Act and the Combines Investigation Act" (1983), 52 Antitrust L.J. 979; D.R. Hinton, "United States Policy Toward Foreign Investments" in Canadian Foreign Investment Review Seminar - Texts of the Addresses Given by the Principal Speakers (Toronto: De Boo, 1974), 34; M.-J. Drouin & H. Malmgrem, "Canada, the United States and the World Economy" (1982) 60 Foreign Aff. 393; Fisher, supra, note 32, at 81 ff. However, the Canadian legislation also attracted interest in other capital exporting countries. Cp. J. F. Chown, "The Attitude of the European Community and its Members to the New Canadian Law" in Canadian Investment Review Seminar - Texts of the Addresses given by the Principal Speakers (Toronto: De Boo, 1974) 74; M. Bloomfield, "Gesetz zur Überwachung ausländischer Investitionen in Kanada - Canada's Foreign Investment Review Act" [1975] Die Aktiengesellschaft 67 ff.; M. Abrell & M. Theurer, "Investitionskontrolle in Kanada" [1977] Recht der Internationalen Wirtschaft 150 ff.; N. Hood & S. Young, "British Policy and Inward Direct Investment" (1981) 15 J.W.T.L. 231, 249; R. L. Simmonds & C. Quack, "Die Gründung einer Tochtergesellschaft in Kanada" in

the subject of a heated debate both in the international field and domestically. Throughout the history of the Foreign Investment Review Act, the necessity of a review procedure for foreign direct investments was controversial.[59] Even those who favoured it sometimes doubted that the provisions of the Act would allow the federal Cabinet to control foreign investments effectively.[60] Others argued that the Foreign Investment Review Act violated domestic law[61] and that some of its provisions were inconsis-

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Die Gründung einer Tochtergesellschaft im Ausland, ed. by M. Lutter (Berlin: De Gruyter, 1983), 213 at 229 ff.

59 Bliss, supra, note 14, at 10: "... some business commentators and economists argued that the whole concept of assessing the contribution of foreign investments to an economy was grounded in economic illiteracy ...".

60 Only roughly twenty percent of foreign direct investments in Canada were subject to the review procedure, since most direct investments are undertaken through internal expansion. Cp. Turner, supra, note 47, at 338 f. Thus, Canadian economic nationalists considered the Foreign Investment Review Act as "too little too late"; cp. Bliss, ibid. See also Canadian Labour Congress, Submission to the House of Commons Standing Committee on Regional Development on the Investment Canada Act, Bill C-15, at 3: "FIRA, in fact, has been no significant bar to foreign investment."

61 As to the constitutionality of the Act see E. J. Arnett, "Canadian Regulation of Foreign Investment: The Legal Parameters" (1972) 50 Can. Bar Rev. 212; Donaldson, supra, note 49, at 476 ff. As to the consistency of the Act with administrative law principles see E.J. Arnett, R. Rueter & E.P. Mendes, "FIRA and the Rule of Law" (1984) 62 Can.

tent with Canada's obligations under international law.[62] A GATT panel held that the practice of the Canadian government to favour "buy Canadian" undertakings from foreign investors breached the national treatment provision (Art. III) of the General Agreement on Tariffs and Trade.[63]

Many of those who could find no merit in these claims were, nevertheless, afraid that Canada's practice would turn away much needed foreign investment. They argued that the "significant benefit" concept was too broad and that its application resulted in uncertainty on the part of potential investors about the requirements they had to meet.[64] The whole

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Bar Rev. 121.

62 Albrecht, supra, note 20, at 396 ff. See also W. P. Rosenfeld, "Extraterritorial Application of FIRA - Fact or Argument" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 121 ff.; Turner, supra, note 47, 344 ff.

63 GATT Panel Report: Canada - Administration of the Foreign Investment Review Act (L/5504). As to the GATT proceedings Samet, supra, note 58, at 306; J. M. Spence, "FIRA: A Decade of Evolution" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 315 at 336 f.

64 See only Rugman, supra, note 13, at 352; R. Schultz, F. Swedlove & K. Swinton, The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act, Working Paper No. 6 (Ottawa: Economic Council of Canada, 1980) at 150-55; Case

review procedure was frequently considered to have a deterrent effect on foreign businesses.[65] The Agency's review was even called a "poker game".[66]

Despite the criticism, the Foreign Investment Review Act remained in force for over a decade without significant amendments.[67] In the Throne speech on April 24, 1980, Prime Minister Trudeau confirmed that his government intended to strengthen the Foreign Investment Review Act and expand the role of the Review Agency:

> "The Foreign Investment Review Act will be amended to provide for performance reviews of how large foreign firms are meeting the test of bringing substantial benefits to Canada. As well, amendments will be introduced to ensure that major

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Comment, "Dow Jones & Co., Inc. v. Attorney General of Canada: The Canadian Foreign Investment Review Act" (1982-83) 14 Law & Policy in Int'l Bus. 505 at 509 ff.; P. R. Hayden, "Don't Blame FIRA", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf, September, 1982) 2111.

65 D. McDowall, A Fit Place for Investment?, Study No. 81 (Ottawa: The Conference Board of Canada, 1984) at ix.

66 T. G. Grivakes, "FIRA: Experiences of Canadian Lawyers", in Current Legal Aspects of Doing Business in Canada (American Bar Association, 1976) 16 at 23.

67 S.C. 1973-74, c. 46, amended by 1976-77, c. 52, s. 128 (2); 1980-81-82, c. 107, s. 63 (1).

> acquisition proposals by foreign companies will be publicized prior to a government decision on their acceptability. The Government will assist Canadian companies wishing to repatriate assets or to bid for ownership or control of companies subject to take-over offers by non-Canadians."[68]

It was not until November, 1981, that Canada's official attitude toward foreign direct investments began to change. After tabling the November 12, 1981 budget, the Minister of Finance made comments in the House of Commons to the effect that no amendments to the Foreign Investment Review Act were intended.[69] At that time, Canada was already hit by the recession. High unemployment rates in all provinces and a significant decrease in the amount of foreign capital invested in Canada created political tensions between the federal government and the provinces. Provincial premiers were reported to have "denounced the Foreign Investment Review Act and the National Energy Program as misguided approaches that have blocked the flow of capital and investment."[70] The premier of Alberta, Mr. Lougheed, called for the abolition of the Foreign Investment Review Agency which he regarded as a major

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68 Quoted by Donaldson, supra, note 40, at 102, note 22.

69 Cp. House of Commons, Debates, at 12721-9 (November 12, 1981).

70 Cp. Turner, supra, note 47, at 337, note 25.

obstacle to the inflow of foreign capital.[71] Political pressure finally induced the liberal government under Prime Minister Trudeau to change its administration of the Act. While almost 30 percent of new business investments and 20 percent of foreign acquisitions of Canadian businesses had been disallowed in 1981[72], 91 percent and 97 percent respectively were allowed in the fiscal year 1982-83.[73]

Notwithstanding these changes, the domestic political debate continued about the question whether the Foreign Investment Review Act had, at least partly, caused the deterioration of the Canadian economy. The Progressive Conservative Party expressed concern about the Act and its effect on the attitude of potential foreign investors. Mr. Clark, the then party leader, said in a television interview that the Foreign Investment Review Act was an expression of a "national identity paranoia".[74] In 1983, Brian Mulroney, while campaigning for the leadership of his

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71 Spence, supra, note 63, at 322.

72 See Foreign Investment Review, Spring 1982, 34-5.

73 See J. M. Spence & W. P. Rosenfeld, ed., Foreign Investment Review Law in Canada (Toronto: Butterworths, 1984) appendix at 354-56.

74 Spence, supra, note 63, at 322.

party, made comments to the effect that a new federal government under his leadership would take steps in order to encourage foreign investment.[75] As it turns out he had a good understanding of what the Canadian public wanted. According to a 1984 Gallup poll, the Canadian public at that time felt better about foreign investment than at any time in the last decade.[76]

In September 1984, the Progressive Conservative Party under Brian Mulroney won a majority of 211 seats in the federal elections. Shortly after the new government had taken office, International Trade Minister James Kelleher announced that both the name and the mandate of the Foreign Investment Review Agency would be changed.[77] On December 7, 1984, Industry Minister Sinclair Stevens introduced Bill C-15 in the Canadian Parliament.[78] In the statement following the tabling of the Bill, Mr. Stevens expressed the belief of the Mulroney administration

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75 Ibid., at 334.

76 D. McGregor, "Canada for Sale But Who's Buying?" Report on Business Magazine (March 1985) 76.

77 "FIRA, energy program to change", The [Montreal] Gazette (September 26, 1984) A-9.

78 Investment Canada, News Release, December 7, 1984, at 1.

that "Canada's interests will be advanced by encouraging Canadian and non-Canadian investment, not by discouraging it".[79] Bill C-15 received second reading in January 1985. As the Investment Canada Act it became law and the Foreign Investment Review Act was repealed on July 1, 1985.[80]

A new agency, Investment Canada, was created to replace the Foreign Investment Review Agency. It has a mandate of encouraging and promoting investment in Canada by Canadians and non-Canadians as well as administering the foreign investment notification and review procedures. Shortly after the creation of the new agency, the Canadian government started a global campaign to attract foreign capital.[81] In the words of David Winfield, director of international development for Investment Canada, encouraging and facili-

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79 Statement by the Honourable Sinclair Stevens Following the Tabling of the Investment Canada Bill, in Statements and Speeches, ed. by Investment Canada (Ottawa, December 7, 1984) at 1.

80 Bill C-15, An Act respecting investment in Canada, 1st Sess., 33d Parl., 1984-85.

81 Cowan, supra, note 12, at A-11. See also "Kanada setzt auf Privatkapital" Frankfurter Allgemeine Zeitung (June 12, 1985) 13.

tating foreign investment will be the Agency's "prime function".[82]

Such a task seems to be desirable, indeed. Concern over foreign investment controls were already easing before the conservative government of Prime Minister Brian Mulroney took office in 1984.[83] After devastating outflows of direct foreign investment funds in 1981[84] and 1982[85], Canada had returned to a positive balance in 1984. Nevertheless, a 1984 survey revealed that foreign investors still feared that Canadian controls of their activities could again militate against their interests, given a shift in the political or ideological climate of the country.[86] In view of the criteria which the Investment Canada Act uses to determine whether a foreign investment is of net benefit to Canada, a sense of uncertainty remains even after the new legislation entered into force.[87]

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82 See Cowan, ibid.

83 McDowall, supra, note 65, at x.

84 Net outflow of $ 4.6 billion; cf. McGregor, supra, note 76, at 80.

85 Net outflow of $ 1.4 billion; McGregor, ibid., at 80.

86 McDowall, supra, note 65, at x.

87 See supra, at 6 f.

Chapter 2: Impact of Foreign Direct Investment

The short overview of the development of foreign participation in the Canadian economy and the reaction it set off shows that since 1973 Canada's official attitude toward foreign investment lacks internal consistency. The Foreign Investment Review Act as well as the Investment Canada Act can be regarded as attempts to reconcile the "commercial imperatives" with Canadian economic nationalism in a way which - in the words of Lester B. Pearson - would give Canada the best of both worlds[88]: A maximum amount of benefits brought by foreign investment and a minimum amount of costs which can be associated with such

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88 L. B. Pearson, "The U.S. and Us", Speech given at the Couchiching Conference, 1968, in T. E. Reid, ed., Foreign Ownership: Villain or Scapegoat? (Toronto: Holt, Rinehart and Winston, 1972), 15 at 18: "Independance needs economic strength to support it and policies discouraging foreign investment could weaken us. On the other hand, while other policies could make us more independent by increasing our economic strength, they could also insure that this stronger Canada would be controlled economically, and hence ultimately politically, outside Canada by the United States. That's a dilemma that doesn't have to happen. We can reconcile these difficulties and in a way which should give us the best of both worlds." (emphasis added).

investment.[89] Both the Foreign Investment Review Act and the Investment Canada Act provide for a review procedure for foreign investments to make sure that foreign investments are beneficial to Canada.

The problem with both pieces of legislation is, however, how to assess the costs and benefits of foreign investment. In the following, we shall attempt to analyze both the economic and the political impact of foreign capital investment in Canada.

1. Economic Impact of Foreign Direct Investment

a) General Remarks

Over the last three decades it became apparent that the development of international trade and the state of mutual economic dependency between the nations of the world rendered ineffective many of the traditional policy instruments of the nation state to

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89 This is the fundamental goal of any form of investment control. Cp. Grewlich, supra, note 16, at 63: "The issue is, how to get foreign investment on terms which are best for the host countries' interest, and indeed to use the potential of the foreign investors to promote the recipient countries' national goals."

manage the economy. Not surprisingly, a policy which tried to insulate the national economic environment from undesirable foreign influence became more and more attractive.

At the same time, the economic and social objectives of modern industrial states became much broader and deeper. There was an international trend that governments accepted responsibilities for an increasing number of economic and social objectives. They did not only pursue the traditional macroeconomic goals of full employment, price stability and sustained economic growth, but also got interested in other objectives such as better income distribution, high technology industries, regional equity and so on.[90] Consequently, governments were seeking additional policy instruments.[91]

In Canada, the control over foreign investment was considered to be one means to influence the develop-

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90 Thus, state regulations gained more and more importance. H. Gattiker, "Behandlung und Rolle von Auslandsinvestitionen im modernen Völkerrecht: Eine Standortbestimmung", in Swiss Yearbook of International Law 1981 (Bern: 1982) 25 at 56 points out that many western states have given up to believe that a market economy and competition are the only means of social and economic control.

91 Grewlich, supra, note 16, at 64.

ment of the domestic economy. Canadian efforts to control foreign investment sprang from the desire to insulate the Canadian economy from undesirable external economic forces, especially those from the U.S.[92]

Canadian economic nationalism in the 1960s and 1970s had a lot to do with the extraordinary success of transnational enterprises. Though I shall not deal with this in any detail, one has to bear in mind that the number of transnational enterprises grew constantly after World War II. These enterprises gain advantage from the fact that they operate in more than one country.[93] To give one example, by manipulating the transfer prices between branches or subsidiaries and parent company and thereby ignoring the true market prices, transnational enterprises limit the ability of governments to manage the economy and lower the tax revenues of nation states.[94] Canadian

92 Bakken, supra, note 58, at 979.

93 The growth of the transnational enterprise tends to weaken nation states. Cp. Hymer & Rowthorn, supra, note 41, at 88.

94 Government of Canada, supra, note 52, at 55 f; Canadian Labour Congress, supra, note 60, at 10. Cp. also C. T. Ebenroth, Die verdeckten Vermögenszuwendungen im transnationalen Unternehmen (Bielefeld: Gieseking, 1979); B. Grossfeld, "Multinationale Korporationen im Internationalen Steurrecht" in Internationalrechtliche Probleme multinationaler Korporationen (Heidelberg: C. F. Mueller,

critics of a free flow of capital have emphazised the economic dangers resulting from the activities of transnational enterprises in Canada.[95]

Nevertheless, even under these changed conditions, economic growth is still a function of investment.[96] The standard of living in a country depends to a high degree on its stock of productive capital. Though undoubtedly economic costs occur if this capital originates from a foreign country, foreign capital is nevertheless an important factor for economic growth in the host country.[97] Given the interdependence

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1978) 73 ff. (with English summary).

95 K. Levitt, Silent Surrender, The Multinational Corporation in Canada (Toronto: MacMillan, 1970); Government of Ontario, supra, note 20, at 24 f.; Government of Canada, ibid., at 59. See also Canadian Labour Congress, supra, note 60, at p. 2: "In 1973, we pointed out that 'large and powerful corporations, either acting under policies laid down by foreign laws, or simply motivated by their own interests, or by both, may ignore the economic and social goals of the country in which they are based.' The intervening years have not changed our views on the problems of foreign control of our economy...".

96 Government of Ontario, ibid., at 14.

97 Cp. Canadian Manufacturers' Association "The Watkins Report: A Disturbing Document" in T. E. Reid, ed., Foreign Ownership: Villain or Scapegoat? (Toronto: Holt, Rinehart and Winston, 1972) 27 at 29. See also H. I. Macdonald, "Nationalism in Canada" in T. E. Reid, ed., Foreign Ownership: Villain or Scapegoat? (Toronto: Holt, Rinehart and Winston, 1972) 71 at 74: "Private investment

between economic growth and the rate of productive capital, any investment control measure bears risks, which are closely related to the fact that a majority of foreign investments is made by transnational enterprises. The flexibility of these enterprises to go elsewhere makes investment control in the long run a detriment to the country using it.[98] The discouragement of foreign direct investment in 1981, for example, was considered to be detrimental to Canada's economic recovery, because little, if any, alternative domestic investment was forthcoming to replace the lost foreign capital. The decline in the Canadian dollar and increased unemployment was partly a result of a decline in foreign capital investment.[99]

Today's national economies are in a state of mutual economic dependency.[100] The economic well-being of industrialized countries like Canada is a

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contributes to economic welfare in two ways: it yields an income to the investor (a private benefit) and a tax revenue to government (a social benefit). If investors invest at home, the country gets both benefits; if they invest abroad, the host country rather than the investing country collects the social benefit.".

98 Rugman, supra, note 13, at 354.

99 Ibid.

100 Albrecht, supra, note 20, at 150; Turner, supra, note 47, at 334; Rugman, ibid., at 354.

direct result of extended international trade. For these countries, a free flow of goods and capital is an important prerequisite to maintain the standard of living.[101] Since a concrete danger of retaliation exists, investment controls as well as import controls or other "protective" measures to restrict the free flow of capital and goods will eventually be harmful to the country using it.[102]

U.S. reactions to the announcement of greater powers for the Foreign Investment Review Agency in 1980 show that foreign investment control mechanisms implemented by an important economic power such as Canada affect the whole system of international trade: The United States viewed the strengthening of the Foreign Investment Review Agency not only as a bilateral threat but also as a serious threat facing the liberal international economic order. In the words of Harvey Bale, then Assistant United States Trade Representative for Investment Policy:

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101 P. Behrens, "Kontrolle ausländischer Direktinvestitionen" (1976) 40 Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht 233 at 264 ff; Rugman, supra, note 13, at 352.

102 According to Rugman, ibid., at 352, the U.S. perception of FIRA in the beginning of the 1980's was a disaster for Canada.

> "We do not object to Canada's desire to "Canadianize" its economy. Whether we agree with it or not, this is their choice to make. However, we are concerned about a number of the policy measures that the Canadian Government proposes in order to achieve that objective. These policies are particularly troublesome as they undercut current U.S. efforts to persuade other countries, especially the developing world, to move away from such measures, and they increase pressures for the United States to adopt similar policies - to the detriment of Canada, the United States and the world trading and economic system as a whole."[103]

Though retaliation is rarely an effective means to deter a country from using interventionist measures[104], it is very likely that foreign investment control will lead to some form of retaliation which would increase the cost of barriers to the free flow of capital. In the light of growing protectionism, retaliation would further threaten the international economic order and would eventually be harmful for all trading countries.[105]

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103 Statement before the Subcommittee on International Economic Policy of the Senate Foreign Relations Committee, 97th Cong., 2d Sess., March 10, 1982, at 29.

104 For details see P. A. Samuelson & W. D. Nordhaus, Economics, 12th edition (New York: McGraw-Hill, 1985) at 864 f.

105 Hinton, supra, note 58, at 41: "As we move toward a freer and fairer international economic system we must move forward progressively across the board. The world is increasingly interdependent and the pieces of the economic system increasingly interrelated. It would make little sense for us to liberalize one part of the international system while further restricting another. To do

Nevertheless, a number of economic reasons have been advanced for the introduction of foreign investment control in Canada. It appears to be necessary to look at some of the arguments in favour of foreign investment control more carefully.

b) Employment

The transnational enterprise, it has been said, endeavours to favour imports from affiliates to the detriment of competitive local sources of supply.[106] This would be felt by the local labour-force since imports prevent domestic production and thus employment opportunities for Canadians. It has also been argued that there would be fewer lay-offs of em-

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so would only increase existing inequities and distortions." See also I. A. Litvak & C. J. Maule, "Canadian Outward Investment: Impact and Policy" (1980) 14 J.W.T.L. 310 at 311, who point out that Canada's policy on outward investment is inconsistent with the countries position on inward investment. Cp. also Samet, supra, note 58, at 294 ff.

106 Government of Ontario, supra, note 20, at 25; Albrecht, supra, note 20, at 152, note 11. In 1978, for example, of almost $50 billion of imports into Canada, $43.7 billion could be categorized by the nationality of the importer. The result was that 72% were brought in by firms under foreign control: Macdonald, supra, note 28, at 387 f.

ployees by Canadian owned companies than by foreign owned firms.[107] Thus, during the political debate about the future of the Foreign Investment Review Agency, Lorne Nystrom of the New Democratic Party argued that "one way out of the current recession and the horror of ever-increasing unemployment is to strengthen FIRA, not weaken it."[108]

To assure that subsidiaries of foreign enterprises abstain from importing goods and services, governments may seek to commit foreign investors to use domestic sources rather than import parts and components abroad. This was the idea that hid behind "Buy Canadian" undertakings imposed on foreign investors under the Foreign Investment Review Act. Since the undertakings were only imposed on foreign investors and not on Canadian firms, the Canadian Government at that time seems to have assumed that Canadian-controlled firms usually import less, a proposition for which it is not easy to produce facts. Even the large percentage of foreign-controlled firms among the importers of goods into

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107 Canadian Labour Congress, supra, note 60, at 5 f.

108 Quoted by Spence, supra, note 63, at 334.

Canada[109] does not prove that foreign-controlled firms are more likely to buy parts and components abroad. It only shows the high degree of foreign ownership and may be a hint that the Canadian manufacturing industry in certain sectors is not as competitive as it probably could be.

What is even more significant is that "Buy Canadian" undertakings imposed on foreign investors disregard basic principles of international trade. The theory of comparative advantage holds that

> "[c]ountries will specialize in the production of those commodities where they are most productive. The principle of comparative advantage shows that such specialization will benefit all countries even when one country is absolutely more efficient in the production of all goods than other countries. If countries specialize in the products in which they have a comparative advantage (or greater relative efficiency), then trade will be mutually beneficial to all countries."[110]

It is evident that foreign investment review, forcing foreign-controlled firms to use Canadian parts and components, does not protect Canadian workers but may eventually be harmful. What has been said about tariffs or quotas thus is also correct

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109 See supra, note 106.

110 Samuelson & Nordhaus, supra, note 104, at 834; see also 836.

with regard to barriers to capital investments which indirectly affect the free flow of goods:

> "An ill-designed tariff or quota, far from helping the "protected" workers or consumers in a country, will instead reduce their real incomes by making imports expensive and by making the whole world less productive. Countries lose from protectionism because reduced international trade eliminates the efficiency inherent in specialization and division of labor."[111]

It may well be that increased levels of investment will not increase employment levels.[112] Yet, the problem of unemployment has little, if anything, to do with the country of origin of the capital invested. Rather, capital inflows generally alter the capital/labour ratio in the economy, because firms substitute capital for labour. The problem is one common to all mature economies.[113]

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111 Ibid., at 836.

112 The Conference Board of Canada's Medium-Term Forecasting Model was used to simulate the Canadian economy. Though the productivity of the Canadian economy increased in most simulations, this had no influence on the employment level: Barrett, Beckman & McDowall, supra, note 14, at 27 ff.

113 For example, in Western Europe, there is growing concern about the impact of new technologies on employment opportunities.

Experience shows that during the last recession, foreign-controlled firms cut back capital spending plans less and contributed more to job creation than Canadian-controlled firms. In the manufacturing sector in 1983, Canadian-controlled firms announced plans to spend $4.1 billion on capital expenditures, or 27% less than in 1982. At the same time, foreign-controlled firms announced they would invest $5 billion, a decrease of only 9%. In 1984, foreign-controlled firms accounted for proportionally more new spending in manufacturing than Canadian firms.[114] On the basis of the World Bank's estimate that $100,000 in new investment is necessary to create one new job in an industrialized country such as Canada, the investment of American corporations in Canada in 1984 of $ 7.4 billion created 74,000 jobs in that year.[115] Thus, it is not likely that foreign investment control will help to create employment opportunities in Canada. On the contrary, investment control would eventually be harmful to Canada's economy as a whole.

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114 Cf. McGregor, supra, note 76, at 77.

115 Ibid., at 78.

c) Research and Development

Canadian economic nationalists consider Canada's declining relative share of export markets and the country's large trade deficit in manufactured goods to be a manifestation of the negative impact of foreign direct investment on the Canadian economy.[116] They argue that Canadian subsidiaries of foreign parents are limited in scope and potential: basic decision-making and the bulk of research and development activities would be concentrated in the parent company.[117] The Canadian subsidiary of a foreign firm, it has been said, usually performs only secondary or assembly functions, the more sophisticated production processes occuring in the parent's country of origin.[118] A 1979 OECD report proved that Canada

116 As to the costs of imported technology see Government of Canada, supra, note 52, at 130 ff.

117 See, e.g., Government of Ontario, supra, at 24. Thus, the Canadian economy is called a "branch-plant" economy; cp. Albrecht, supra, note 20, at 152.

118 This brake on the branch plant's entrepreneurship has been called "truncation". See only Government of Canada, supra, note 52, at 6: "Direct investment by foreign companies has led to establishment in Canada of "truncated" enterprises, in which many important activities are performed abroad by the parent or other affiliated firms." Cp. also S. Wex, Instead of FIRA - Autonomy for Canadian Subsidiaries? (Montreal: The Institute for Research on Public Policy, 1984) 29.

has a lower research and development level than that of any other major industrialized nation.[119]

For many critics of foreign investment in Canada, the country's poor record of research and development has a lot to do with the fact that many subsidiaries are subject to export restrictions imposed by their parents to prevent competition by the subsidiaries in international markets. In their view, Canadian branch plants usually only have the mandate to replicate the parents' product line, but not to develop a product line of their own. Many critics find that these limitations in scope and potential of foreign-controlled firms resulted in Canada's lack of competitiveness in the international market for manufactured goods[120]:

> "The high level of foreign investment ... affects the structure of Canada's manufacturing industry. Many foreign corporations invest in Canada to

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119 Cp. Organization for Economic Cooperation and Development, Trends in Industrial Research and Development, 1967-1975, (Paris: OECD, 1979) at 102. The result was confirmed by a study by the Science Council of Canada which proved that Canada spent a smaller proportion of its gross domestic product on research and development than most other industrialized nations. Cp. Science Council of Canada, Hard Times, Hard Choices-Technology and the Balance of Payments (Ottawa: Supply and Services Canada, 1981) at 56.

120 Government of Canada, supra, note 52, at 42; Wex, supra, note 118, at 2.

> extend the market for their manufactured goods. They tend to produce a wide range of products in short runs to supply the Canadian market only. Furthermore, Canada can become locked into accepting a pattern of innovation and technological development which has its origins abroad. These tendencies add to the relatively high costs in the Canadain economy stemming from a variety of domestic factors and result in the establishment of dependent manufacturing operations which, in many cases, are not in a position to compete internationally."[121]

In 1985, the Canadian Labour Congress declared in a submission to the House of Commons Standing Committee on Regional Development that

> "a large proportion of Canadian patents are owned by foreign nationals and are not necessarily used for the benefit of Canadians. Subsidiaries in a branch plant economy often find themselves in the position of researching, marketing and producing products that might be in competition with the parent and are often constained from competing with the parent."[122]

The labour organization refered to a study by the Science Council of Canada. According to this study, foreign-controlled firms did "a lot less research and development relative to sales than [did] domestically controlled firms."[123]

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121 Government of Canada, ibid.

122 Canadian Labour Congress, supra, note 60, at 7.

123 Science Council of Canada, supra, note 119, at 56.

There is no question that foreign direct investment causes problems for the foreign parent company in deciding where research and development are best based and how to structure the activities of the subsidiary. However, Canada's poor record of innovation and research and development is closely related to the nation's tariff policy. In the past, foreign manufacturing subsidiaries were usually located in Canada to capture a share of the Canadian market: "No innovative capacity or entrepreneurial spirit was required of the market seeker, save that necessary to build a market share based on the parent's technology, 'know-how', and marketing..".[124] Though the branch plant was not efficient by international standards, "it thrived behind the protection of high tariffs".[125] In the future, the situation will be different. After the results of the latest round of tariff reductions under the General Agreement on Tariffs and Trade will take effect by 1987, Canadian subsidiaries will be facing increased international competition.[125a] Since "the traditional market seeker

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124 Wex, supra, note 118, at 4 f.

125 Ibid., at 5.

125 a The tariff wall will be 7 - 9% only and there will be no tariff on 80% of all goods.

is not expected to survive"[126], existing as well as newly established subsidiaries of foreign firms will be compelled to do more research and development in order to remain competitive.

Finally, what has to be borne in mind is the fact that foreign direct investment involves not only the flow of capital, but is also a means to transfer technology and managerial skills. Although foreign-controlled firms may not develop the full range of activities of a mature corporation, foreign direct investment does, nevertheless, lead to the transfer of technology and managerial skills: The decision to establish a business in a foreign country is usually based on the existence of intangible assets such as patents, know-how or managerial skills. These assets have a positive effect on productivity and enable foreign firms to compete against firms in the host country.[127]

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126 Ibid., at 5.

127 C. P. Kindleberger, "Restrictions on Direct Investments in Host Countries", Discussion Paper for the University of Chicago Workshop on International Business (March 5, 1969) at 9, quoted in R. Z. Aliber, "A Theory of Direct Foreign Investment" in The International Corporation - A Symposium, ed. by C. P. Kindleberger (Cambridge, Mass.: The M. I. T. Press, 1970) 17 at 19. See also Barrett, Beckman & McDowall, supra, note 14, at 24 f.

Increased productivity does not only benefit the foreign investor through higher profit levels but also the host country, since it leads to greater real wages, salaries and revenues.[128] What appears to be more important in our context is the fact that nationals of the host country are needed to operate the business. Thus, positive "spillover" effects occur. Skills acquired in working for a foreign-controlled firm will later be available to Canadian-controlled firms as these Canadians move around the economy.[129]

One can hardly assess whether the research and development capacity of Canada would be different in the absence of foreign direct investment. Probably, the situation would not be better. Generally, foreign

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128 Government of Canada, supra, note 52, at 41.

129 Ibid. See also S. Globerman, U.S. Ownership of Firms in Canada: Issues and Policy Approaches (Montreal: C. D. Howe Research Institute, 1979) at 72 f. Some commentators have called transnational corporations "agents of technological change" which have been "the most important, and most successful, instruments for effecting diffusion." See G. Rosegger, "Multinational Corporations and Technology Transfer: The Need for a Fresh Outlook" in The Economic Effects of Multinational Corporations, ed. by W. Sichel, Michigan Business Papers No. 61 (Ann Arbor: University of Michigan, 1975) 59 at 60 f.

direct investment has filled gaps in Canadian resources and capacities in areas where Canada suffered a deficiency. There is no reason to assume that the situation will change in the future. No Canadian capital being available to substitute for foreign investment, the development of new and inovative products would be even more difficult.[130] This is of particular importance given the changing conditions of world trade. The relative importance of trade in manufactured products is growing while the relative importance of international trade in primary resources and food, for which Canada has a comparative advantage, has diminished. To adapt to these changing conditions, Canada will need foreign direct investment, not only as a source of savings but also as a source of new technology and mangerial skills.[131]

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130 If an economy lacks the capital to invest in new equipment and machinery, its competitive position is at stake. Many experts believe that Canada is in such a position. Cp. D. McGregor, supra, note 76, at 77, who quotes C. Beckman of the Conference Board of Canada saying that Canada will need "significantly higher levels of foreign investment to remain internationally competitive."

131 Barrett, Beckman & McDowall, supra, note 14, at 55.

d) Competition

A study, released in 1981, of the control of the 50 largest Canadian companies in terms of sales revenues, shows that 20 were foreign-controlled. Of these 20 companies, five were wholly-owned by a foreign company, ten were controlled by foreigners holding between 50% and 100% and five by foreigners holding between 20% and 50%. Of the remaining 30 Canadian-controlled corporations, nine were wholly owned by the government or a single family, seven were controlled by family or corporate holdings of between 50% and 100%; five were controlled by family or corporate holdings of between 20% and 50% and only nine were classifiable as widely-held corporations.[132] Thus, what Canada is facing is a problem of concentration of economic power.[133]

To say that this concentration of economic power is a direct result of foreign direct investment seems

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132 For details see Hadden, Forbes & Simmonds, supra, note 16, at 78.

133 Cp. Government of Canada, supra, note 52, at 43: "... much foreign investment merely represents the extension of foreign oligopoly and world concentration into Canada."

to be too far reaching. While it is probably fair to say that foreign investors tend to favour large firms and, thus, can lessen competition in the industry involved[134], one can also argue that in certain circumstances foreign direct investment can add significantly to the competitive climate. In some cases, foreign-controlled firms may be the only challenge to existing Canadian businesses.[135]

Foreign investment review can, of course, be used to monitor competition in certain industries to prevent further concentration. However, it will only prevent those distortions of the market economy which have their origin abroad. It will not allow the Canadian authorities to react to all concentration tendencies in the Canadian economy. This shortcoming of foreign investment review suggests that it is not

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134 Among the 100 largest and the next 900 enterprises in Canada, there is a very high degree of foreign ownership (48% and 47% respectively). However, of the 31, 611 corporations covered by the survey, only 8% were foreign-controlled: "...the bulk of foreign ownership and control is concentrated in a relatively small number of relatively large enterprises in certain sectors". Hadden, Forbes & Simmonds, supra, note 16, at 79 f. Cp. also Government of Canada, supra, note 52, at 43.

135 Government of Canada, ibid., at 41. For a critical analysis see Globerman, supra, note 129, at 67.

a very efficient means to ensure competition in the Canadian market economy.

e) Balance of Payments

Another important objection to increased levels of foreign investment in Canada has been its effect on the Canadian balance of payments. It has been argued that a current account deficit rather than the reverse would be the result of increased inflows of external capital.[136] Increased foreign direct investment would lead to higher incomes, more employment and an increase in consumption. This, in turn, would lead to growing imports since consumers would tend to purchase more foreign goods and services. Even when they would buy Canadian goods and services, their demand would lead to a current account deficit since domestic firms would be forced to import more machinery and other producer goods abroad.[137] A high portion of foreign-controlled firms, buying relatively more parts and components abroad, would add to this trend. In addition, dividend and royalty payments to

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136 Ibid., at 82.

137 Those who favour foreign investment control admit that this is only one possible outcome of foreign direct investment. Cp. Government of Canada, ibid., at 82.

the parent firm as well as fees and salaries to foreigners would constitute a drain on Canada's balance of payments.[138]

The critics of large foreign investment in Canada do not suggest that foreign direct investment in Canada should be prohibited for balance of payments reasons. However, they recommend that the Canadian Government ensures that imports of capital are kept under careful control.[139]

What has to be seen, however, is that the relative importance of foreign direct investment has been declining in the past[140] and Canadian outward investment became more and more important.[141] It may be

138 See Government of Ontario, supra, note 20, at 24: "The gradual replacement of resident ownership of industries by non-resident ownership is, naturally, not a simple matter of substitution. Foreign-owned investment constitutes a sort of debt which needs to be serviced, and Canada's payments of interest and dividends have already reached relatively high dollar values." For a more recent evaluation see Canadian Labour Congress, supra, note 60, at 13, quoting the report of the Multinational Enterprise Sub-Committee of the Major Projects Task Force.

139 Government of Canada, supra, note 52, at 83 f.

140 Barret, Beckman & McDowall, supra, note 14, at 3.

141 It strikes the foreign observer that for a long time Canadian nationalism has focused on foreign investment in Canada, while little thought has

assumed to grow considerably during the next decade.[142] Thus, foreign direct investment appears to be no threat to the Canadian balance of payments. Assuming that Canada-U.S. trade talks will be successful[143], increased direct investment flows in both directions will make the screening of external capital inflows for balance of payments reasons even less important.[144] Given the admitted benefits arising from foreign direct investment, it appears to be open to question whether Canada should review the inflow of external capital for balance of payments reasons. Rather, the balance of payments should be controlled by macroeconomic policy instruments such as adjust-

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been given on part of the Canadian Government to the potential for diplomatic disputes over reciprocal equality of investment access. Cp. Litvak & Maule, supra, note 105, at 311: "Canada has detailed policy with respect to inward investment. In dealing with other countries, its position and policies on outward investment should show some consistency with its position on inward investment." See also Barrett, Beckman & Mcdowall, supra, note 14, at 58.

142 Barrett, Beckman & Mcdowall, ibid.

143 As to the problems see A. Murray, "U.S. Bid for Free-Trade Pact With Canada Upsets Farmers" The Wall Street Journal [Europe] (May 15, 1986) at 8; J. D. Edmonds, "Menu for Canada Trade Talks: Hold the Rhetoric" The Wall Street Journal [Europe] (July 15, 1986) at 8.

144 Apart from that, it is inconsistent to negotiate with the United States for a liberalization of bilateral trade and at the same time to refuse a free flow of capital.

ments in the exchange rate by the Canadian monetary authorities as well as fiscal and monetary policy.[145]

2. Political Impact of Foreign Direct Investment

a) General Remarks

The shift from the traditional Canadian attitude of laissez-faire[146] toward government control over foreign investment was, to a considerable degree, motivated by political considerations. Political concern about foreign ownership is understandable bearing in mind that the per-capita level of foreign ownership in Canada is higher than that of any other industrial nation.[147] Thus, the arguments of those

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145 Cp. H. G. Johnson, "The Efficiency and Welfare Implications of the International Corporation" in The International Corporation - A Symposium, ed. by C. P. Kindleberger (Cambridge, Mass.: The M.I.T. Press) 35 at 53 f.

146 Canada has been less resistant than other countries to giving up national independence for economic benefits brought in by foreign capital investment. Cp. Hymer & Rowthorn, supra, note 41, at 89.

147 New Democratic Party Member of Parliament Ian Deans is of the opinion that ICA will raise this level: "Further Reaction to Investment Canada Bill", Foreign Investment in Canada, ed. by P. R.

who want to restrict foreign investment are frequently non-economic.[148] Many critics accept the fact that foreign investment benefits the Canadian economy. However, they argue that the economic benefits are outweighed by non- economic drawbacks.[149]

Some of the political reasons for the implementation of both the Foreign Investment Review Act and the Investment Canada Act will be presented in the following.

Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf, January, 1985) Report Bulletin No. B9-1-1.

148 The so-called "Waffle Resolution", presented at the NDP National Convention, October 30, 1969, is a good example for the more political than economic motives behind the demand for investment control. The resolution aimed at the building of a socialist Canada. It stated that in order to achive such a goal Canada had to become politically and, therefore, economically independent. In the words of the resolution: "Capitalism must be replaced by socialism, by national planning of investment and by the public ownership of the means of production in the interests of the Canadian people as a whole." See the text of the resolution in Foreign Investment: Villain or Scapegoat?, ed. by T. E. Reid (Toronto: Holt, Rinehart and Winston, 1972) at 53 ff.

149 Hinton, supra, note 58, at 36.

b) Canadian National Independence and Canadian Unity

Canada's concern about the level and effects of foreign direct investments are, at least in part, a manifestation of Canada's "historical search for ... identity".[150] Many Canadians believe that foreign direct investment threatens Canadian national independence. They argue that it "can act as a transmission belt for the entry of foreign laws into Canada" and that it "can bring cultural influences which may or may not be desirable."[151] This fear is understandable in view of the fact that most of the foreign capital invested in Canada originates in the United States.[152] For many, the rate of American ownership of Canadian firms is a "unique phenomenon" which "impinges on virtually every aspect of the Canadian national interest"[153]. The reasoning is summarized by the Canadian Labour Congress in a sub-

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150 Cp. Drouin & Malmgrem, supra, note 58, at 399. Cp. also Macdonald, supra, note 28, at 385; Koehler, "Foreign Ownership Policies in Canada: 'From Colony to Nation' again" (1981) 11 Am. Rev. of Can. Stud. 77.

151 Government of Canada, supra, note 52, at 43.

152 J. R. Murray, "FIRA: Its Origin and Purpose" in Current Legal Aspects of Doing Business in Canada (American Bar Association, 1976) 3 at 4 f.

153 M. Sharp, "Canada-U.S. Relations: Options for the Future", Int'l Perspectives (Autumn 1972) at 1.

mission to the House of Commons Standing Committee on Regional Development on the Investment Canada Act, Bill C-15:

> "A nation cannot have political sovereignty without economic sovereignty, and it cannot be independent as long as important decisions affecting its economy are made externally."[154]

Thus, much of the political debate surrounding both the Foreign Investment Review Act and the Investment Canada Act stems not merely from the fact that Canada has more foreign investment per capita than any country in the world but that U.S.-controlled firms are the major foreign presence.

In order to understand this Canadian nationalist concern about American investment, one has to bear in mind the French-Anglo division of Canada. Canada's English-speaking population, lacking a strong and cohesive culture of their own[155], has been highly

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154 Canadian Labour Congress, supra, note 60, at 2.

155 Cp. R. Cpuzin, Foreign Participation in the Canadian Economy (Montreal: McGill University, 1972) at 3: "French Canada ... grew from about 65,000 inhabitants in 1763 to 5.5 million in 1961 mainly by natural increase. Commonality of ancestry was bolstered by linguistic, religious and cultural identity, all accentuated by contrast. French Canada naturally developed a nationalism along lines of tradition. [...] the traditional-

susceptible to American cultural influences. In the past, this led to an alienation from the Francophones. The so-called "révolution tranquille" in Quebec during the 1960's aimed - beside other targets - at the hegemony of English-speaking Canadians in the affairs of the nation.[156]

The Canadian Government, in a report published in 1970, stated that Canada's challenge was to maintain national unity "distinct from but in harmony with the world's most powerful and dynamic nation, the United States".[157] The Foreign Investment Review Act was an effort to meet this challenge by trying to prevent that alienation and to create a separate Canadian identity in the nation as a whole.[158] However, given

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ist nationalism of French Canada ... has no counterpart among Canadians of English origin, much less within non-French Canada as a whole. [...] the fallacy in the theory of "deux nations" is not that Québec or French Canada does not merit this epithet, which it probably does, but rather that there is no second."

156 For details see Franck & Gudgeon, supra, note 16, at 82.

157 Government of Canada, Dep't of External Affairs, Foreign Policy for Canadians (Ottawa: Queen's Printer, 1970) at 20 f.

158 Cp. Franck & Gudgeon, supra, note 16, at 78 ff.; Couzin, supra, note 155, at 3 :"Canadian nationalism is ... necessarily a matter of national purpose rather than shared experience, of national institutions rather than popular tradition."

a relationship between Canada and the United States not of mutual dependence but of unequal dependence, many believe that Canada will not achieve her objective. As one American observer noted:

> "Canada, I have long believed, is fighting a rearguard action against the inevitable. ... I do not believe they will succeed in reconciling the intrinsic contradiction of their position. ... Sooner or later, commercial imperatives will bring about free movement of all goods back and forth across our long border; and when that occurs, or even before it does, it will become unmistakably clear that countries with economies so inextricably interwined must also have free movement of the other vital factors of production - capital, services and labor. The result will inevitably be substantial economic integration, which will require for its full realization a progressively expanding area of common political decision."[159]

Canadian politicians, who favour control over foreign investment, also see this threat to Canada's independence. They do not consider political integration to be inevitable, however. Many politicians have argued that control over foreign investment in Canada is an effective means "to protect the fabric of Canadian Society against the autonomous and re-

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159 G. Ball, The Discipline of Power, quoted by Franck & Gudgeon, supra, note 16, at 84.

lentless forces running 'free' in the North American market economy."[160]

However, it seems that even in the Canadian context, the dangers to national independence arising from foreign direct investment are frequently exaggerated. As early as 1978, Grewlich has pointed out that "sovereignty seems to be no longer at bay in host countries."[161] He based his opinion on a shift in power from the transnational enterprise to the nation state and spoke of a global trend. Though foreign-controlled firms may limit the freedom of the host country to set and pursue national objectives with traditional national policy instruments, a number of other policy instruments are available to respond to foreign capital participation. In addition, there is convincing evidence that the total amount of foreign capital in Canadian non-financial industries has remained almost constant since the 1950's.[162] Some commentators even suggest that the

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160 Turner, supra, note 47, at 335 f., quoting Rotstein, "Canada: The New Nationalism" (1976) 54 Foreign Aff. 97 at 115.

161 Grewlich, supra, note 16, at 66.

162 Report of the Royal Commission on Corporate Concentration, R. B. Bryce, chairman (Ottawa: Supply & Services Canada, 1978) at 189, table 8.2.

level of foreign control has significantly declined.[163] Thus, it seems to be possible that the use of nationalistic rhetoric sometimes serves purposes other than to prevent "alienation". It may be that the interests of certain groups are suggested to be public interests.[164]

Chapter 3: Future Canadian Investment Requirements and the Global Economic Environment

It is a commonplace that the successful implementation of policy demands recognition of reality. In the light of recent developments it has been argued that Canada has little choice but to accept the new economic realities and to reconsider her approach toward foreign investment.[165] In the following, we

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163 Fisher, supra, note 32, at 85, note 143; T. Zahavich, "More foreign investment but ... less foreign control" (1981) Foreign Investment Review 11 at 12. Cp. also McGregor, supra, note 76, at 80, who points out that while the Canadian ownership rate in manufacturing stood at 39% in 1970, it stood at a level of 51% in 1985. Similarly, Canadians now control 57% of the capital employed in mining and smelting, compared to a level of 30% 15 years ago. The Canadian ownership rate in the oil and gas industry changed from 26% in 1975 to 55% in 1985.

164 Behrens, supra, note 101, at 239.

165 McGregor, supra, note 76, at 100.

shall look upon some of the national and global factors which may force Canada to change her foreign investment policy.

1. Canadian Savings Pattern and Canadian Investment Requirements

The ability of an economy to grow and to prosper depends partly on its ability to save, because savings offer the resources for investment.[166] Traditionally, foreigners have been net lenders to Canada because Canadian investment requirements have exceeded domestic savings. Though personal savings played an important role in the capital formation in Canada they could not eliminate Canada's dependency on foreign savings. It was not until recently that Canada became a net lender to foreign countries.[167] However, this was probably due to the small growth rate of the Canadian economy which resulted in reduced investment in Canada. It is unlikely that

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166 Barrett, Beckman & McDowall, supra, note 14, at 11. For a detailed analysis see Samuelson & Nordhaus, supra, note 104, at 138.

167 Barrett, Beckman & McDowall, supra, note 14, at 13.

Canada will remain a net lender once the level of economic activity has returned to a higher level.[168]

A recent comparison with the United States produces evidence for this proposition. While total business investment in 1985 in the United States stood a real 21.5% above pre-recession levels, in Canada, business investment remained 19% below the level reached in 1981 before the recession began.[169]

In order to change Canada's dependency on foreign funds Canadians could attempt to increase the personal savings rate, the major source of savings to finance new capital investment.[170] In the short run, however, such a step may well reduce total savings rather than increase them, since it would lower income and output and increase the government sector deficit.[171] Moreover, the personal savings rate in

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168 Ibid.

169 McGregor, supra, note 76, at 77.

170 The relative importance of personal savings has been growing since 1972. However, this was only a result of a shift in savings patterns among sectors of the Canadian economy and has not resulted in an increase in total domestic sources of savings. Cp. Barrett, Beckman & McDowall, supra, note 14, chart II at 15.

171 Ibid., at 14.

Canada is already relatively high compared with the personal savings rate in the United States.[172] Currently, what seems to be necessary is a change in the composition of these savings. The capitalization of Canadian corporations, for example, is not as good as the capitalization of American companies. Within Canada, foreign-controlled firms tend to be capitalized better than Canadian-controlled firms.[173] One reason for this may be that Canadian households prefer liquid debt instruments over equity capital: In 1984, only 11 percent of Canadians owned shares in publicly-traded corporations compared with 22 percent of Americans. A change in the composition of Canadian savings, however, would not alter overall Canadian investment requirements.

Given these facts, it is fair to say that Canada will still need foreign capital in the future to generate economic growth and to meet societal expectations. The country could probably forego foreign savings in the long run, but only at costs most Canadians would be unwilling to accept.[174]

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172 Ibid., chart III at 16.

173 Ibid., at 17.

174 Ibid., at 68.

2. Direct Investments v. Portfolio Investments

A recent study released by the Conference Board of Canada shows that international investment flows have changed rapidly over the last twenty years.[175] After European currencies had returned to full convertibility by the late 1950's, the Eurocurrency market developed which led to a substantial increase in international financial flows. It was only in the last twenty years, however, that rising oil prices and floating exchange rates in the 1970's or the budget deficit and financial deregulation in the United States in the 1980's led to the explosion of international financial flows.

While international financial flows increased rapidly, the world saw a shift away from direct investment to short-term liquid instruments. A growing portion of the increase in international capital flows was in portfolio investment while the amount of capital available for direct investment was shrinking. A major reason for this development was the fact that portfolio investment offered investors more

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175 Ibid. at 48.

flexibility and an opportunity for diversification. With world trade stagnating for the first time after World War II, high debt loads on many developing countries and weak economic recovery in Europe and Canada, portfolio investment appeared to be less risky than direct investment.[176]

Another important factor for the growing attractiveness of portfolio investment since the 1970s was an international trend toward restrictions of the free flow of capital. A number of countries tried to cope with changing international economic conditions by introducing foreign direct investment control.[177] These measures made the return from direct investment even less certain. Other factors such as the emergence of large pools of capital (pension funds, mutual funds) added to the trend. Finally, multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade resulted in

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176 Ibid., at 48.

177 In addition to Canada, Australia (Foreign Take-Overs Act 1975; cp. Behrens, supra, note 101, at 263 ff), France (Act No. 66-1008; cp. J. Guyénot & G. Brachvogel, "Die Gründung einer Tochtergesellschaft in Frankreich" in Die Gründung einer Tochtergesellschaft im Ausland, ed. by M. Lutter (Berlin: de Gruyter, 1983) 99 at 119 ff.) and Great Britain (Industry Act 1975; cp. Behrens, supra, note 101, at 263 ff.) started to review foreign investments.

significant tariff reductions which often made it unnecessary for firms to establish foreign subsidiaries to penetrate foreign markets.[178]

3. Increased Competition Among Host Countries for Foreign Capital

Some have suggested that Canada has been declared open to business at a time when the business of moving investment capital around the world has changed to Canada's disadvantage.[179] According to one source, a liberal approach toward foreign direct investment "can do nothing about the fundamental problem facing Canada: that foreign capitalists can make more money elsewhere, no matter what action the Canadian government takes".[180] A major reason for

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178 In 1987, as a result of the latest international talks under the auspices of the General Agreement on Tariffs and Trade, most import tariffs will decline 40%: McGregor, supra, note 76, at 76 f. For details on the MTN Agreements see R. W. Burchill, "Commentary on Some Treaties Signed by Canada in 1979: GATT - The MTN Agreements" (1980) XVIII C.Y.I.L. 384.

179 Cp. B. Little, "Replacing FIRA may not attract investors", The [Toronto] Globe and Mail, (January 17, 1985) 8.

180 See Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition) Report Bulletin B9-1-1, quoting a representative of U.S.

this pessimistic outlook is the fact that the shift away to portfolio investment resulted in growing competition among host countries for foreign direct investment. Today, Canada has to compete with other industrialized nations[181] and a growing number of newly industrialized countries.[182] Developing countries, desperately in search of means to stimulate economic growth, are probably winning a bigger share of the worldwide $ 550 Billion (U.S.) in annual foreign direct investment.[183]

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investment bankers operating in Canada.

181 For example, the Australian Treasurer Paul Keating announced a broad liberalization of the rules governing foreign take-overs of Australian manufacturing companies. Cp. "Australia Says It Won't Apply Securities Tax", The Wall Street Journal [Europe] (29 July, 1986).

182 For example, Indonesia is trying to increase the country's attractiveness for foreign investors. Cp. S. Jones, "Indonesia Eases Regulation of Investment by Foreigners" The Wall Street Journal [Europe] (May 9, 1986) at 26.

183 See Barrett, Beckman & McDowall, supra, note 14, at 73: "Some commented that their ultimate investment decision was swayed by incentives offered by countries such as Singapore ... and South Korea. Other investors noted that even such countries as Chile, Northern Ireland and the People's Republic of China - countries not generally seen as Canada's rivals for foreign investors' attention - provided sufficiently attractive incentives to lure investments away from Canada."
In 1984, for example, Mexico announced that she would apply her Foreign Investment Law with flexibility and that she would consider permitting an foreign ownership rate of up to 100% in a

Furthermore, the United States have become an importer of capital while the flow of outward investment from the U.S. will continue to slow.[184] Official figures for 1985 show that the United States owed foreigners $ 107.4 billion more than it was owed.[185] At the end of 1984, the U.S. still had a surplus of $ 4.4 billion.[186] The Conference Board of Canada foresees no early end to these new investment patterns.[187] Little economic growth, faltering world trade, increasing economic nationalism and protectionism and the persistence of the international debt

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number of cases. Cp. S. F. Maviglia, "Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries" (1986) 80 Am. J. Int'l L. 281. See also McGregor, supra, note 76, at 77: "In that light [of developing countries competing for foreign capital], Canada could be compared to a high-priced boutique opening for business when all the surrounding shops are holding half-price sales."
It should be noted, however, that many countries still offer less favourable conditions to foreign investors than does Canada. Cp., e.g., J. R. Schiffman, "Chinese Pledge to Alleviate Foreign Investors' Problems" The Wall Street Journal [Europe] (August 11, 1986) at 5.

184 Little, supra, note 179, at 8.

185 Gutfeld, supra, note 43, at 13.

186 Ibid.

187 Barrett, Beckman & McDowall, supra, note 14, at 54.

crisis will combine to limit global flows of direct investment.[188]

Conclusion

It could probably be shown that the negative impact of foreign direct investment in Canada on employment, research and development, competition and the balance of payments is not as evident as the critics of foreign direct investment suggest. Though Canada is facing problems in all areas mentioned, a review procedure can only deal with certain aspects and probably not in the most efficient way. In view of Canada's investment requirements, it can be assumed that while foreign investment review may, for example, prevent further concentration, it may at the same time keep much needed capital investment away.

As to the political impact of foreign direct investment, the process of economic integration necessarily involves some loss of independence of the

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188 Little, supra, note 179, at 8.

nation states.[189] They lose part of their control over the domestic economy since they become influenced by changing patterns of international trade and investment. Thus, there may be political reasons for the control of foreign capital. One may argue that economic gains do not justify a loss of sovereignty. As significant economic gains for all participating nations are likely to be the result of a free flow of capital and goods, each nation should, however, be sure about what political objectives to achieve. As the Canadian Manufacturers' Association stated almost twenty years ago:

> "It is the clear right, of course, of any nation to decide at any time that the economic good of foreign capital is outweighed by the political harm and to act accordingly. But since the restraints which it elects to impose are unlikely to sit well with the foreign investor, it must not be surprised if the subsequent economic repercussions are both considerable and unpleasant."[190]

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189 Cp. Pearson, supra note 88, at 17: "[Independence] cannot mean that we become a nation by ourselves, with full control of our own destiny. It cannot mean freedom from U.S. influence or pressure. For us, or indeed for any country, it must mean less than this if there is to be international cooperation and peace. Independence is relative and limited."

190 Canadian Manufacturers' Association, supra, note 97, at 29.

Part II: Legislative Responses to Foreign Direct Investment in Canada

Chapter 4: The Foreign Investment Review Act

1. Background

It has been shown that the creation of the Foreign Investment Review Agency was a result of an economic and political debate which first started at the end of the 1950s.[191] Before the Act entered into force, several reports had recommended a number of measures to respond to the high degree of foreign ownership in Canada. The Gordon Commission in 1957[192] and the Wahn Committee in 1970[193] favoured measures which would require some degree of ownership and control in foreign owned corporations to rest in the hands of Canadians, both through substantial Canadian shareholdings and the appointment of Canadian directors.

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191 Supra, at 13.

192 Government of Canada, supra, note 34.

193 Government of Canada, Report of the House of Commons Standing Committee on External Affairs and National Defense (Ottawa: Queen's Printer, 1968).

The Watkins Report in 1968[194] and the Gray Report in 1972[195] recommended the creation of a governmental agency which would have to monitor the activities of Canadian subsidiaries of foreign parent companies and to exercise some form of control over new foreign investments. The agency would have the mandate to bargain on a case-by-case basis with individual investors. The bargaining would have been constrained by an established policy and by a limitation to significant investments.[196]

In 1972, the federal Government under Prime Minister Trudeau introduced legislation to establish a process of reviewing foreign take-overs, thereby

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194 Government of Canada, supra, note 45.

195 Government of Canada, supra, note 52.

196 According to the Gray Report, supra, note 52, at 462, several types of foreign investment propositions would have been subject to governmental review:
- take-overs of Canadian businesses by foreign interests;
- the establishment of a new Canadian business;
- new licensing and franchising arrangements;
- major new investments by existing foreign-controlled companies in Canada;
- existing foreign-controlled companies, even if they were not planning major new investments in Canada;
- major new investments abroad by Canadian-based transnational enterprises.

adopting some of the Gray Report's recommendations.[197] As the bill did not direct the screening process to all new investments and to already existing foreign investments, it showed that the Liberals were not prepared "to go too far too quickly in confronting the foreign investor".[198] Before the bill could receive final approval, Parliament was dissolved for a general election. In 1973, the new liberal Government, dependent on support from the New Democratic Party[199], introduced a revised bill which would include new investments in the review procedure.[200] It was passed by the House of Commons in November 1973.[201]

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197 Bill C-201, the Foreign Take-Overs Review Act (Fourth Session, 28th Parliament, May 4, 1972). Cp. Donaldson, supra, note 49, at 475; Franck & Gudgeon, supra, note 16, at 105.

198 Franck & Gudgeon, ibid., at 105.

199 This party is frequently considered to be more nationalist than the Liberal Party. Cp. only Bliss, supra, note 14, at 9.

200 According to Franck & Gudgeon, supra, note 16, at 107, "[t]he Prime Minister ... had come out of the election debacle convinced that economic nationalism was a major force - if not in Canada as a whole then certainly in Ontario, the province with the largest number of seats in Parliament, and where the Liberal losses had been paricularly heavy."

201 For details see Bliss, supra, note 14, at 9.

The Foreign Investment Review Act became effective in two stages, each announced by proclamation (sec. 31 FIRA). The first stage, which applied to the acquisition of Canadian enterprises by foreign interests, began on April 9, 1974.[202] The second stage, which applied to the establishment of new businesses unrelated to a business previously carried on in Canada by the foreign investor, began on October 15, 1975.[203]

2. The Objectives of the Act and the Underlying Policy Considerations

Although the Gray Report contained the caveat that it was "not a statement of government policy nor should it be assumed that the government endorses all aspects of the analysis contained in it"[204], it is probably fair to say that the report, as far as the reasons for the introduction of a foreign investment review screening agency are concerned, reflects the opinion of the federal Government at the time FIRA

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202 (1974) 108 Canada Gazette, Part II, at 1533.

203 House of Commons Debates, 30th Parl., 1st Sess. 7712 (1975).

204 Government of Canada, supra, note 52, at v.

was passed.[205] The Report stated that the primary purpose of a foreign investment review procedure was to guarantee that new foreign investment could enter the Canadian economy only on terms favorable to the country:

> "One aim of policy should be to ensure that a reasonable proportion of the benefits from the investor's distinctive capacities are obtained by Canadians. A review mechanism would allow Canada to marshal Canadian bargaining power in an effort to obtain the maximum benefits possible for Canada from foreign direct investment."[206]

A basic reason for the introduction of a general screening procedure was that it is - other than the key-sector approach - flexible and can adapt to different industries and changing conditions over time.[207] In particular, it can focus on those sectors of the economy which in the eyes of the government of the day need protection from alienation. In fact, the federal Cabinet used its powers under the Foreign

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205 Cp. Franck & Gudgeon, supra, note 16, at 102.

206 Government of Canada, supra, note 52, at 453. A second important goal was Canadianization. See, e.g., Gillespie, supra, note 21, at 63: "The Canadian people and the Canadian government were determined that not only should we have an internationally-competitive economy, but that our economy and our economic future should be controlled by Canadians."

207 Ibid., at 453.

Investment Review Act to give special protection to certain industries such as book publishing, computer software firms, and oil and gas production.[208]

3. The Regulatory Scheme of the Act

a) Overview

At the base of the regulatory scheme of the Foreign Investment Review Act was a distinction between investors who were, and those who were not, permitted to make investments in Canada free of scrutiny. Investors who were not allowed to invest freely were called "non-eligible persons"; it was to them that the provisions of the Act applied (subsec. 8 (1) and (2) FIRA). The term "non-eligible person" was somewhat misleading since non-eligible persons were at no time ineligible to invest in Canada but were ineligible to invest without scrutiny. Even when an investor was considered to be a non-eligible person, his investment was not necessarily subject to review since certain investments were exempted from

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208 Hayden, Burns & Kaufman, supra, note 22, at 5002.

the review procedure.[209] Finally, investments which were to be reviewed under the Act could only be rejected if the investor failed to satisfy the Governor in Council that the proposed investment was or was likely to be of significant benefit to Canada (subsec. 2 (2) FIRA). Thus, in 1973 John Turner, the then Finance Minister of Canada, said about the purpose of the Foreign Investment Act: "It is not a dam, it's a filter ...".[210]

b) Non-Eligible Person

According to subsec. 8 (1) and (2) FIRA, "every non-eligible person, and every group of persons any member of which is a non-eligible person", that proposed to acquire control of a Canadian business enterprise or to establish a new business in Canada had to give written notice to the Foreign Investment Review Agency. The definition of a non-eligible

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209 See infra at 100 ff.

210 Statement before the U.S. Council of International Chambers of Commerce, quoted in J. B. Nixon & J. H. Burns, "An Examination of the Legality of the Use of the Foreign Investment Review Act by the Government of Canada to Control Intra- and Extraterritorial Commercial Activity by Aliens" (1984) 33 Int'l & Comp. L. Q. 57 at 59.

person was given in subsec. 3 (1) of the Act. Basically, non-eligible persons were foreign individuals, foreign public bodies and corporations controlled by foreigners.[211] The definition, however, also included Canadians not ordinarily resident in Canada who were member of a class of persons prescribed by regulations[212].

With respect to individuals the definition of a non-eligible person was relatively straightforward. It should be mentioned that it did not rely on the common law concept of domicile but on the civil law concept of nationality, coupled with the requirement of ordinary residence in Canada.[213]

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211 J. M. Spence, "The Foreign Investment Review Act: An Overview" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984), 13 at 15.

212 According to subsec. 3 (1) and (2) of the Foreign Investment Review Regulations, 1983, this were persons who had applied for citizenship of a country other than Canada and persons who had been ordinarily resident outside Canada for five or more consecutive years unless they lived abroad as
- a full-time employee of the Government of Canada or the government of a province;
- a full-time employee engaged in the conduct of a Canadian business enterprise;
- a full-time student;
- a full-time employee in an international association or organization of which Canada is a member.

213 Cp. Bakken, supra, note 58, at 983.

With respect to the status of corporations, the definition was not as clear. Basically, the Act used the concept of control in fact, not the concept of legal control, to determine whether or not a company was a non-eligible person: According to the definition in subsec. 3 (1) of the Act, "a coporation incorporated in Canada or elsewhere that is controlled in any manner that results in control in fact, whether directly through the ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation or otherwise", by a non-eligible person or group of persons was a non-eligible person itself.[214] This relatively broad concept gave rise to doubts concerning the question just how broad to read the language of the Act.

The specific examples given in subsec. 3 (1) ("... whether directly through the ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation ...") all involved legally enforceable rights. Thus, it was argued that control in fact needed a control base consisting of

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214 Spence, supra, note 211, at 15 f.; Donaldson, supra, note 40, at 114.

legally enforceable rights.[215] There was, however, also another reading of the language used in subsec. 3 (1) FIRA, namely that control in fact meant "dominating influence, however exercised".[216] It was the view of the Foreign Investment Review Agency that dominating influences had to be taken into account in considering whether a corporation investing in Canada was eligible or not. In any way, the concept of control in fact gave the review procedure a certain vagueness.[217]

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215 For details see Spence, ibid., at 16. In A.-G. Canada v. KSC Ltd. (1983) 22 B.L.R. 32, the Federal Court, Trial Division, found that a Canadian, who held 51% of the shares of KSC Ltd., in fact controlled the company even though one single non-eligible person owned the other 49% of the shares. In the words of Mr. Justice Jerome, the majority of the shares "if not conclusive of control, would at the very minimum place a heavy onus of disproof of control upon the applicant".

216 Spence, ibid. Another commentator stated that "economic control" was sufficient "which occurs when foreign entities have economic power over a Canadian corporation through their exlusive supply of all of the signficant inputs for carrying on the Canadian corporation's business or their exclusive purchase of all of the output of the Canadian corporation's business"; cp. P. R. Hayden, "Concepts of Control under the Foreign Investment Review Act" in J. M. Spence & W. P. Rosenfeld, Foreign Investment Review Law in Canada (Toronto: Butterworths, 1984) 37 at 43.

217 Ibid.

With respect to control through the ownership of shares, subsec. 3 (2) of the Foreign Investment Review Act gave a number of presumptions as to non-eligible person status. The provision established no conclusive upper or lower limits but only a rebuttable presumption when equity was held by non-eligible persons.[218] A corporation the shares of which were publicly traded[219] was deemed to be a non-eligible person if 25% or more of the voting shares were owned by one or more non-eligible persons, or by one or more corporations incorporated elsewhere than in Canada. In the case of a corporation not publicly traded the threshold for the presumption was 40%. If 5% of the voting shares of a corporation were held by any one non-eligible person, this corporation was

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218 Franck & Gudgeon, supra, note 16, at 115. In addition, according to para. 3 (3) (f) FIRA, an acquisition by a trustee or trustees was deemed to have been made by a corporation of which the trustees were the directors and the shareholders were the beneficiaries, thereby providing a formula for determinig whether or not a trust was a non-eligible person. For details see Hayden, ibid., at 51.

219 Cp. para. 3 (6) (a) FIRA: "... the shares of a corporation are publicly traded only if shares of the corporation, to which are attached voting rights ordinarily exercisable at meetings of shareholders of the corporation, are publicly traded in the open market in the manner in which shares would normally be traded by any member of the public in the open market".

also deemed to be a non-elibible person.

For greater certainty, para. 3 (7) (b) FIRA provided that a corporation which was not controlled by one person or a group of persons or which had no share capital was presumed to be controlled by the board of directors.[220] Such a corporation was deemed not to be a non-eligible person if not more than 20% of the members of the board of directors or other governing body were non-eligible persons (subpara. 3 (7) (c) (i). If the number of non-eligible members exceeded 20% of the total number of members of the board of directors but was less than 50%, the corporation was deemed not to be a non-eligible person if it could be established that the non-eligible members of the board did not act in concert with one another in matters affecting the management of the corporation (subpara. 3 (7) (c) (ii)). If more than 50% of the members of the board of directors were non-eligible persons, the corporation was deemed to be a non-eligible person itself (subpara. 3 (7) (c) (iii)).

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220 For details see Hayden, supra, note 216, at 44 f.

To sum up, one can say that the concept of control in fact was very broad and vague. This vagueness was frequently considered to be an advantage: "... the lack of a conclusive, all-inclusive definition of NEP [non-eligible person] status is designed precisely to avoid technical, loophole-seeking "compliance by avoidance", while permitting flexibility for foreign investors to provide financing and to share in profits so long as they do not exercise de facto control over decisions."[221] Yet, it also created uncertainty on the part of potential investors as to their status under the Act. Thus, it had also been stated that "the definition of NEP's by reference to NEP control creates the possibility of infinite regression in the search for "real" control".[222]

c) Significant Benefit

In order to decide whether or not to approve the proposed investment, Cabinet applied the "significant benefit test": Approval was only given if the new investment was or was likely to be of significant

221 Franck & Gudgeon, supra, note 16, at 115.

222 Ibid., at 114.

benefit to Canada.[223] The burden of proof was on the investor to establish that he met the standard.[224] Although the significant benefit test was the sole test to determine whether or not to allow the proposed investment, the Act did not define what exactly was a significant benefit to Canada. Yet, the Act permitted only the following factors to be taken into account (cp. subsec. 2(2) of the Act):

> (a) the effect of the acquisition on the level and the nature of economic activity in Canada, including ... the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
> (b) the degree and significance of participation by Canadians in the business enterprise or the new business and in any industry or industries in Canada of which the business enterprise or the new business forms or would form a part;
> (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product innovation and product variety in Canada;
> (d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
> (e) the compatability of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

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223 Subsec. 2(1) FIRA.

224 Franck & Gudgeon, supra, note 16, at 125.

Subsec. 2 (2) FIRA suggested that only these factors were to be taken into account.[225] However, this did not mean that the scope of the significant benefit test was in fact limited. On the contrary, para. 2 (2) (e) FIRA, refering to "the compatability of the acquisition or establishment with national industrial and economic policies" opened the review procedure to a variety of considerations which were not expressly mentioned in the Act.[226] Among these other factors were the New Principles of International Business Conduct[227], the geographic location of the proposed investment, the elimination of Canadian

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225 The then Minister of Industry, Trade and Commerce Allister Gillespie indicated in 1973 that the factors enumerated in subsec. 2 (2) FIRA were exclusive. Cp. Donaldson, supra, note 40, at 105, note 26.

226 Critics of FIRA argued that this paragraph included a "catch-all phrase", reserving the right to disappove of the investment for any reason. Cp. P. R. Hayden & J. H. Burns, "Canada's Control of Multinationals" (1975) J. Bus. L. 75 at 76.

227 The 14 New Principles were tabled on July 18, 1975. They were introduced to reflect the "broad government policy regarding the activities and responsibilities of foreign controlled business enterprises in Canada". According to the then Minister of Industry, Trade and Commerce, Herb Gray, the New Principles provided "a very good basis for corporations in this country under foreign control to assess the way they are conducting themselves as good corporate citizens". Cp. House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, p. 57:11 (May 26, 1981).

ownership, the industry sector under review, and, in particular, the attitude of the government of the day towards foreign investment.[228]

In general, it was not sufficient to simply show that the status quo was maintained. Government officials made it clear that investments which only met the "no detriment" test would not be approved.[229] On the other hand, during the time the Foreign Investment Review Act existed, it was never quite clear which weight was given to each factor and how many

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228 Cp. Donaldson, supra, note 40, at 105, quoting FIRA's Annual Report (1980-81) at 4: "The weight given to each of the factors that is relevant to a particular case varies according to the nature of the proposal, the sector in which the investment is to occur, the region on which it is to be made, the kinds of undertakings, if any, offered by the applicant, and other factors and circumstances unique to each case."

229 A. Grover, "FIRA: In a Nutshell" in Current Legal Aspects of Doing Business in Canada (American Bar Association, 1976) 10; Donaldson, ibid., at 105. In fact, the Act intended to prevent foreign investments which only had a "neutral" effect. Cp. Franck & Gudgeon, supra, note 16, at 125. See also Hayden & Burns, supra, note 226, at 76: "The Canadian Minister of Industry, Trade and Commerce indicated in a speech of April 30, 1974, that an agreement by a non-eligible person to maintain a majority of Canadians on the board of directors of a proposed takee, to continue the Canadian sourcing of components, to continue the research and development facilities of the takee, to appoint Canadians to management positions, and not to restrict export development, would not meet the significant benefit to Canada test, since it brings no "new benefits" to Canada."

requirements had to be fulfilled by a transaction in order to be of "significant" benefit to Canada.[230] Thus, it was sometimes suggested that in the case of foreign take-overs it ought to be sufficient that the foreign investor was willing to continue to operate an acquired business efficiently and profitably.[231] Others even argued that the economic criteria were so broad that "virtually any new business investment can satisfy one or more of these broad objectives".[232]

The fact that almost 30 percent of new business investments and 20 percent of foreign acquisitions of Canadian businesses had been disallowed in 1981[233], while 91 percent and 97 percent respectively were allowed in the fiscal year 1982-83[234], shows that the discretion of the Government to decide whether the test was met by the applicant was considerable. Though it has been said that the objective of the Act

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230 Case Comment, supra, note 64, at 510.

231 P. R. Hayden, "Can FIRA be Suspended?" in Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition) 2107 at 2109 f., considered the broad concept of significant benefit applied by the Agency and Cabinet to be "misconstrued".

232 Rugman, supra, note 13, at 354.

233 See Foreign Investment Review, Spring 1982, 34-5.

234 See Foreign Investment Review Law in Canada, supra, note 73, at 354 ff.

was not to discourage investors but to permit "pragmatic flexibility"[235], the broad standard of "significant benefit" made the review process "bent with the political winds"[236] and resulted in great uncertainty on the part potential foreign investors.[237]

d) Reviewable Investments

As has been mentioned, the Gray Report had recommended to review

- foreign take-overs of Canadian firms;
- establishments of new business enterprises by foreigners;
- new licensing and franchising arrangements;
- major new investments by existing foreign-controlled companies in Canada;

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235 Franck & Gudgeon, supra, note 16, at 125.

236 Rugman, supra, note 13, at 354.

237 One commentator observed "frustrating subjectivity" on the part of the Canadian authorities responsible for the administration of the Act. See Case Comment, supra, note 64, at 510. However, the "chilling" of applicants was not an undesirable outcome for those who used the Foreign Investment Review Act as a means to "Canadianize" the economy. Cp. Franck & Gudgeon, supra, note 16, at 125. For details see infra, at 138 ff.

- existing foreign-controlled companies even if they were not planning major new investments.[238]

The Foreign Investment Review Act did not go that far. According to subsec. 2 (1) of the Act, only the acquisition of control of a Canadian business enterprise and the establishment of a new and unrelated business in Canada were subject to review.[239] The existing operations and expansions of foreign-controlled firms in the form of reinvested earnings and borrowings from Canadian banks were not subject to Government scrutiny. Thus, only roughly 20% of foreign direct investments in Canada were subject to the review procedure, since most foreign direct

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238 Government of Canada, supra, note 52, at 462.

239 According to subsec. 4 (2) FIRA, the Minister of Industry, Trade and Commerce could issue and publish guidelines with respect to the application and administration of any provision of or any regulation made pursuant to the Act. Thus, the Ministry of Industry, Trade and Commerce had issued guidelines which intended to assist investors in determining whether or not an investment was subject to review. For details see R. C. Cole, "Special Considerations for Foreign Investors" in Acquisition and Mergers in Canada, ed. by D. B. Morin & W. Chippindale, 2nd edition (Toronto: Methuen, 1977) 319 at 322 ff. In addition, the Foreign Investment Review Agency had issued so-called Interpretation Notes which had the same purpose.

investments in Canada are undertaken through internal expansion.[240]

(i) Acquisition of Control of a Canadian Business Enterprise

One major form of foreign direct investment in Canada which was subject to review under the Foreign Investment Review Act was the take-over of a Canadian firm, or, in the words of the Act, the "acquisition of control of a Canadian business enterprise". The Act defined a business to include "any undertaking or enterprise carried on in anticipation of profit".[241] The word "includes" indicated that the definition was not an all-inclusive one.[242] However, it could be argued that investments in Canada for capital gains purposes or for personal use and enjoyment were not

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240 Cp. Zahavich, supra, note 163, at 12; Turner, supra, note 47, at 338 f.; Franck & Gudgeon, supra, note 16, at 112.

241 Subsec. 3 (1) FIRA.

242 T. S. Barton, "The Concept of a Canadian Business Enterprise" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 25 at 27.

review since no commercial activity was carried on for continuing profit.[243]

According to the definition in subsec. 3 (1) FIRA, a Canadian business enterprise meant a business that was either a Canadian business or a Canadian branch business.[244] This definition included a part of a business that was capable of being carried on as a separate business if the business of which it was a part was a Canadian business enterprise.[245] A Canadian business meant a business that was carried on in Canada by a Canadian or by a corporation incorporated in Canada and maintaining one or more establishments in Canada.[246]

The provisions in para. 3 (6) (g) FIRA especially caused problems of interpretation. It was not always easy to say whether a division of a company could be carried on as a separate business. The question was

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243 Ibid., 29.

244 For details see Barton, ibid., at 33 ff.

245 Para. 3 (6) (g) FIRA.

246 Subsec. 3 (1) FIRA. Cp. also para. 3 (6) (f) which provided that a Canadian business was deemed to be carried on in Canada "not withstanding that it is carried on partly in Canada and partly in some other place". For details see Barton, supra, note 242, at 32.

even more difficult where the assets to be acquired would not ordinarily be though of as a "division".[247]

Another important issue with respect to the definition of a Canadian business enterprise was the question whether the various rights to oil and gas were Canadian businesses within the meaning of the Act. According to Article V of the Real Estate Guidelines published under the Act, a separable business required that prior to the acquisition there had to be in existence a separable business, "not merely property that could or would be used as an asset of a separate business". With respect to oil and gas rights, however, this Article, which had not the force of law[248], was not applied. Rather, oil and gas rights were considered to be a separable business if the net income from the property could support business activities.[249]

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247 For an example see Spence, supra, note 211, at 18.

248 Cp. H. A. Jacques & C. A. Rae, "FIRA and the Oil and Gas Industry", in Foreign Investment Review Law in Canada, ed. J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 219 at 229, note 27.

249 Of particular importance were the "Guidelines concerning Acquisitions of Interests in Oil and Gas Rights", published by the Agency on January 5, 1976. For details see Jacques & Rae, ibid., at 228 ff.

The Foreign Investment Review Act was more specific as to how control of a Canadian business enterprise could be acquired. Paragraph 3 (3) (a) FIRA distinguished two cases in which control of a Canadian business enterprise could be acquired. If the Canadian business enterprise was a Canadian business carried on by a corporation either alone or jointly or in concert with one or more other persons, control was acquired

- by the acquisition of voting shares of the corporation, or
- by the acquisition of all or substantially all of the property used in carrying on the business in Canada.

In the case of any other Canadian business enterprise, control was acquired by the acquisition of all or substantially all property used in carrying on the business in Canada. Thus, acquisitions of control through, for example, management or administrative agreements were excluded from review.[250]

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250 Hayden, supra, note 216, at 55 ff.

No interpretation problems arose with respect to the acquisition of all or substantially all of the property used in carrying on a business in Canada.[251] In the case of the acquisition of shares, the provisions of the Act were more complicated. The Act did not say exactly under which circumstances control was acquired. Since Parliament intended to enable Canadians to maintain effective control over their environment (subsec. 2 (1)), it was concerned with de facto changes of control, i.e. "those changes which would put foreign investors in a position to make decisions affecting how the Canadian businesses operate".[252] This objective required that the provisions regarding control of corporations were broad so as to cover most situations in which the control of a Canadian business changed, if only the acquisition of control occured through the purchase of shares.

The Act created a series of assumptions with respect to the acquisition of control of a business carried on by a corporation. Furthermore, a number of

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251 Cp. also para. 3 (6) (e) FIRA which provided that the acquisition of a leasehold interest in business property was deemed to constitute the acquisition of that property.

252 Hayden, supra, note 216, at 49.

transactions were excluded from the concept of acquisition of control which otherwise would have to be included.

First, subparagraph 3 (3) (b) (i) of the Foreign Investment Review Act provided that control of a Canadian business enterprise was not acquired by reason only of the acquisition of less than 5% of the voting shares of a publicly traded corporation or less than 20% of the voting shares of not publicly traded companies. Conversely, the acquisition of 5% of the voting shares of a publicly traded company or 20% of the voting shares of a non-publicly traded company was deemed to constitute the acquisition of control of any business carried on by the corporation unless the investor could establish the contrary.[253] Where more than 50% of the voting shares of a corporation were acquired, the person or group of persons acquiring the shares was deemed to have acquired control unless the person or group of persons already

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253 Para. 3 (3) (c) FIRA. This could be done by identifying another shareholder with a larger block of voting shares with whom the investor did not act in concert and who therefore could be said to control the corporation. See, e.g., Bakken, supra, note 58, at 985; R. A. Donaldson & J. D. A. Jackson, "The Foreign Investment Review Act: An Analysis of the Legislation" (1975) 53 Can. Bar Rev. 171 at 186.

had control in fact of the corporation at the time of the acquisition.[254] No distinction was made between a publicly traded and a non-publicly traded corporation. The presumption was not rebutable.[255]

The Foreign Investment Review Act created another important assumption with respect to the acquisition of rights to acquire shares or property under a contract. Both absolute and contingent rights to acquire shares or other property were treated as if such rights had been exercised, thereby deeming non-eligible persons who held such rights to be owners of the shares or the property.[256] Thus, acquisitions of control were deemed to have occured even if they had not and might never occur.[257]

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254 Para. 3 (3) (d) FIRA. For details see, e.g., Donaldson & Jackson, ibid., at 186. It was sometimes questioned whether or not the acquisition by a wholly owned subsidiary of 100% of the voting shares of another wholly owned subsidiary of the same parent was the acquisition of control although ultimate control had not changed. Some commentators answered in the negative. Cp. Hayden, supra, note 216, at 51.

255 Spence, supra, note 211, at 19.

256 Para. 3 (6) (c).

257 Glover, New & Lacourcière, supra, note 13, at 89.

In cases of amalgamations of two or more companies, the Foreign Investment Review Act presumed that the continuing amalgamated corporation had acquired control of the business carried on by the other corporations.[258] Exempted were amalgamations which formed part of a corporate reorganization and which were carried out for purposes unrelated to the provisions of the Act if the amalgamated corporation was controlled by the same persons who previously controlled each of the amalgamating corporations.[259] The Act did not exempt other corporate reorganizations from the review procedure and, therefore, created "unfair over-reaching, where the statute [was] unlikely to produce significant benefits to Canada but [did] ... constitute an unproductive admininistrative burden for the screening agency."[260]

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258 Para. 3 (3) (e) FIRA. Cp. Bakken, supra, note 58, at 986.

259 Para. 3 (3) (e) FIRA. See, e.g., Hayden, supra, note 216, at 51.

260 W. M. H. Grover, "Corporate Reorganizations" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 129, who points out that the Act was over-reaching with respect to internal reorganization inside and outside Canada where there was no change of control. Other commentators also criticised that the reorganization exemption was not extended to other internal transactions where there would be no ultimate change of control. See, e.g., Donaldson & Jackson, supra, note 253, at 207.

As to the acquisition of control, it did not matter whether or not it occured as the result of a single transaction.[261] Thus, the avoidance of the legislative scheme through a series of transactions was prevented.[262] It was, however, unclear whether or not this rule had also to be applied if the acquisition of control through a series of purchases was not intended.[263]

Although the Foreign Investment Review Act's concept of acquisition of control was very broad, the Act exempted certain specified transactions from review which would have otherwise constituted an acquisition of control. Some of these exemptions have already been mentioned[264], others had only limited

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261 Subsec. 3 (8) FIRA.

262 Donaldson & Jackson, supra, note 253, at 186 f.; Bakken, supra, note 58, at 986.

263 Hayden, supra, note 216, at 54.

264 See supra, at 97 (acquisitions of control through management or administrative agreements), and 100 (amalgamations which formed part of a corporate reorganization and which were carried out for purposes unrelated to the provisions of the Act if the amalgamated corporation was controlled by the same persons who previously controlled each of the amalgamating corporations).

importance.[265] In addition, the Act provided that the acquisition of shares of a corporation by a trader or dealer in securities was not, for that reason only, an acquisition of control.[266] Furthermore, under the Foreign Investment Review Act, there was no acquisition of control by reason only of a corporation acquiring control of another corporation if the controlling corporation acquired control as security for a loan and there was an agreement under which the controlling corporation had to give up control on the occurence of an event which was likely to occur.[267]

In summary, the concept of acquisition of control under the Foreign Investment Review Act, with all its presumptions and exemptions, was broad and gave rise to a number of questions which increased the uncertainty on part of potential foreign investors.

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265 This was particularly true with respect to the so-called "small business exemption", para. 5 (1) (c) FIRA. For details see Donaldson & Jackson, supra, note 253, at 202 f.

266 Subpara. 3 (3) (b) (ii) FIRA. For details see Donaldson & Jackson, ibid., at 206; Hayden, supra, note 216, at 59.

267 Subpara. 3 (3) (b) (iv) FIRA. For details see, e.g., Hayden, ibid., at 59 f.

(ii) Establishment of an Unrelated New Business

The second form of foreign direct investment in Canada which was subject to review under the Foreign Investment Review Act was the establishment of an unrelated new business.[268] The Act defined "establishment" in subsection 3 (4):

> "For the purpose of this Act, a business is established in Canada only if there is an establishment in Canada to which one or more employees of the person or group of persons establishing the business report for work in connection with the business, and the time at which a business is established in Canada is the time at which the first of such employees reports for work in connection with the business at such an establishment."[269]

A new business was defined in the Act as a business "not previously carried on in Canada".[270] Thus, mere expansions of an existing business were not reviewable under the Foreign Investment Review Act. On the other hand, it was impossible to transfer an established business, which was carried on by one corporation, to a newly incorporated firm controlled

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268 Subsec. 2 (1) FIRA.

269 Spence, supra, note 211, at 22, gives an example for a business carried on in Canada without being established here.

270 Subsec. 3 (1) FIRA.

by the same non-eligible persons without Government approval since, for the new company, any business was a new business.[271]

Subsections 2 (1) and 8 (2) of the Foreign Investment Review Act provided that only those new businesses of non-eligible persons were reviewable which were unrelated to a business carried on in Canada by the same person immediately prior to the commencement of the new business. The "related business" provisions were necessary to avoid "a more interventionist policy" of reviewing all expansions of foreign firms in the line of business in which they were already operating.[272]

The Act did not define what a related business was. The Ministry of Industry, Trade and Commerce, under the authority of the Act, published the "Relatedness Guidelines" which intended to set forth the Minister's interpretation of the term "related busi-

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271 Cf. Donaldson & Jackson, supra, note 253, at 192.

272 Franck & Gudgeon, supra, note 16, at 123. The related business exemption of the Foreign Investment Review Act did also apply to the acquisition of a Canadian business enterprise. Cf. D. C. New, "Related Business Exemption" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 159 at 165.

ness".[273] Yet, these Guidelines were not legally binding on the public or on the courts and they were not intended to be exhaustive.[274] Non-eligible persons were still free to argue that their investment proposal was a related business.

The "Relatedness Guidelines" contained six specific guidelines; if any of these guidelines was satisfied the new business was considered to be a related business for the purposes of the Act. Under the Guidelines, a new business was exempted from review if it was related to an established service-producing business[275], to an established importing and distribution business[276], or to an established goods-producing business.[277] Guideline 3 provided that a new business was considered to be related to an established business in Canada if the new business

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273 Guidelines Concerning Related Business, issued and published on August 2, 1975 (ammended March 19, 1977). For details see Donaldson, supra, note 49, at 483 f.; New, ibid., at 161 f.

274 New, ibid., at 162.

275 Para. (a) of guideline 1. For details see New, ibid., at 165 f.

276 Para. (b) of guideline 1. For details see New, ibid., at 166 f.

277 Guideline 2. For Details see New, ibid., at 167 f.

produced a product or service that was directly substitutable for an existing product or service which was produced by the existing business.[278]

According to guideline 4, a new business was related if both the technology and the production processes on which it was based were essentially the same as those used by the established business.[279] Guideline 5 provided that a new business which had resulted largely from research and development work carried out in Canada was also considered to be a related business if the research and development was directed towards improving or enhancing the established business.[280] Finally, a new business was a related business due to a similarity of industrial classification.[281] The classification system was set out in an annex to guideline 6 and was based on the "Standard Industrial Classification Manual" of Statistics Canada.[282]

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278 For details see New, ibid., at 169 f.

279 Ibid., at 170 f.

280 Ibid., at 171 f.

281 Guideline 6.

282 For details see New, supra, note 272, at 172 f.

In case an investment was not covered by any of the guidelines, there was still room for arguing that it was a related business.[283] Nevertheless, the concept of relatedness was narrow. It intended to prevent a freezing of businesses at a particular moment in their growth[284], but did not aim at creating a loophole for foreign investors to escape review of their investments. Only guideline 5, which refered to relatedness due to research and development work in Canada, extended the concept, thus providing an incentive for foreign-controlled firms to do more research and development in Canada.[285]

f) The Review Process

According to subsections 8 (1) and (2) of the Foreign Investment Review Act, every non-eligible person, that proposed to acquire control of a Cana-

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283 Cp. New, ibid., at 174 f.

284 Spence, supra, note 211, at 23.

285 It should be emphasized, however, that the research and development had to be directed towards improving or enhancing the established business. Thus, the guideline was not a "carte blanche" for foreign-controlled firms to start research and development in areas apart from the established business and then to invest without scrutiny. Cf. New, supra, note 272, at 171.

dian business enterprise or that wished to establish a new and unrelated business, had to give written notice to the Foreign Investment Review Agency. The Minister was empowered to make a demand for the giving of a notice if he had reason to believe that a reviewable investment had been made or was proposed to be made.[286] The notice had to contain the information specified in the Foreign Investment Review Regulations, 1983.[287]

Notwithstanding the fact that every acquisition of control of a Canadian business enterprise and every establishment of a new and unrelated business was subject to review, the Regulations provided for a small business procedure.[288] Generally, the Regulations required foreign investors to give detailed information concerning their actual or proposed investment. For small investments, the Regulations were less demanding. In cases of direct acquisition,

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286 Subsec. 8 (3) FIRA.

287 Regulations Respecting the Acquisition of Control of Canadian Business Enterprises and the Establishment of New Businesses in Canada, SOR/83-493. As to the previous regulations see D. S. Pryde, "A Practitioner's Guide to the Review Process" in Foreign Investment Review Law in Canada, ed. by J. M. Spence & W. P. Rosenfeld (Toronto: Butterworths, 1984) 177 at 179 ff.

288 For details see Pryde, ibid., at 180 ff.

the foreign investor had to send to the Foreign Investment Review Agency a short form of notice where the gross assets of the Canadian business enterprise were less than $5,000,000 and the number of employees was less than 200.[289] In cases of indirect acquisition, i.e. an acquisition through a foreign merger or a take-over of the foreign parent of the Canadian business enterprise, the threshold was gross assets of less than $15,000,000 and less than 600 employees.[290] The short form of notice could also be used in cases of the establishment of a new and unrelated business, where the gross assets were less than $5,000,000, and the number of employees was or was expected to be less than 200.[291]

Having received the notice, the Agency had to forward to the applicant a certificate of the date of receipt of the notice.[292] The applicant's notice initiated the review process. First, the Agency screened the application in order to determine

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289 Subsec. 5 (2) Foreign Investment Review Regulations, 1983.

290 Subsec. 5 (5) Foreign Investment Review Regulations, 1983.

291 Subsec. 5 (3) and (4) Foreign Investment Review Regulations, 1983.

292 Subsec. 8 (4) FIRA.

whether or not the proposal required review under the Act. Where government approval was required, the Agency could contact the investor and request further information. Frequently, the Agency entered into negotiations with prospective or actual investors to obtain commitments relating to the criteria enumerated in subsection 2 (2) of the Act, such as employment, utilization of parts and components and services produced in Canada, industrial efficiency, transfer of technology, competition or Canadian participation as managers or owners.[293] Usually, the Agency did also consult with other government departments and with those provinces which were likely to be affected by the investment.[294] Ultimately, the notice and the Agency's findings were reported to the Minister responsible for the administration of the Act.[295] In practice, the Agency also formulated a recommendation, based on the investor's represen-

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293 Cf. Arnett, Rueter & Mendes, supra, note 61, at 124, who point out that, in the normal case, the screening and negotiation took place between receipt of the notice and the forwarding of it to the Minister. See also Donaldson & Jackson, supra, note 253, at 212; Fisher, supra, note 32, at 80.

294 Donaldson & Jackson, supra, note 253, at 194; Turner, supra, note 47, at 339; Arnett, Rueter & Mendes, supra, note 61, at 124 f.

295 Sec. 9 FIRA.

tations, and submitted it to the Minister for his consideration.[296]

It was the Minister's task to assess whether or not, in his opinion, the investment was or was likely to be of significant benefit to Canada, having regard to the factors enumerated in subsection 2 (2) FIRA.[297] If, within 60 days after receipt of the notice, the Minister was not in a position to make a favourable recommendation, he could notify the Agency. The Agency then had to send a notice to the investor advising him "of his right to make ... further representations in connection with the matter ...".[298] The investor could then, within at least 30 days, make further information available to the Minister.[299] In practice, this led to further negotiations between the Agency and the investor. If the

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296 Arnett, Rueter & Mendes, supra, note 61, at 125; Spence, supra, note 211, at 14. See also Donaldson & Jackson, supra, note 253, at 194: "... subsection 7 (1), which establishes the Agency, provides that it shall 'advise and assist the Minister in connection with the administration of this Act'. In fact it is clear to those who have dealt with the Agency ... that it plays a substantially larger role in the review process than the legislation might indicate."

297 Cp. supra, at 86 f.

298 Subsec. 11 (1) FIRA.

299 Subsec. 11 (2) FIRA.

investor did make further representations, the Minister had to reconsider his opinion in the light of this new information and then had to submit his recommendation to the Canadian Cabinet.[300] If, however, the applicant did avail himself of his right to make further representations in connection with his actual or proposed investment, the Minister was to submit the matter to the Canadian Cabinet with a summary of the relevant information, commitments and provincial representations.[301]

It was the Canadian Cabinet which ultimately decided whether or not to allow the investment.[302] Where the Cabinet was unable to determine whether to allow or refuse the investment, it could by order direct the Minister to proceed as though the Minister himself was unable to reach a decision.[303] The provision again gave room for negotiations entered into by the investor and the Agency which often resulted in additional undertakings made by the investor to obtain approval. If the Cabinet approved the proposed

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300 Subsec. 11 (4) FIRA.

301 Subsec. 11 (2) FIRA.

302 Cp. ss. 10; 11 (2); 12 (1) FIRA.

303 Subsec. 12 (2) FIRA.

or actual investment, all commitments constituted legally binding undertakings with the Canadian Government.[304] Compliance was monitored by the Foreign Investment Review Agency.[305]

The Foreign Investment Review Act also provided for the "deemed allowance" of a proposed or actual investment. As mentioned above, the Foreign Investment Review Agency had to forward to the applicant a certificate of the date of receipt of the notice of his proposed or actual investment.[306] Section 13 of the Act provided that the Governor in Council was deemed to have allowed the investment if sixty days had elapsed since the date of receipt and neither the Agency had requested further information nor the

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304 Cp. sec. 21 FIRA: "Where a person who has given a written undertaking to Her Majesty in right of Canada relating to an investment that has been allowed by order of the Governor in Council fails or refuses to comply with such undertaking, a superior court may, on application on behalf of the Minister, make an order directing that person to comply with the undertaking." For details see Arnett, Rueter & Mendes, supra, note 61, at 125; Turner, supra, note 47, at 341.

305 Turner, ibid., at 341.

306 Supra, at 109.

Governor in Council had made an order allowing or refusing the investment.[307]

An investment which was pursued despite its disallowance or under conditions inconsistent with the negotiated agreement, could be rendered nugatory.[308] In addition, where shares of a corporation or property were held by a person outside Canada and that person failed to comply with an order to dispose of the shares or property, a superior court could vest the shares or property in a trustee named by it. The trustee had to give effect to the order of the court and, after the payment of his fees and expenses, had to pay the balance to the person who previously owned the shares or the property.[309]

Finally, since a number of uncertainties resulted from the legislation, every investor could apply for an opinion of the Minister on the question whether or not the investor was a non-eligible person or whether or not the business he wanted to establish was an

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307 For details see Donaldson & Jackson, supra, note 253, at 195; Spence, supra, note 211, at 15.

308 Subsec. 20 (1) FIRA.

309 Subsec. 20 (3) FIRA. For details, e.g., Franck & Gudgeon, supra, note 16, at 133 f.

unrelated business.[310] The opinion was binding on the Minister for two years, unless the material facts on which he had based his opinion changed. In addition, the Agency had prepared so-called interpretation notes to assist foreign investors to determine whether or not their proposed or actual investment was subject to review under the Act.[311]

4. Criticism

Much of the criticism which occured during the time the Foreign Investment Review Act was in effect has already been mentioned elsewhere in this essay. It seems, however, useful to look at some of the more important issues in detail.

a) Violation of Canada's Duties Under International Law

The increasing interdependence of the global economy makes conflicts between national political goals and the principles of international law a

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310 Subsec. 4 (1) FIRA.

311 Spence, supra, note 211, at 21. See also supra, note 239.

frequent occurence. It is, however, in the interest of the world's trading nations that these conflicts are solved in accordance with the international rule of law. Since Canada, like other industrialized countries, relies heavily on international trade and investment, the country is not in a position to ignore constraints on its national policy which are imposed by international law.[312]

With respect to the use of the Foreign Investment Review Act, a number of questions under international law occured concerning the legality of the intra- and extraterritorial control of the commercial activities of foreigners by the Canadian Government. First, it was alleged that the Act was discriminatory to foreign investors vis-à-vis Canadian investors. The allegation was based on customary international law and on international agreements which Canada was obliged to uphold. In addition, the so-called "extra-territorial application" of the Act was frequently considered to be inconsistent with international law.

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312 Cp. Albrecht, supra, note 20, at 153: "Canada has a duty as well as an obvious interest in maintaining the international rule of law. Therefore, its actions must be justified in terms of ... international law. [ ] Failure to play by the rules could lead to diplomatic, legal, and political repercussions."

1) OECD Declaration on International Investment and Multinational Enterprises

Under customary international law, sovereign states are free to prevent the acquisition by foreigners of property in their territory.[313] Every state is, however, bound to extend to foreign investment the protection of law and assumes obligations concerning the treatment of such investment when it is admitted into the state's territory.[314] Moreover, members of the Organization for Economic Co-operation and Development (OECD) like Canada[315] are bound by the Declaration on International Investment and Multinational Enterprises, agreed to by the governments of the OECD member countries on June 21,

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313 Gattiker, supra, note 90, at 31; Arnett, supra, note 61, at 234; Nixon & Burns, supra, note 210, at 67.

314 The Barcelona Traction, Light and Power Company, Limited [1970] I.C.J. Rep. 4 at 32. Thus, expropriation without prompt and adequate compensation would constitute a violation of international law. Cp., e.g., Macdonald, supra, note 28, at 404.

315 Canada is one of the founding members of the OECD which was established in 1961 to replace the Organization for European Economic Co-operation (OEEC). Cp. Albrecht, supra, note 20, at 162.

1976.[316] Paragraph 1 of Article II of the Declaration states

> "that Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign-Controlled Enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as 'National Treatment')."

Foreign objections to the Foreign Investment Review Act were sometimes based on this national treatment provision of the Declaration.[317] It was argued that Canada had to accord foreign investors

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316 Organization for Economic Co-operation and Development, Declaration on International Investment and the Multinational Enterprise (Paris, 1976). The Declaration is probably not a binding commitment of the OECD Member countries but merely a declaration of policy or a statement of intention which does not give rise to legal obligations. Cf. Albrecht, supra, note 20, at 168 f. The Declaration does, however, impose political obligations on those member states which have accepted it. Cf. Nixon & Burns, supra, note 210, at 69. As to the the legal obligations imposed on the Member countries see also H. W. Bade, "Legal Effects of Codes of Conduct" in Legal Problems of Codes of Conduct for Multinational Enterprises, ed. by N. Horn (Deventer, 1980) 3 at 10 ff.

317 Macdonald, supra, note 28, at 398; Samet, supra, note 58, at 304 f.

treatment equivalent to domestic entities and that the application of the Act did violate this duty.

It was, however, difficult to produce facts for this allegation. Though the Canadian Government accepted the Declaration, it reserved the right to take measures affecting foreign investors.[318] In 1979, the reservation was reaffirmed by the Honourable Flora MacDonald, then Secretary of State for External Affairs.[319] What is probably more important in our context is the fact that paragraph 4 of Article II expressly exempts the right of Member states to regulate the entry of foreign capital into their territory from the scope of the declaration. Paragraph 4 provides

> "that this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises."

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318 Government of Canada, Department of External Affairs, Investment Issues and Guidelines for Multinational Enterprises, Notes for a Statement by the Honourable Allan J. MacEachen at the OECD Ministerial Meeting, June 21, 1976: "... I note that Canada will continue to retain its right to take measures, affecting foreign investors, which we believe are necessary given our particular circumstances."

319 Government of Canada, Department of External Affairs, Statement by the Honourable Flora MacDonald at the OECD Ministerial Meeting, June 13, 1979. For Details see Macdonald, supra, note 28, at 398 f.

Since the Foreign Investment Review Act provided a mechanism to deal with new foreign investment in Canada but not with existing foreign capital participation, there was only little room to challenge the legality of the Act on the ground that it violated the OECD Declaration. Only with respect to the narrow concept of relatedness one could probably argue that the application of the Act violated the Declaration's national treatment provision since foreign-controlled firms in Canada were not accorded treatment equivalent to domestic firms with respect to diversification.[320] Nevertheless, the political pressures on Canada to reconsider her approach towards foreign investment which resulted from the Declaration should not be underestimated.

ii) General Agreement on Tariffs and Trade

It has already been mentioned that the Foreign Investment Review Agency, attempting to make sure that the foreign investment was of significant benefit to Canada, entered into negotiations with foreign

320 Cp. Nixon & Burns, supra, note 210, at 71; Spence, supra, note 63, at 318.

investors which normally resulted in undertakings given by the investor regarding the factors enumerated in subsection 2 (2) of the Act.[321] Investors were, for example, required to provide undertakings that the new investment created job opportunities for Canadians or that it increased research and development in Canada. Over the years, increased emphasis was placed on stimulating the use of goods and services produced in Canada.[322] The Foreign Investment Review Agency suggested to foreign investors that they undertake to purchase specific Canadian-sourced goods and services or to purchase materials and supplies in Canada "subject to competitive availability".[323]

In the view of Canada's trading partners, particularly the United States of America, these trade-related performance requirements violated the General

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321 See supra at 110 ff.

322 P. R. Hayden, " GATT Considers FIRA" in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) at 2117; Macdonald, supra, note 28, at 395; Nixon & Burns, supra, note 210, at 68 f.

323 Hayden, ibid.

Agreement on Tariffs and Trade.[324] Article III of the GATT requires member countries to accord imported products treatment equivalent to domestic goods:

> "1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
> ...
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

The critics of trade-related performance requirements suggested that undertakings as to local sourcing were contrary to the national treatment provision of Article III since imported products were

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324 Contracting Parties to the General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents, Vol. IV (Geneva, 1969) at 6.

accorded treatment less favourable than that accorded products of national origin.[325]

The Canadian point of view was that due to the high level of foreign ownership in the Canadian economy, Canada had little choice but to require foreign-controlled firms to purchase a substantial part of materials and supplies in Canada to prevent that multinational firms concentrate manufacturing facilities only in the world's largest manufacturing nations.[326] It was said that a request to give Canadian suppliers a chance "hardly seems too much to ask of foreign investors."[327] Others suggested that buy Canadian undertakings did not constitute a discriminatory treatment since the undertakings were "unilaterally given at the discretion of the foreign investor".[328]

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325 Samet, supra, note 58, at 305 f.; Nixon & Burns, supra, note 210, at 70.

326 "Gatt v. Canada", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) 2134.

327 Hayden, supra, note 322, at 2117.

328 P. R. Hayden, "Further Musings on the GATT Ruling", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) 2135 at 2136. Some commentators, however, asked whether "undertakings, exacted under pressure,

Finally, some commentators refered to the legislative history of the General Agreement on Tariffs and Trade in order to prove that the Canadian practice did not violate its provisions. They argued that the GATT only deals with issues concerning the trade in products but not with the control of foreign investment. Local sourcing requirements being a means to set the terms on which foreign investors were allowed to make an investment in Canada but not a means to interfere with international trade, they were not considered to be violative of the Agreement.[329]

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and with the prospect of review in three to five years' time after a major investment has been made, to achieve percentage levels of repair, maintenance and Canadian value added ... are not in effect more demanding than higher tariff levels or as demanding as quantitative restrictions, both of which are proscribed by GATT." Cp. Macdonald, supra, note 28, at 396.

329 Cp., e.g., Macdonald, supra, note 28, at 403 f.: "The General Agreement on Tariffs and Trade deals with a subject area of commercial policy, viz., governmental measures taken to affect the trade in products. It does not deal with the question of investment or foreign ownership. The legislative history of GATT confirms this conclusion. ... GATT came into existence by the same negotiating process which produced the Havanna Charter. The Charter dealt with a much broader range of economic matters than commercial policy and, in particular, in Article XII dealt with the question of international private investment. Chapter IV of the Havanna Charter, dealing with commercial policy, survived in substance as the GATT. The other economic provisions, including those with respect to private foreign investment,

The United States did not buy either of these arguments. U.S. Officials considered commitments as to local sourcing as "merely a nagging example of the beggar-thy-neighbor policies threatening to plunge the world into a new spiral of protectionism."[330] On January 5, 1982, the United States sought consultations with Canada under Article XXII of the GATT.[331] Since the consultations did not produce a resolution of the dispute, the American Government commenced a formal complaint under Article XXIII of the GATT.[332] A GATT Panel was established which held that Canada had breached Article III of the Agreement by requiring foreign investors to agree to Canadian sourcing. The Panel found that GATT members must "accord to imported products treatment no less favourable than that accorded to like products of origin in respect of all internal requirements affec-

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expired with the Charter." See also Hayden, supra, note 322, at 2118; Turner, supra, note 47, at 346.

330 Samet, supra, note 58, at 305.

331 Ibid., at 306.

332 Ibid.

ting their purchase".[333] The Canadian Government decided to comply with the Panel's decision and to stop requiring buy Canadian undertakings from foreign investors.[334] Thus, the Canadian Government was probably prepared to admit that, to the extent that the review process created internal barriers to products, it was violative of Article III:4 of the GATT.[335]

In her formal complaint under Article XXIII of the GATT, the United States also argued that another practice of the Foreign Investment Review Agency breached Canadian obligations under international law. In case a non-eligible person wanted to establish a new manufacturing business in Canada or intended to acquire control of a Canadian manufacturing business, the Agency requested undertakings re-

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333 "GATT v. Canada", supra, note 326, at 2134; Hayden, supra, note 328, at 2135; P. R. Hayden, "Effects of GATT Compliance" in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: PrenticeHall, loose-leaf edition) 2149; A. L. C. de Mestral, J.-G. Castel & W. C. Graham, International Business Transactions and Economic Relations: Cases, Notes and Materials on the Law as it Applies to Canada 5th edition (Montreal & Toronto: McGill University, Osgoode Hall Law School, University of Toronto, 1983) at IV-122.

334 Hayden, "GATT Compliance", ibid., at 2149.

335 Macdonald, supra, note 28, at 405.

garding exports by the new or acquired business.[336] In these cases it was a condition of approval that the new or acquired business undertook not only to produce for the Canadian market, but also to export part of the products abroad.

The Canadian Government justified this practice by refering to the branch plant nature of the Canadian economy.[337] In the eyes of the United States Government[338], undertakings relating to exports violated the Code on Subsidies and Countervailing Duties[339] and Article XVII:1(c) of the GATT.[340]

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336 Hayden, supra, note 322, at 2118.

337 Ibid.

338 Samet, supra, note 58, at 296 f. See also C. G. Fontheim & R. M. Gadbaw, "Trade-Related Performance Requirements under the GATT-MTN System" (1982) 14 Law & Policy in Int'l Bus. 129.

339 Contracting Parties to the General Agreement on Tariffs and Trade, Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, in Basic Instruments and Selected Documents, 26th Supp. (Geneva, 1980) 56. The Code on Subsidies and Countervailing Duties was a result of the Tokyo Round of Multilateral Trade Negotiations, held under the auspices of the General Agreement on Tariffs and Trade from 1973-79. For details see GATT Information Service, GATT 30 Years, 1947-1977: What it is, What it does (Geneva, 1979) at 3 f.

340 De Mestral, Castel & Graham, supra, note 333, at 122.

The Code on Subsidies and Countervailing Duties commits signatory governments to ensure that any use of subsidies by them does not harm the trading interests of another signatory. It provides that no signatory shall grant export subsidies on products other than certain primary products.[341] The Code does not define what exactly an export subsidy is, but certain practices listed in the Annex are considered to be illustrative of export subsidies.[342]

Looking at these illustrations, one can hardly regard undertakings relating to exports provided by foreign investors in Canada as export subsidies. Though they were in certain cases a condition of carrying out a business in Canada, no measures were taken by the Canadian Government to subsidize exports from Canada, i.e. to enable foreign-controlled firms to export products from Canada at a price which was lower than the comparable price charged for the like product to buyers in the Canadian market.[343]

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341 Para. 1 of Article 9 of the Code on Subsidies and Countervailing Duties.

342 Para. 2 of Article 9 of the Code on Subsidies and Countervailing Duties.

343 Cp. Article XVI:4 of the General Agreement on Tariffs and Trade.

Neither could the Canadian practice be considered to violate Article XVII:1(c) of the General Agreement on Tariffs and Trade which provides that

> "No contracting party shall prevent any enterprise ... under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph."

Subparagraphs (a) and (b) of Article XVI:1 require state or privileged enterprises to act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the Agreement for governmental measures affecting imports or exports by private traders. In particular, such enterprises have to make any purchase or sale "solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

Since the export commitments were a condition of certain investments in Canada but not a means to force foreign-controlled firms to disregard commercial considerations, they did not violate Article

XVII:1(c) of the GATT. Correspondingly, the GATT Panel found that Canada neither breached her obligations under the Code on Subsidies and Countervailing Duties nor acted inconsistently with Article XVII:1(c) of the Agreement.[344]

iii) International Comity and Fairness

The fact that the purchase of a foreign business with assets or a subsidiary in Canada was subject to review as to the Canadian interests affected has been called "one of the most vexing aspects" of the Foreign Investment Review Act.[345] The interference with contracts made in a foreign jurisdiction raised difficult questions as to the extraterritorial application of the Act.[346]

According to the Act, the acquisition of shares of a foreign company that carried on a branch business

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344 De Mestral, Castel & Graham, supra, note 333, at IV-122; Hayden, supra, note 328, at 2135.

345 G. C. Glover, "FIRA: Practical Insights" in Current Legal Aspects of Doing Business in Canada (American Bar Association, 1976) 30 at 36.

346 See, e.g., Glover, ibid.; Franck & Gudgeon, supra, note 16, at 134 ff; Nixon & Burns, supra, note 210, at 72 ff.; Case Comment, supra, note 64, at 517 ff.

in Canada[347] as well as the acquisition of shares of a foreign company which controlled a subsidiary incorporated in Canada[348] was reviewable if it led to the acquisition of control of the Canadian business enterprise. Thus, any take-over which involved an ultimate change in control of a Canadian subsidiary or a Canadian branch business could be reviewed under the Act.[349] Failure of the foreign parties to comply with the provisions of the Foreign Investment Review Act could result in vesting the Canadian subsidiary in a trustee for sale to Canadians.[350]

Obviously, the implications of the broad legislative concept were immense. The Canadian Government was put into a position where it could review corporate reorganizations which did not involve any change in ultimate or de facto control of the Canadian business enterprise.[351] The Foreign Investment Review Act became a means to Canadianize the domestic

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347 Cp. the definitions of Canadian business enterprise and Canadian branch business in subsec. 3 (1) FIRA.

348 Cp. subsec. 3 (1) and para. 3 (6) (h) FIRA.

349 Cp. Nixon & Burns, supra, note 210, at 73 f.

350 See supra, at 114.

351 Donaldson & Jackson, supra, note 253, at 219.

economy.[352] Critics spoke of "an unprecedented extension of Canadian law into foreign transactions in which the parties are not Canadians, are not in Canada, and are not dealing directly with Canadian businesses." It was argued that the extraterritorial application was "precisely the kind of interference which the Canadian government would resent were a foreign government to attempt to so legislate in what would be regarded as a domestic transaction in Canada."[353]

It was suggested that the problem of the extraterritorial application of the Foreign Investment Review Act should be solved according to the rules of private international law.[354] Where the Act affected alien contracts, the proponents of a conflicts of laws solution determined whether Canadian law was the proper law of the contract.[355] If the proper law was

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352 Case Comment, supra, note 64, at 517.

353 Glover, supra, note 345, at 36. See also Franck & Gudgeon, supra, note 16, at 135.

354 Nixon & Burns, supra, note 210, at 72.

355 In order to determine the proper law of a contract, one first has to examine whether there is an express choice of the parties as to the applicable law. In the absence of such express choice, the proper law of a contract is the law which has the closest and most real connection with the transaction. A contract good by the proper law

Canadian, they did not object to the application of the Act to the transaction. Where, however, the proper law was not Canadian law, and the contract was valid under the law of the governing state, it was suggested to uphold the contract and to give effect to all of its provisons in Canada.[356]

Canadian courts, however, in a number of cases, were not of the opinion that the Foreign Investment Review Act was applied extraterritorially in case of an indirect acquisition. The problem was discussed by the Federal Court of Appeal in the case of A.-G. Canada v. Fallbridge Holdings Ltd. and Central Cartage Company.[357] The case dealt with the transfer of American-owned controlling shares of a Canadian corporation to another American-owned corporation. Mr. Justice Gibson stated:

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but void under Canadian law will be enforceable in Canada. For details see J.-G. Castel, Conflict of Laws: Cases, Notes and Materials, 4th edition (Toronto: Butterworths, 1978) at 12-1. See also Lord Simmonds in Bonthyon v. Commonwealth of Australia [1951] A.C. 201 at 219 (House of Lords); Colmenares v. Imperial Life Assurance Co. of Canada (1967) 62 D.L.R. (2d) 138 (S.C.C.), [1967] S.C.R. 443.

356 Nixon & Burns, supra, note 210, at 72 f.

357 (1979) 7 D.L.R. 275 (Fed. Ct., Trial Div.). Cp. Nixon & Burns, ibid., at 75; Bakken, supra, note 58, at 991 f.

> "... for greater certainty, this injunction is not intended to be an exercise of jurisdiction not provided for by the principles, laws and practice of private international law, and as a consequence it is hereby expressly stated that this injunction recognizes and acknowledges the comity between this Court and the Courts of the State of Michigan and this injunction does not have any effect so as to infringe the authority of the Courts of the State of Michigan, and does not have extra-territorial effect, so that in respect of the Respondent Central Cartage Company specifically, this injunction is not intended to have, and does not have, any extra-territorial operation, but instead is confined to whatever jurisdiction this Court may have over Central Cartage Company insofar as any of its activities are carried on in Canada or have an impact in Canada."[358]

In the case of A.-G. Canada v. Dow Jones and Co. Inc.[359], the Federal Court of Canada had to deal with the question whether or not the Foreign Investment Review Act applied to take-overs that occured outside Canada and resulted in the indirect acquisition of a Canadian subsidiary. Dow Jones argued that the Foreign Investment Review Act was not intended to operate extraterritorially and could not be applied to the merger of two American corporations since such operation constituted a violation of the principle of

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358 Quoted by Nixon & Burns, ibid., at 76.

359 (1980) 113 D.L.R. (3d) 395 (Fed. Ct., Trial Div.). As to the facts and for a detailed analysis of the case see Case Comment, supra, note 64; Nixon & Burns, ibid., at 76 ff.

international comity.[360] As to the problem of extra-territorial application of the Act, Mr. Justice Grant commented:

> "Counsel for Dow Jones submits that acquisition of control by a foreign corporation from another foreign corporation which controls the Canadian business enterprise is not an acquisition of control ... [and] is therefore not affected by the legislation. Such an interpretation would thwart the purpose and intent of the Act. The business which is the subject of the legislation is one carried on in Canada and it follows that the control thereof must be exercised within this country no matter where the foreign corporation acquiring it has its *situs*.
>
> The Act does not regulate the merger of [the American subsidiary] into [the newly-created American subsidiary]. It is only the acquisition of control of the business carried on in Canada which is subject to the review provided by Section 8 of the Act. It therefore does not seek to affect extra-territorial activities but is enforced only in relation to the Canadian business. The provisions of the Act were not applied extra-territorially although Parliament has power to enact legislation which will have such effect."[361]

Probably, the Federal Court wanted to avoid the examination of the issue raised by the company. The dicta at the end of the quotation, however, indicated that the Court was not prepared to prevent the extra-territorial application of the statute.[362]

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360 Cp. Case Comment, *ibid.*, at 515.

361 *A.-G. Canada* v. *Dow Jones and Co., Inc.*, *supra*, note 359, at 400 f.

362 Case Comment, *supra*, note 64, at 515.

The Canadian Governments asserted jurisdiction to review transactions even though there was no jurisdictional connection with Canada. It was pointed out that the extraterritorial application of the Foreign Investment Review Act was within the alien power of the British North America Act, 1867,[363] and did not violate the principle of international comity, since the legislation dealt only with the entry into Canada of aliens and alien-owned capital and did not discriminate between eligible and non-eligible persons concerning their right to dispose of shares or assets held in Canada.[364]

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363 Sec. 91 (25) British North America Act, 1867. Cp. A.-G. Canada v. A.-G. Alberta (The Insurance Reference) [1916] 1 A.C. 588 at 597 (Privy Council); In Re Insurance Act of Canada [1932] A.C. 41 at 51 per Viscount Dunedin; Arnett, supra, note 61, at 229 ff.; Nixon & Burns, supra, note 210, at 65 ff.

364 Cp. the letter from the Honourable Herb Gray to the Honourable Malcolm Baldridge, Secretary of Commerce of the United States of America, July 8, 1981 (reported in FIRA News Release F-174, Ottawa, August 4, 1981): "... the Canadian law is not being applied extra-territorially. For the Act applies only to changes of control of Canadian business enterprises that are subject to Canadian (and only Canadian) jurisdiction. ... I can confirm that it was fully intended that the Act would apply equally to transfers of control of Canadian businesses, whether such transfer were from a Canadian to a foreign person or from one foreign person to another. If that were not the case a very large part indeed of the Canadian economy would be excluded from the scope of the Act, and the ability of Canadians to gain and maintain effective control over their economc

This proposition, however, seemed only to be true in cases where there was a change in the ownership of shares of a Canadian subsidiary or a change in title to Canadian assets. In cases where the transaction had no real and substantial connection with Canada, i.e. where there was no actual transfer of ownership of the Canadian subsidiary or a change in title to Canadian assets but merely a change in the ownership of a foreign parent, the situation was different. Here, the proper law was frequently not Canadian law and therefore it appeared to be a question of international comity to protect the justified expectations of the contracting parties and to consider "the need for certainty, predictability and uniformity of result in commercial dealings."[365] The case could be

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environment would be greatly diminished." See also Nixon & Burns, ibid., at 79.

365 Nixon & Burns, ibid., at 79 f. Cp. also Castel, supra, note 355, at 1-8: "The relevant conflicts rule of the forum enables the court to select the law of a particular country or jurisdiction applicable to that legal category or issue without first having to ascertain how that law would decide the case. The jurisdiction-selecting choice of law rule makes a state or country or legal unit the object of the choice. It does not consider the contents or the applicable law. Such a method ... achieves certainty although it does not always achieve justice. This is the method followed by the Canadian courts." (emphasis added).

made that transactions between foreign corporations without any transfer of shares in a Canadian subsidiary were not reviewable in law.[366]

Understandably, the Canadian practice met strong protest from the governments of those countries whose nationals were affected. In particular the United States questioned the legality of the extraterritorial application of the Foreign Investment Review Act and considered unilateral retaliatory action.[367] Bilateral consultations were held which did not result in significant modifications to the Foreign Investment Review Act but forced the Liberal Government to reconsider its administration of the Act.[368]

b) Violation of Canadian Domestic Law

Though the Canadian Parliament had the constitutional authority to enact the Foreign Investment

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366 Nixon & Burns, ibid., at 80.

367 Turner, supra, note 47, at 349; Case Comment, supra, note 64, at 518. See also Nixon & Burns, ibid., at 78 f.

368 Spence, supra, note 63, at 324 f.

Review Act[369], certain provisions and the application of the Foreign Investment Review Act also raised questions concerning their legality under Canadian law.

i) Duty of Fairness

One aspect of the review procedure which always caused criticism was its vagueness and a lack of clarity. This vagueness was the result of the Government's failure to spell out all of its economic policies.[370] Many commentators criticised the fact that foreign investors had no clear guidance as to the standard they had to meet in order to obtain approval.[371] The Canadian Government and its agent, the Foreign Investment Review Agency, had no recognizable policy which would have allowed the non-eligible person to know beforehand where the threshold of significant benefit lay. Recommendations to

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369 The Federal Parliament has exclusive legislative authority to pass legislation on the rights and duties of aliens: sec. 91(25) British North America Act, 1867. For a detailed analysis of the constitutional issues see Arnett, supra, note 61; Nixon & Burns, supra, note 210, at 61 ff.

370 Hayden, supra, note 64, at 2112.

371 See, e.g., Arnett, Rueter & Mendes, supra, note 61, at 126; Rugman, supra, note 13, at 354.

the Minister or the Governor in Council were made in secret and, thus, it was impossible for the investor to determine whether the undertakings he provided were sufficient in the eyes of the Agency or the Government.[372]

In addition, the foreign investor would not know which treatment was accorded other foreign investors. Since the decision-making process was secret and no reasons were given in case of disallowance, the investor frequently suspected "an inadequate assessment or improper purpose if his investment was disallowed."[373]

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372 Ibid.; Case Comment, supra, note 64, at 510. See also Schultz, Swedlove & Swinton, supra, note 64, at 150, who stated in 1980: "It will be recalled that the criteria in the Foreign Investment Review Act were criticized for their generality and subjectivity when the Act was before Parliament. A promise was made by the minister to publish guidelines that would 'flesh out' the criteria when experience had been gained with the process. To date, policy enunciation and refinement has, at best, been tangential and incremental. While it would be inaccurate to argue that a policy vacuum has developed - there are the statutory criteria, after all - it is accurate to argue that there has been very limited development of foreign investment policy to guide the review process in the past six years."

373 Arnett, Rueter & Mendes, ibid., at 127.

What made the situation of the foreign investor even more difficult was the fact that he had to negotiate with the Agency which had no decision-making powers. Agency officials had no authority to bind the Governor in Council.[374] Thus, it was said that the non-eligible person was in the position "of extending an open offer to a hidden offeree who does not disclose his position. In other words, the foreign investor [was] 'shadow boxing'."[375]

Not surprisingly, Canadian critics stated that the review procedure contained arbitrary and unfair elements. They considered it to be violative of the obligation to accord procedural fairness to foreign investors who had filed a notice.[376] This opinion was based on a number of cases decided by the Supreme Court of Canada. These decisions have removed the need to characterize an administrative function as judicial or quasi-judicial before the duty of procedural fairness arises. In Nicholson v. Haldiman-

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374 Cp. the wording of subsection 7 (1) FIRA: "There is hereby established an agency, to be known as the Foreign Investment Review Agency, to advise and assist the Minister in connection with the administration of this Act." (emphasis added).

375 Arnett, Rueter & Mendes, supra, note 61, at 126.

376 Ibid., at 131.

Norfolk Regional Board of Commissioners of Police[377], Laskin C.J.C., in delivering the opinion of the majority of the Supreme Court, pointed out that

> "the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question."[378]

In the case of Martineau v. Matsqui Institution Disciplinary Board (No. 2)[379], Pigeon J. confirmed that a general duty of fairness exists even in the exercise of an administrative or executive function. Based on these decisions, it was argued that the Governor in Council and the Minister responsible for the administration of the Act had a duty to accord foreign investors fair treatment.[380]

Since the duty of fairness has to be accorded to any person whose rights, interests, property, privi-

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377 [1979] 1 S.C.R. 311, (1978) 88 D.L.R. (3d) 671.

378 Ibid., at 325 (S.C.R.), 681 (D.L.R.).

379 [1980] 1 S.C.R. 602, (1979) 106 D.L.R. (3d) 385.

380 Arnett, Rueter & Mendes, supra, note 61, at 126.

leges, or liberties are affected by a decision of a public body[381], it did not matter that foreign investors were not Canadian citizens. Though aliens have no right to invest in Canada[382], they have to be treated fairly after they filed a notice with the Agency.[383]

The scope of the duty to act fairly depends on the nature of the procedure and the consequences which this procedure may have on persons affected by it.[384] The fundamental rule is that if a person is adversely affected by the procedure, "he should be told the case made against him and be afforded a fair opportunity of answering it."[385] Thus, it was argued that

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381 Dickson J. in his concurring judgement in Martineau v. Matsqui Institution Disciplinary Board, supra, note 379, at 622 f. (S.C.R.), 405 (D.L.R.).

382 A.-G. Canada v. Cain [1906] A.C. 542 at 546 (Privy Council).

383 For a more thorough discussion of the issue see Arnett, Rueter & Mendes, supra, note 61, at 133 ff.

384 Cp. A.-G. Cananda v. Inuit Tapirisat of Canada et al. [1980] 2 S.C.R. 735 at 747 f., (1980) 115 D.L.R. (3d) 1 at 10 f., refering to the English decision of Selvarajan v. Race Relations Board [1976] 1 All E.R. 12 at 19.

385 Lord Denning M.R. in Selvarajan v. Race Relations Board, ibid., at 19.

the Minister had at least to accord a foreign investor

> "the right to know the case he has to meet and afford him an opportunity of meeting it. This would mean at least that he must be told the nature of the concerns against his application including the nature of any interventions against him."[386]

Similarly, the Canadian Bar Association urged the Canadian Government

> "to regularly issue guidelines on an industry sector basis to indicate the manner in which the government is interpreting the significant benefit criteria in light of changing conditions and government policy."[387]

The organization added that

> "[t]he confidential requirements of the Act should have the effect of eliminating a third party intervention in the review process. It should only be allowed within a regualtory framework which gives the applicant the intervenors submission and a chance to respond. Any practice short of this standard offends the rules of natural justice."[388]

The Liberal Government did not, however, introduce any major changes to the review procedure, leave

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386 Arnett, Rueter & Mendes, supra, note 61, at 135. See also Spence, supra, note 63, at 327 ff.

387 Canadian Bar Association, Committee on Foreign Investment Review, Brief to the Honourable Herb Gray, Minister of Industry, Trade and Commerce on the Foreign Investment Review Act - Highligths of Recommendations (Ottawa: Canadian Bar Association, 1981) at 2.

388 Ibid., at 7.

alone show any disposition to accede to demands for the suspension or repeal of the Foreign Investment Review Act.[389] With respect to the proposal to issue guidelines on an industry sector basis which would have indicated the manner in which the Government was interpreting the significant benefit criteria, the Honourable Herb Gray, then the Minister reponsible for the administration of the Act, stated:

> "There may be some merit in the ... suggestion for the issuance of 'guidelines on a regular industry sector basis to indicate the manner in which the cabinet or Review Agency is interpreting the significant benefit criteria in the light of changing economic conditions and government policy.' But it appears to reflect an over simplified view of the economy and of the assessment process itself. Sector guidelines could not possibly deal with all of the many variables that come into play as between different proposals, even within the same industry sector, e.g., the state of business that is being acquired, the impact on competition, the impact on technological advancement etc."[390]

Apparently, the Liberal Government considered it to be impossible to spell out all of its economic policies. The breach of the duty to treat foreign investors fairly remained.

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389 For details see Spence, supra, note 63, at 323.

390 Letter from the Honourable Herb Gray to Mr. Paul Fraser, President of the Canadian Bar Association, March 2, 1982 (reported in FIRA News Release, F-13, Ottawa, March 2, 1982, at 9).

ii) Ultra Vires Doctrine

The exercise of the discretion to allow or disallow an investment proposal was also examined. Under Canadian administrative law, all administrative, executive or legislative bodies to whom Parliament has delegated its powers must act strictly within their statutory jurisdiction.[391] None of these bodies may take into account irrelevant evidence or exceed the scope of his delegated powers.[392] It was submitted that the Minister and the Governor in Council frequently took into account irrelevant evidence and were therefore acting ultra vires.[393]

This opinion was based on certain provisions of the Foreign Investment Review Act. First, subsection 2(1) stated that the effect of foreign investment "on the ability of Canadians to maintain effective control over their economic environment" was a matter of national concern (emphasis added).[394] In addition,

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391 For details see Arnett, Rueter & Mendes, supra, note 61, at 136.

392 Ibid.

393 Ibid., at 136.

394 Ibid., at 138; "... it is absolutely clear that concern about control over the 'economic environment' was at the heart of the decision to enact

the factors of assessment mentioned in subsection 2(2) of the Foreign Investment Review Act were all economic.[395] Despite its breadth and vagueness, subsection 2(2) made it quite clear that Parliament did not intend to give the Minister and the Governor in Council authority to take into account virtually anything, including social or cultural policies. Accordingly, the Minister and the Governor in Council, in exercising their discretion, had to base their decision on considerations of an economic nature, not on irrelevant policy considerations such as the impact of the investment on Canadian social or cultural life.[396]

Finally, critics of the review procedure under the Foreign Investment Review Act suggested that the taking into account of a private intervention was also ultra vires. According to the wording of section 9 of the Act, the Minister had to base his recommendation on the information contained in the notice of the foreign investor, on information submitted by any

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the Act."

395 Even para. 2(2)(e), which included the "catch-all phrase" (cp. supra, at 88, note 226) only refered to national industrial and economic policies.

396 Arnett, Rueter & Mendes, supra, note 61, at 139.

party to the proposed or actual investment, on written undertakings given by a party to the investment, and on represesentations submitted by a provines that was affected by the investment. Consultations with a third party required the authorisation of the parties to the investment.[397] Thus, it was argued that the Governor in Council and the Minister were acting outside their discretion in basing their decision on the consideration of an intervenor representation since in this case "the government were using the Act to pursue in private with a select few some undisclosed industrial, economic or political strategy".[398]

Despite the criticism, the Foreign Investment Review Agency in general was not prepared to disclose to the investor the fact that an intervention had been made, leave alone the substance of any allegation against the actual or proposed investment.[399]

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397 Paragraph 11 (3) (b) FIRA.

398 Arnett, Rueter & Mendes, supra, note 61, at 140. See also Spence, supra, note 63, at 328.

399 Spence, ibid.

Chapter 5: The Investment Canada Act

1. Background

The Investment Canada Act was a legislative response to growing concern that foreign investors might invest elsewhere than in Canada. Though it was impossible to quantify the loss of desirable investment due to the mere existence of the Foreign Investment Review Act, it is possibly fair to say that at the time the Foreign Investment Review Act was in operation many foreign investors turned their backs on Canada and capital that otherwise would have been invested here was led to some other country.[400] Probably more important was the reaction of the United States. Since the United States are Canada's primary source of investment and the major trading

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400 One can form an idea of the negative impact which the Foreign Investment Review Act had on the perception of Canada as a host country for foreign investment when looking at the 1983 survey of European Management Forum. In this survey, Canada was ranked last (out of 28 countries) in welcoming foreign investment for the fourth consecutive year. Cp. W. B. Rose, "Foreign Investment in Canada: The New Investment Canada Act" (1986) 20 Int'l Lawyer 19 at 21, note 14.

partner, her reaction could hardly be ignored.[401] Threats of retributive actions by the United States Government against Canada, trade protectionist initiatives in Congress or "Buy American" legislation[402], were of serious import.[402a]

In view of the negative impact any such measure would have had on the Canadian economy, the Liberal Government already had made a number of changes to

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401 Canada, with one-tenth of the population of the European Community, buys as much from the United States of America as the EC countries combined. Canada receives almost one quarter of American exports and provides for almost one-fifth of American imports. The bilateral trade has an annual value of more than $ 100 billion. Cp. R. E. Lutz, "This Issue ..." (1986) 20 Int'l Lawyer xxi.

402 Macdonald, supra, note 28, at 386; Albrecht, supra, note 20, at 149 f. See also supra, at 37 f.

402 a With respect to the National Energy Program, Olmstead, Krauland & Orentlicher have stated: "[T]he Government's desire to encourage Canadian participation in the oil and gas industry should not be subject to criticism. The means to further this goal, however, cannot be discriminatory or unfairly retroactive. In a world of diverse national objectives, where normative judgements regarding those objectives are not universial, the need to protect against unfair and illegal methods is critical. It is the role of international law to ensure that diverse national objectives are not sought or obtained at the expense of fairness or justice." Cp. supra, note 315, at 466. Similarly, it could be argued that the Foreign Investment Review Act was a discriminatory means to increase Canadian participation in the Canadian economy. The Investment Canada Act attempts to restore the traditional Canadian respect for the rule of law in international economic relations.

1984. It received second reading in January, 1985, and was passed on June 6, 1985. It entered into force on July 1, 1985.[408]

2. The Objectives of the Act and the Underlying Policy Considerations

While the Foreign Investment Review Act was a means to support the "Canadianization" of the economy by monitoring new foreign investments in Canada[409], the Investment Canada Act attempts to encourage investment in Canada by both Canadians and non-Canadians that contributes to economic growth and employment opportunities.[410] The new Act starts from the assumption that Canadian and, in most cases, foreign investment is beneficial to Canada.[411] Convinced that "investment means jobs"[412], the Progressive Conservative Government of Prime Minister Brian Mulroney

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408 Supra, 28 f.

409 Donaldson, supra, note 49, at 465.

410 Cp. sec. 2 ICA.

411 The Act attempts to encourage investment by both Canadians and non-Canadians and its application is therefore not limited to foreign investment. Cp., e.g., Coté, supra, note 8, at 279; Glover, New & Lacourcière, supra, note 13, at 84.

412 Sinclair Stevens, then Industry Minister of Canada, quoted in Investment Canada, News Release, December 7, 1984, at 1.

the administration of the Foreign Investment Review Act. The review process was streamlined and given a lower profile.[403] The recession also induced the Liberal Government to increase the rate of approvals.[404] The Progressive Conservative Party and many of the provinces, however, did not consider this to be sufficient to attract much-needed foreign capital.[405] They argued that the administrative changes did not alleviate the concern of foreign investors that the more restrictive and arbitrary practice could return. Accordingly, they recommended a fundamental change in the Canadian law.[406]

In September 1984, when Canada saw a change of government, the reform of Canada's foreign investment review law was the first major project of the new Government.[407] Bill C-15, the Investment Canada bill, was introduced in the House of Commons in December,

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403 As to the short form of notice see supra, at 108.

404 Supra, at 27.

405 Cp. supra, at 26 ff.

406 Rose, supra, note 400, at 22.

407 One day after being appointed to the cabinet, Finance Minister Michael Wilson stated that "something will be done about FIRA as soon as possible". Cp. P. R. Hayden, "What's Ahead for FIRA?", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) at 2169.

considers the encouragement of investment in Canada a major element of its economic policy. To ensure that the assumption of benefit is justified, the Act provides for the review of large foreign investments that can have an impact on the development of the Canadian economy.[413]

A new agency, Investment Canada, has replaced the Foreign Investment Review Agency. Since promoters of foreign investment argued that the Foreign Investment Review Agency's very existence deterred foreign capital investment, both the name and the mandate of the Foreign Investment Review Agency were changed. Following the tabling of the Investment Canada Act, Sinclair Stevens, the then Industry Minister of Canada, said:

> "Perceptions play a vital role in the world of investment. The words and actions of a government can tip the delicate balance underlying a country's reputation as a place to invest. That is why it is so important to change the name and mandate of FIRA. FIRA has sent negative signals to domestic and foreign investors, leading them to think that Canada is ambivalent, if not hostile, to non-Canadian investment. The Investment Canada Bill is a major step in changing those perceptions. We are saying to Canadians and the world

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413 Cp. sec. 2 ICA: "Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investment in Canada by non-Canadians in order to ensure such benefit to Canada."

> that we want to encourage as much investment as possible to stimulate trade and industrial development, to improve our international competitiveness and to rekindle the entrepreneurial spirit in Canada. The Investment Canada Bill is one measure among many this Government intends to take to dismantle needless barriers to enterprise in this country."[414]

In autumn 1985, a global campaign was started to attract foreign capital.[415] The Progressive Conservative Government is convinced that the new approach will help to improve Canada's economic situation. In the words of Sinclair Stevens:

> "Investment Canada, with its new mandate and a new approach, will help pull Canada out of its defensive shell and will reinvigorate this country with a flow of goods, capital, technology and ideas. It is a positive, forward-looking policy. We believe that it is time for us to build bridges, not barriers."[416]

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414 Statement by the Honourable Sinclair Stevens Following the Tabling of the Investment Canada Bill, in Statements and Speeches, ed. by Investment Canada (Ottawa, December 7, 1984) at 1. His opinion was shared by the Canadian Chamber of Commerce which had urged the new Government to change the name and the mandate of the Foreign Investment Review Agency so as to signal that the Agency encourages investment rather then controlling it. Cp. Hayden, supra, note 407, at 2169.

415 Cowan, supra, note 12, at A-11; Rose, supra, note 400, at 23. As to the response to the campaign in the Federal Republic of Germany see "Kanada setzt auf Privatkapital" Frankfurter Allgemeine Zeitung (June 12, 1985) 13.

416 Statement by the Honourable Sinclair Stevens following the tabling of the Investment Canada Bill, in Statements and speeches, ed. by Investment Canada (Ottawa, December 7, 1984) at 2.

Both the objectives and the underlying policy considerations are, to a large extent, contrary to the earlier approach toward foreign capital investment in Canada.[417] In the following, the influence of the new attitude on the law of foreign investment review in Canada will be examined.

3. The Regulatory Scheme of the Act

a) Overview

The administration of the Investment Canada Act is the responsibility of a member of the Canadian Government designated by the Governor in Council.[418] Currently, this is the Minister of Regional Industrial Expansion (the Minister).[419] The duties of the Minister are

- to encourage business investment by such means and in such manner as he deems appropriate;
- to assist Canadian business to exploit oppor-

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417 Rose, supra, note 400, at 22.

418 Sec. 3 ICA.

419 Rose, supra, note 400, at 22.

tunities for investment and technological advancement;

- to carry out research and analysis relating to domestic and international investment;
- to provide investment information services and other investment services to facilitate economic growth in Canada;
- to assist in the development of industrial and economic policies that affect investment in Canada;
- to ensure that the notification and review of investment by non-Canadians are carried out in accordance with the provisions of the Act;
- to perform all other duties required by the Act to be performed by the Minister.[420]

In exercising his powers and performing his duties under the Act, the Minister can use the services and facilities of other departments, branches or agencies of the Canadian Government. He may also, with the approval of the Governor in Council, enter into agreements with the provinces for the purposes of the Act. Finally, he may consult with, and organize conferences of, representatives of industry and

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420 Subsec. 5 (1) ICA.

labour, provincial and local authorities and other interested persons.[421]

The Minister is also responsible for the management and direction of Investment Canada, the new agency established under the Act.[422] Investment Canada has to advise and assist the Minister in exercising his powers and performing his duties under the Act.[423] In particular, the new agency has to encourage and facilitate investment in Canada.[424]

Under the Act, investments by non-Canadians fall under one of three categories:

- investments that are exempted from both notification and review;
- investments that are exempted from review but require notification;
- investments that are subject to review.

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421 Cp. Subsec. 5 (2) ICA.

422 Sec. 4 ICA.

423 Sec. 6 ICA.

424 Investment Canada, "Highlights Investment Canada Act", in News Release (Ottawa, December 7, 1984) at 4.

With respect to reviewable investments, the criterion for approval under the new Act differs from the criterion established by the Foreign Investment Review Act in that a new investment, instead of having to be of significant benefit to Canada, will be allowed if it is likely to be of net benefit to Canada.[425] Although the wording indicates that the test is more lenient than the significant benefit test required under the Foreign Investment Review Act, the factors to be taken into account have not changed materially.[426] It is the Minister, not the Canadian Cabinet, who decides whether or not the standard of net benefit is met.[427]

b) Non-Canadian

Only investments by non-Canadians require notification or are subject to review under the Investment Canada Act.[428] The Act defines a non-Canadian to be

425 Sec. 21 ICA.

426 Cp. sec. 20 ICA with subsec. 2 (2) FIRA.

427 Cp. subsec. 21 (1) ICA.

428 Cp. sec. 11; 14 ICA.

an "individual, a government or an agency thereof or an entity that is not Canadian".[429]

An individual is considered to be Canadian if he is either a Canadian citizen or a permanent resident within the meaning of the Immigration Act, 1976 who has been ordinarily resident in Canada for not more than one year after the time at which he first became eligible to apply for Canadian citizenship.[430] The requirement of ordinary residence in Canada, which was contained in the Foreign Investment Review Act, has been abolished.

With respect to entities[431], they are considered to be Canadian if they are Canadian-controlled.[432] Section 26 contains a series of rules which allow to determine the Canadian status of an entity. Where one Canadian or two or more members of a voting group[433]

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429 Sec. 3 ICA.

430 Sec. 3 ICA.

431 Entity means a corporation, a partnership, a trust or a joint venture. Cp. sec. 3 ICA.

432 Sec. 3 ICA.

433 Voting group means two or more persons who are associated with respect to the exercise of rights attached to voting interests in an entity by contract, business arrangement, personal relationship, common control in fact through the

who are Canadians own a majority of the voting interests[434] of an entity, this entity is Canadian-controlled.[435] Correspondingly, where one non-Canadian or two or more members of a voting group who are non-Canadians own a majority of the voting interests of an entity, this entity is not a Canadian-controlled entity.[436] Where two persons own equally all of the voting shares[437] of a corporation and one of them is

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ownership of voting interests, or otherwise, in such a manner that they would ordinarily be expected to act together on a continuing basis with respect to the exercise of those rights. Cp. sec. 3 ICA.

434 Voting interest, with respect to a corporation with share capital, means a voting share. With respect to a corporation without share capital, the term means an ownership interest in the assets of the corporation that entitles the owner to rights similar to those enjoyed by the owner of voting shares. With respect to a partnership, trust or joint venture, voting interest means an ownership interest in the assets of the partnership, trust or joint venture that entitles the owner to receive a share of the profits and to share in the assets on dissolution. Cp. sec. 3 ICA.

435 Para. 26 (1) (a) ICA.

436 Para. 26 (1) (b) ICA.

437 Voting share means a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of shareholders of the corporation an to which is ordinarily attached a right to receive a share of the profits, or to share in the assets of the corporation on dissolution, or both. Cp. sec. 3 ICA.

a non-Canadian, the corporation is not a Canadian-controlled entity for the purposes of the Act.[438]

In case these rules do not apply and a majority of the voting interests of an entity are owned by Canadians and it can be established that the entity is not controlled in fact through the ownership of its voting interests by one non-Canadian or by a voting group in which a member or members who are non-Canadians own at least fifty percent of those voting interests of the entity owned by the voting group, the entity is considered to be Canadian-controlled.[439]

If none of these rules applies and less than a majority of the voting interests of an entity are owned by Canadians, that entity is presumed not to be a Canadian-controlled entity unless it can be established that the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which a member or members who are Canadian own a majority of the voting interests

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438 Subsec. 26 (6) ICA.

439 Para. 26 (1) (c) ICA.

of the entity owned by the voting group.[440] Alternatively, where the entity is a corporation or limited partnership, it has to be shown that the entity is not in fact controlled through the ownership of its voting interests and that two-thirds of the members of its board of directors or, in case of a limited partnership, two-thirds of its general partners, are Canadians.[441]

In case a trust is not controlled in fact through the ownership of its voting interests, subsection 26 (1) does not apply and the trust is a Canadian-controlled entity if two-thirds of its trustees are Canadians.[442]

With respect to a publicly traded corporation incorporated in Canada, this corporation is deemed to be a Canadian for the purpose of subsection 14 (1) of the Act[443] (if the investment is not in a specific type of business activity related to Canada's cul-

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440 Subpara. 26 (1) (d) (i) ICA.

441 Subpara. 26 (1) (d) (ii) ICA.

442 Subsec. 26 (2) ICA.

443 The presumption does not apply where the Minister has to determine whether or not notification is required. Cp. Rose, supra, note 400, at 25.

tural heritage or national identity) where the Minister can be satisfied that

- the majority of the voting shares are owned by Canadians,
- four-fifth of the members of the board of directors are Canadian citizens ordinarily resident in Canada,
- the chief executive officer and three of the four highest-paid officers are Canadian citizens ordinarily resident in Canada,
- the principal place of business is in Canada,
- the board of directors supervises the management of the corporation's business and affairs on an autonomous basis without direction from any shareholders other than through the normal exercise of voting interests at meetings of its shareholders, and
- the circumstances just mentioned have existed for at least one year immediately preceding the submission of the information by the corporation to Investment Canada.[444]

A publicly traded corporation which is deemed a Canadian according to the rules just mentioned will

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444 Cp. subsec. 26 (3) ICA.

be a Canadian for two years, provided that the material facts upon which the Minister based the presumption remain unchanged.[445]

In order to determine whether or not an entity is Canadian-controlled, the Investment Canada Act contains ancillary rules. First, where voting interests in an entity are owned by a partnership, trust, or joint venture, these voting interests are deemed to be owned by the partners, beneficiaries or members of the joint venture in the same proportion as their respective ownership interests in the assets of the partnership, trust or joint venture.[446] In addition, the voting shares of a corporation that are issued to bearer are deemed to be owned by non-Canadians unless the contrary can be established.[447]

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445 Subsec. 26 (5) ICA.

446 Subsec. 27 (a) ICA. This rule prevents the unequal treatment afforded partnerships and joint ventures under the Foreign Investment Review Act. Subsec. 8 (1) and 8 (2) FIRA required every non-eligible person and every group of persons any member of which was a non-eligible person to give notice of an actual or proposed investment to the Agency. Cp. supra, at 80. Thus, any investment of a partnership or a joint venture was reviewable if any partner or member of the joint venture was a non-eligible person, regardless of the size of the non-eligible person's interest in the partnership or joint venture. Cp. Rose, supra, note 400, at 27.

447 Subsec. 27 (c) ICA.

Finally, the Act provides for the case that voting interests of an entity are held by individuals each of whom owns not more than one percent of the total number of voting interests of the entity. In this case, the Minister shall, in the absence of evidence to the contrary, accept that the voting interests are owned by Canadians upon receipt of a signed statement from a person authorized by the entity that indicates that according to the records of the entity, the individuals who hold the interests have addresses in Canada, and that the person purporting the statement has no knowledge to believe that the voting interests are held by non-Canadians.[448]

Compared with the definition of non-eligible person in subsection 3 (1) of the Foreign Investment Review Act[449], the rules to determine the status of entities are clearer and much easier to apply: The factor to determine whether an or not an entity is

448 Subsec. 27 (d) ICA. See also Rose, supra, note 400, at 26.

449 The definition provided that a corporation that was controlled in any manner that resulted in control in fact, whether through the ownership of shares or through a trust, a contract, the ownership of shares of any other corporation or otherwise, was a non-eligible person. Cp. supra, at 82 f.

Canadian is the ownership of its voting interests. The existence of any contract which might provide to a non-Canadian the power to influence the conduct of an entity does not affect the determination of Canadian status.[450]

c) Net Benefit

A major problem for foreign investors under the Foreign Investment Review Act was to determine beforehand whether a proposed or actual investment would meet the significant benefit test. The broad standard of significant benefit resulted in great uncertainty on part of foreign investors.[451]

Under the Investment Canada Act, the new standard for allowance of a reviewable investment is net benefit to Canada. The non-Canadian investor must satisfy the Minister that his investment is likely to be of net benefit to Canada.[452] Yet, like the Foreign

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450 Cp. Rose, supra, note 400, at 26 f. Thus, the Minister and Investment Canada do not have infinite regression in the search for real control under the new statute.

451 For details see supra, at 86 ff.

452 Subsec. 21 (1) ICA.

Investment Review Act, the Investment Canada Act does not lay down what exactly constitutes net benefit to Canada.[453] The factors to be taken into account, which are very similar to the factors enumerated in subsection 2 (2) of the Foreign Investment Review Act[454], are —

> "(a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
> (b) the degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;
> (c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
> (d) the effect of the investment on competition within any industry or industries in Canada;
> (e) the compatability of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
> (f) the contribution of the investment to Canada's ability to compete in world markets."[455]

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453 Rose, supra, note 400, at 41.

454 Cp. supra, at 87.

455 Sec. 20 ICA.

Similar to the situation under the Foreign Investment Review Act, foreign investors do not know what weight is given each of these factors. Although it appears from the wording that net benefit is a less onerous criterion than significant benefit, the catalogue has been extended so as to allow the Minister to take into account Canada's international competitiveness and the compatibility of the investment with national and provincial cultural policies. It is understood that this was also done by the Governor in Council under the Foreign Investment Review Act. Yet, this practice appeared to be ultra vires under the former Act, since the factors enumerated in the Foreign Investment Review Act were exclusive.[456] Now, it is expressly stated that other than economic policies may be taken into consideration. The Investment Canada Act, thus, gives the Minister considerable discretion.

The possibility of taking into account other than economic policies gains even more importance in view of the fact that the Minister is already in a position to review investments that would otherwise not be reviewable if they occur in industries related to

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456 Cp. supra, at 88; 146 f.

Canada's cultural heritage or national identity.[457] Since the Minister is authorized to consider the cultural policy of the federal and provincial governments in each case, it is possible that the net benefit test will become even broader than the significant benefit test. Clearly, the current Government's intention is to encourage foreign investment rather than create barriers to the inflow of foreign capital.[458] A new Government, having a different attitude towards foreign investment, can probably change significantly the manner in which the Investment Canada Act is administered.[459]

d) Exempt Transactions

A number of transactions which would otherwise require notification or review under the Investment Canada Act are expressly exempted from the application of the Act. Basically, these transactions are temporary or involuntary acquisition of control of a

457 Sec. 15 ICA. For details see infra, at 182 ff.

458 Rose, supra, note 400, at 41.

459 See also Rose, supra, note 400, at 41; Glover, New & Lacourcière, supra, note 13, at 98.

Canadian business.[460] In particular, the Act does not apply to

- the acquisition of voting shares or other voting interests by a trader or dealer in securities in the ordinary course of his business;
- the acquisition of voting interests in the ordinary course of the business of providing venture capital;
- the acquisition of control of a Canadian business in connection with the realization of security granted for bona fide loans or other financial assistance;[461]
- the acquisition of control of a Canadian business for the purpose of facilitating its financing and not for any purpose related to the provisions of the Act on the condition that the acquiror divest himself of control within two years after control is acquired;
- the acquisition of control of a Canadian business by reason of an amalgamation, a merger, a consolidation or a corporate reorganization

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460 Coté, supra, note 8, at 279.

461 R. E. Hutchison, "Lending to Canadians: Issues for Foreign Lenders" (1986) 41 Bus. Lawyer 393 at 396.

following which the ultimate direct or indirect control remains unchanged;

- the acquisition of control of a Canadian business carried on by an agent of Her Majesty in right of Canada or a province or by a Crown corporation;
- the acquisition of control of a Canadian business carried on by a corporation the taxable income of which is exempt from tax by virtue of paragraph 149 (1) (d) of the Income Tax Act (certain federal, provincial or municipal corporations);[462]
- any transaction to which section 307 of the Bank Act applies (acquisitions or the establishing of Canadian-chartered banks);[463]
- the involuntary acquisition of control of a Canadian business on the devolution of an estate or by operation of law;
- certain acquisitions by insurance companies for the benefit of their policy holders; and
- the acquisition of control of a Canadian business the revenue of which is generated from farming

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462 For details see Rose, supra, note 400, at 36, note 85.

463 Cp. Glover, New & Lacourcière, supra, note 13, at 92; Rose, supra, note 400, at 37, note 88.

carried out on the real property acquired in the same transaction.[463]

e) Notifiable Transactions

Regardless of size, the establishment of a new Canadian business by a foreigner is usually not reviewable[464], but requires only notification to Investment Canada.[465] The term business includes "any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit".[466] Accordingly, it does not matter that a venture is carried on at a loss if only it is capable of generating revenue and its purpose is profit-making.[467] A new Canadian business means a business that is not already carried on in Canada by the non-Canadian and

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463 Subsec. 10 (1) ICA.

464 An exception is only made in cases where the new investment is in an area of business activity prescribed by regulation to be related to Canada's cultural heritage or national identity. Cp. sec. 15 ICA. For details see infra, at 182 ff.

465 Subsec. 11 (a) ICA.

466 Sec. 3 ICA. This definition expands the definition of the term business which was contained in the Foreign Investment Act.

467 Rose, supra, note 400, at 27.

that is either unrelated to any other business being carried on in Canada by the non-Canadian, or is related to another business being carried on in Canada by the non-Canadian but falls within a prescribed specific type of business activity that is related to Canada's cultural heritage or national identity.[468]

The Minister has issued guidelines under section 38 of the Act which provide that an expansion of an existing business is not considered to be the establishment of a new business.[469] In addition, he has issued Related Business Guidelines which help non-Canadians to determine whether or not the new Canadian business is related to another business they carry on in Canada. These guidelines are similar to the Relatedness Guidelines issued under the Foreign Investment Review Act.[470]

Notification is also required in case a non-Canadian acquires control of a Canadian business in a manner which would normally make the transaction

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468 Sec. 3 ICA.

469 For details see Rose, supra, note 400, at 29.

470 Supra, at 104 ff. For details see Rose, ibid.

subject to review but where the investment does not reach the monetary thresholds.[471]

Where an investment is subject to notification, the non-Canadian is required to give notice to Investment Canada prior to or within thirty days after the implementation of the investment.[472] The content of the notice has been prescribed by regulation.[473]

Upon receipt of a complete notice, Investment Canada will send the non-Canadian a receipt certifying the date on which the complete notice was received by the agency and advising the non-Canadian that the investment is not reviewable, or, in case of an investment in a prescribed type of business activity related to Canada's cultural heritage or national identiy, that the investment is not subject to review unless the Governor in Council, within 21 days, issues an order for the review of the investment.[474] If no such order is issued within that

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471 Subsec. 11 (b) ICA. For details see infra, at 177 ff.

472 Sec. 12 ICA.

473 Glover, New & Lacourcière, supra, note 13, at 92.

474 Sec. 13 ICA.

period, the investment is not reviewable.[475] The advise concerning reviewability in the receipt depends upon the information contained in the notification being accurate. Where the notification contains false representations by the non-Canadian, the investment may be reviewed by the Minister.[476]

f) Reviewable Transactions

Since the new Act attempts to attract foreign investment capital into Canada, only acquisitions of significant Canadian businesses by non-Canadians and foreign investments which involve business activities prescribed by regulation to be related to Canada's cultural heritage or national identity are reviewable under the Investment Canada Act.[477]

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475 Para. 13 (3) (b) ICA.

476 Para. 13 (3) (a) ICA.

477 According to the Canadian Government, 90 percent of new foreign direct investments which would have needed cabinet approval under the Foreign Investment Review Act will not be subject to review under the Investment Canada Act. Coté, supra, note 8, at 279. It should, however, be noted that the ten percent of foreign investments still subject to review will comprise ninety percent of the transactional value of foreign investments in Canada. Cp. Glover, New & Lacourcière, supra, note 13, at 98.

i) Acquisition of Control of a Canadian Business

By virtue of section 14 of the Investment Canada Act, ministerial approval is required for certain direct and indirect acquisitions of control of a Canadian business. The major change from the Foreign Investment Review Act, beside the fact that the establishment of a new Canadian business is usually not reviewable, is the introduction of monetary thresholds which have to be reached by the acquisiton in order to make the investment reviewable. Under the previous Act, every acquisition of control of a Canadian business enterprise by a non-eligible person was reviewable.[478]

As to the term Canadian business, the Act provides that it means a business carried on in Canada that has (i) a place of business in Canada; (ii) an individual or individuals who are employed or self-employed in connection with the business; and (iii) assets in Canada used in carrying on the business.[479]

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478 Cp. supra, at 108.

479 Sec. 3 ICA.

The Act also provides that a Canadian business shall be deemed to be carried on in Canada "notwithstanding that it is carried on partly in Canada and partly in some other place."[480] The definition is expanded to a part of a Canadian business that is capable of being carried on as a separate business.[481] The factors which are relevant to determine whether or not a part of a Canadian business is capable of being carried on as a separate business are enumerated in an interpretation note, issued by the Minister under section 38 of the Act.[482]

Where control of a Canadian business is acquired through the acquisition of voting shares of a corporation carrying on the Canadian business and incorpo-

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480 Subsec. 31 (1) ICA.

481 Subsec. 31 (2) ICA.

482 These factors are :
- Does the part have accounting mechanisms, management, advertising, selling, purchasing, delivery, customers, or employees separate from the Canadian business?
- Are the operations of the part carried on under a separate licence, patent, or similar right?
- Are the assets of the part separate from the other business operations or is the part carried on in separate premises?
- Does the part provide services which are more than purely incidental or ancilliary to the main business?

Cp. Interpretation Note No. 2. See also Rose, supra, note 400, at 28.

rated in Canada, the investment is reviewable if the value of the assets of the corporation is $5 million or more.[483] The term assets includes tangible and intangible property of any value.[484] The manner in which the value of the assets is calculated is prescribed by the Regulations to the Investment Canada Act.[485] The calculation is based on the audited financial statements of the Canadian business for the fiscal year immediately preceding the implementation of the investment. Where no audited financial statements are available, the value of the assets is determined from unaudited statements, provided that they have been prepared in accordance with generally accepted accounting principles.[486]

The monetary threshold of $5 million applies also to the acquisition of voting interests of an entity that is either carrying on a Canadian business, or that controls, directly or indirectly, another entity

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483 Para. 14 (1) (a); 28 (1) (a); subsec. 14 (3) ICA.

484 Sec. 3 ICA.

485 SOR/85-116, sec. 3.

486 Cp. Glover, New & Lacourcière, supra, note 13, at 93 f.; Rose, supra, note 400, at 34.

carrying on the Canadian business.[487] Where control of a Canadian business is acquired through the acquisition of all or substantially all of the assets used in carrying on the Canadian business, the value of the assets acquired has also to be $5 million or more so as to make the investment reviewable.[488]

Where the acquisition of control of a Canadian business occurs by virtue of the acquisition of control, directly or indirectly, of a corporation incorporated elsewhere than in Canada that controls, directly or indirectly, an entity in Canada carrying on the Canadian business, and the value of the assets of the entity carrying on the Canadian business, and of all other entities in Canada, the control of which is acquired, amounts to less than fifty percent of the value of all entities which have been acquired in

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487 Para. 14 (1) (a); 28 (1) (b); subsec. 14 (3) ICA. With respect to the control of entities, where one entity controls another entity, it is deemed to control all entities controlled directly or indirectly by the other entity (para. 28 (2) (a) ICA). An entity controls another entity directly where the controlling entity owns a majority of the voting interests of the other entity, or, where the other entity is a corporation, the controlling entity owns less than a majority of the voting shares of the corporation but controls the corporation in fact through the ownership of one-third or more of its voting shares (para. 28 (2) (b) ICA).

488 Para. 14 (1) (a); 28 (1) (c); subsec. 14 (3) ICA.

the transaction, the investment is reviewable if the value of the entity carrying on the Canadian business, and of all other entities in Canada, is $50 million or more.[490] Where, however, the value of the assets of the entity carrying on the Canadian business, and of all other entities in Canada, the control of which is acquired, amounts to more than fifty percent of the value of all entities acquired in the transaction, the investment is reviewable if the value of the entity carrying on the Canadian business, and of all other entities in Canada, is $5 million or more.[491]

The Investment Canada Act contains rules by which one can determine whether or not the acquisition of voting interests of an entity amounts to the acquisition of control of a Canadian business. First, the Act provides that the acquisition of a majority of the voting interests of an entity or of the majority of the undivided ownership interests in the voting shares of a corporation is deemed to be the acquisi-

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490 Para. 14 (1) (c); subpara. 28 (1) (d) (ii); subsec. 14 (2) and (4) ICA.

491 Para. 14 (1) (c); subpara. 28 (1) (d) (ii); subsec. 14 (2) and (3) ICA. See also Rose, supra, note 400, at 34.

tion of control of the entity or corporation.[491] Accordingly, the acquisition of less than a majority of the voting interests of an entity other than a corporation is deemed not to be the acquisition of control of that entity.[492]

The acquisition of less than a majority but one-third or more of the voting shares of a corporation is presumed to be the acquisition of control of that corporation unless the non-Canadian can satisfy the Minister that the corporation is not controlled in fact through the ownership of these voting shares.[493] Correspondingly, the acquisition of less than one-third of the voting shares of a corporation is not deemed to constitute the aquisition of control of the corporation.[494]

Finally, it does not matter whether or not the acquisition of control is the result of a single

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491 Para. 28 (3) (a) ICA.

492 Para. 28 (3) (b) ICA.

493 Para. 28 (3) (c) ICA.

494 Para. 28 (3) (d) ICA.

transaction.[496] In case the acquisition of control of a Canadian business occurs as the result of more than one transaction, the non-Canadian is deemed to have acquired control at the time of the latest of these transactions.[497]

ii) Investment in a Type of Business Activity Related to Canada's Cultural Heritage or National Identity

Section 15 of the Investment Canada Act provides that an investment subject to notification that would not otherwise be reviewable under the Act is subject to review if "it falls within a prescribed specific type of business activity that, in the opinion of the Governor in Council, is related to Canada's cultural heritage or national identity" and the Governor in Council, on the recommendation of the Minister, considers it to be in the public interest to review the investment. Within 21 days after the notice was received by Investment Canada, the Governor in Council has to decide whether or not to issue an order for the review of the investment, and the agency has

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496 Subsec. 29 (1) ICA. For details see Rose, supra, note 400, at 35. As to the situation under the Foreign Investment Review Act cp. supra, at 101.

497 Subsec. 29 (2) ICA.

to send to the non-Canadian a notice for review.[497] Apparently, the discretion of the Canadian Cabinet is considerable and will again create uncertainty on part of foreign investors.[498]

To date, the only specific types of business activity prescribed to relate to Canada's cultural heritage or national identity are

- the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form;
- the distribution, sale or exhibition of film or video products;
- the production, distribution, sale or exhibition of audio or video music recordings; and
- the publication, distribution or sale of music in print or machine-readable form.[499]

To prevent that the Governor in Council changes the regulation concerning section 15 secretly, any regulation concerning section 15 has to be laid before each House of Parliament on any of the first

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497 Subsec. 15 (2) ICA.

498 Glover, New & Lacourcière, supra, note 13, at 93.

499 SOR/85-116, sec. 8. Cp. Rose, supra, note 400, at 35.

five days on which that House is sitting after they are made and shall not come into force before sixty days after they are made.[501]

g) The Review Process

Where the establishment of a new Canadian business or the acquisition of control of a Canadian business by a non-Canadian is subject to review under the Investment Canada Act, the non-Canadian has to file an application with the agency containing the information prescribed by regulation.[502] The applicant must submit financial and business information concerning his and the new or target Canadian business. Furthermore, the application must contain the proposed business plan for the new or target business.[503]

Unlike the Foreign Investment Review Act, the Investment Canada Act prohibits the implementation of

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501 Subsec. 35 (2) ICA. See also Rose, ibid.

502 Subsec. 17 (1) ICA. See also SOR/85-116, sec. 6. The information required depends on the kind of investment under review. For details see Rose, ibid., at 37.

503 Glover, New & Lacourcière, supra, note 13, at 94.

a reviewable investment before it has been allowed by the Minister.[504] An exception can be made where the Minister is satisfied that a delay in implementing the investment would result in undue hardship to the non-Canadian or would jeopardize the operation of the Canadian business that is the subject of the investment.[505] The acquisition of control of a Canadian business through the acquisition of a foreign corporation is also exempted from the requirement of review prior to the implementation as is an investment reviewable pursuant to section 15 of the Act.[506] In these cases, the application can be filed after the implementation of the investment.[507]

Obviously, the requirement to get approval before the investment is made causes problems for foreign investors. They have to make their offers conditional upon the satisfaction of the Minister that their investment is likely to be of net benefit to Canada. In many cases, non-Canadian investors will have to file an application without having sufficient infor-

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504 Subsec. 16 (1) ICA.

505 Para. 16 (2) (a) ICA.

506 Cp. subsec. 16 (2) ICA.

507 Cp. subsec. 17 (2) ICA.

mation about the Canadian business to properly complete the application.[508] To meet this problem, applications which contain reasons for the inability to provide all the information required will be dealt with as complete.[509]

Upon receipt of the application, Investment Canada reviews the application and sends either a receipt to the applicant certifying the date on which the complete application was received by the agency, or a notice specifying the information required to complete the application and requesting the non-Canadian to provide this information.[510] If no certification or notice is send to the applicant within 15 days after an application has been received by Investment Canada, the application is deemed to be complete as of the date the application was received by the agency.[511]

After the receipt has been sent to the non-Canadian, Investment Canada starts to review the invest-

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508 Rose, supra, note 400, at 38.

509 Cp. subsec. 18 (1) ICA.

510 Cp. Subsec. 18 (1) and (2) ICA.

511 Subsec. 18 (3) ICA.

ment. Like the Foreign Investment Review Agency[512], Investment Canada can contact the applicant and may enter into negotiations to obtain commitments relating to the criteria enumerated in section 20 of the Investment Canada Act.[513] The agency will also seek the opinions of other governmental departments and of the province or provinces likely to be significantly affected by the investment. There is no provision in the Investment Canada Act which allows the agency or the Minister to take into consideration any representation made by other parties, i.e. competitors or other potential acquirers.[514]

Investment Canada then has to refer to the Minister all the information received by the agency in the course or the review of the investment, including the information contained in the application, any information submitted by the vendor of the Canadian business, any written undertakings given by the applicant, and any representations submitted by a province

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512 Cp. supra, at 109 ff.

513 Rose, supra, note 400, at 41.

514 Cp. sec. 19; 23 ICA.

that is likely to be significantly affected by the investment.[515]

The Minister has forty-five days from the date of the certified receipt to review the investment and to determine whether or not the investment is likely to be of net benefit to Canada, taking into account the factors mentioned in section 20.[516] Where the Minister is satisfied that the proposed or actual investment is of net benefit to Canada, he has to send a notice to the applicant.[517] If the Minister does not send such a notice to the foreign investor within the forty-five day period, he is deemed to be satisfied that the investment is likely to be of net benefit to Canada.[518] Where the Minister is not in a position to complete the review of the investment within that period, he may send a notice to the non-Canadian. This notice triggers a further thirty day review period which can be extended if the applicant agrees to the extension.[519] Where this period has run out

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515 Cp. sec. 19 ICA.

516 Subsec.21 (1) ICA. As to the net benefit test see supra, at 166 ff.

517 ICA, ibid.

518 Subsec. 21 (2) ICA.

519 Subsec. 22 (1) ICA.

and the Minister has not send a notice to the applicant, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada.[520]

In case the Minister is not satisfied that the proposed or actual investment is likely to be of net benefit to Canada, he can send a notice to the applicant, advising the applicant of his right to make further representations and submit undertakings within thirty days from the date of the notice or within such further period as may be agreed on by the applicant and the Minister.[521] The investor may then make further representations and give undertakings to the Canadian Government relating to the investment.[522] On the expiration of the additional period, the Minister will consider the additional information and will then send a notice to the investor either stating that the Minister is satisfied that the investment is likely to be of net benefit to Canada, or confirming that the Minister is not satisfied.[523]

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520 Subsec. 22 (3) ICA.

521 Subsec. 23 (1) ICA.

522 Subsec. 23 (2) ICA.

523 Subsec. 23 (3) ICA.

In case the proposed investment is allowed by the Minister, the non-Canadian has to comply with any written undertaking given by him.[524] The agency can require information from time to time from the non-Canadian to determine whether or not the investment is carried out in accordance with the representations and the undertakings given.[525]

Where an investment is not allowed, the non-Canadian may not implement the investment; in case the investment has been implemented, he has to divest himself of control of the Canadian business.[526]

Finally, where the Minister has reason to believe that a non-Canadian fails to comply with the provisions of the Investment Canada Act or the Regulations, the Minister can send a demand to the non-Canadian requiring him to cease the contravention or to show that there is no contravention.[527] In case the non-Canadian fails to comply with this demand,

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524 Cp. para. 39 (1) (e) ICA.

525 Sec. 25 ICA.

526 Sec. 24 ICA.

527 Cp. sec. 39 ICA. For details see Glover, New & Lacourcière, supra, note 13, at 97.

the Minister may apply to a superior court for an order requiring the non-Canadian to comply.[528] The superior court has great discretion in the type of order it may issue.[529] The court may even impose a penalty not exeeding $10,000 for each day of non-compliance with the provisions of the Act.[530]

4. Criticism

The reactions which the Investment Canada Act set off differ depending on the general attitude of the commentator towards foreign investment review. Proponents of foreign investment review legislation suggested that the more liberal approach toward foreign direct investment fails to account for the adverse effects of significant and increasing levels of such investments and weakens Canada's ability to ensure that the foreign investment benefits not only the investor but also Canadians.[531] It was argued

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528 Subsec. 40 (1) ICA. See also Glover, New & Lacourcière, ibid.

529 Cp. subsec. 40 (2) ICA.

530 Para. 40 (2) (d) ICA.

531 For example, Herb Gray, liberal member of Parliament, made a comment to the effect that ICA would weaken Canada's ability to prevent economic dama-

that a review of only major new foreign investments in Canada fails to "catch minor investment proposals that may later turn into major investments".[532] New Democratic Party Member of Parliament Steven Langdon called small companies "sitting ducks", waiting for foreign take-overs.[533] Others suggested that after having been protected by the Foreign Investment Review Act for a number of years, many Canadian companies, for example in the computer software industry, are not yet competitive and need further

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ges from foreign investment. Cp. "Further Reaction to Investment Canada Bill", supra, note 147, B9-1-1.

532 P. R. Hayden, "FIRA Guessing Game" in Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition) 2171 at 2172. See also "New Regime for Foreign Investors in Canada", in Foreign Investment in Canada (Scarborough: Prentice-Hall, loose-leaf edition) 2203 at 2205: "The significant effect of the new regime on acquisitions may be to encourage promising but small high tech or manufacturing operations to sell all, or control of, their operations to cash-rich foreign investors." This concern is shared by the Science Council of Canada. It believes that small, technology-intensive enterprises will become easy targets for foreign buyers. Cp. "Science Council Urges Review of Technology Takeovers" in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition), Report Bulletin B-11-1.

533 "Further Reaction to Investment Canada Bill", supra, note 147, B9-1-1.

protection against foreign acquisition.[534] As one commentator stated: "[O]nce a country begins to regulate foreign investment, it can put itself into a position where it is very difficult to de-regulate it, because certain businesses ... may grow up to some extent relying on the protection provided by the review process."[535]

Others stated that the Foreign Investment Review Act had only made a "small start" toward the solution of the problems caused by the high level of foreign investment in Canada and opposed the liberalization of the screening procedure. Instead, they suggested to strengthen the Agency responsible for the administration of the foreign investment review legislation rather than weaken it.[536]

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534 Hayden, supra, note 532, at 2173. Other firms protected by the Foreign Investment Review Act were Canadian-owned distributors of foreign manufactured goods or business and personal consulting firms. Cp. "New Regime for Foreign Investors in Canada", supra, note 532, at 2203.

535 Hayden, supra, note 532, at 2173.

536 Cp. Hayden, supra, note 407, at 2170, quoting J. K. Logan, past deputy chairman of the Committee for an Independent Canada. See also Canadian Labour Congress, supra, note 60, at 25 ff.

Proponents of a free flow of capital welcomed the new legislation. As K. Dixon, President of the Canadian Importers' Association remarked: "Anything is an improvement over FIRA."[537] The Investment Canada Act is viewed to be "a significant positive change for foreign investors wishing to invest in Canada".[538] Other commentators are, however, more sceptical.[539] In fact, the only positive change which occured since 1984 is probably the change in the Canadian Government's attitude towards foreign investment in Canada. With respect to the legislation itself, Parliament missed an opportunity to go much further. Many of the problems created by the Foreign Investment Review Act are still in existence today.

First, the net benefit test is as broad as the significant benefit test. Despite a change in the wording, the standard has not changed materially. Allowing the Minister to take into consideration other than economic policies makes it probably even broader.[540] Like the Foreign Investment Review Act,

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537 "Further Reaction to Investment Canada Bill", supra, note 147, B9-1-1.

538 Rose, supra, note 400, at 44.

539 Glover, New & Lacourcière, supra, note 13, at 98.

540 Cp. supra, at 166 ff.

the new Act does not expressly prohibit that the Minister take into consideration third party interventions when assessing the investment proposal.[541] On the other hand, the Act expressly provides that the Minister may consult with representatives of industry and labour as well as provincial and local authorities and other interested persons in exercising his powers under the Act.[542] Thus, it may well be argued that the Act is "sufficiently broad to permit third party intervention in the review process".[543]

With respect to the exemption of certain investments from review, it is now much easier for many investors to invest in Canada. However, in view of the fact that the investments which are still subject to review comprise ninety percent of the transactional value of foreign investment in Canada,[544] the overall effect on the restoration of a free flow of capital is marginal. In addition, the reviewability of foreign investments in the cultural heritage and

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541 Cp. supra, at 147 f. and 187.

542 Para. 5 (2) (c) ICA.

543 Rose, supra, note 400, at 23, note 21.

544 Cp. supra, note 477.

national identity area is sufficiently vague so as to allow future Canadian Governments to make reviewable foreign investment in any particular industry.[545]

Finally, the Investment Canada Act has not abolished the extraterritorial application of Canadian foreign investment review law. The Act provides that subject to certain monetary thresholds the indirect acquisition of control of a Canadian business through the acquisition of control of a foreign corporation is reviewable.[546] A real danger exists that the tensions between Canada and her neighbor, the United States, will return once the Canadian Government's administration of the Act changes and the Minister or a superior court order a non-Canadian to divest himself of control of a Canadian business which has been acquired by virtue of a foreign take-over.

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545 "New Regime for Foreign Investors in Canada", supra, note 532, at 2205. Critical also P. R. Hayden, "Major Changes to Canada's Foreign Investment Rules", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) 2177.

546 For details see supra, at 179 f.

Part III: Alternatives to a General Screening Procedure

Chapter 6: The Basic Rationale of a Distinction between Foreign Investments and Domestic Investments

1. Economic Reasons for a Distinction between Foreign and Domestic Investments

Both the Foreign Investment Review Act and the Investment Canada Act try to provide economic benefits to Canada through the screening of foreign direct investment which otherwise would have been collected by the foreign investor. With respect to the Foreign Investment Review Act, Globerman has pointed out that the starting point of the Act was the hypothesis that some market imperfections existed in Canada which made possible "the entry and perpetuation of foreign investments that reduce the economic welfare of Canadians. Only to the extent that this hypothesis is valid will FIRA be able to improve the economic benefits for Canada from direct investment. That is, if all markets in Canada, including the market for corporate acquisitions, were efficient and competitive, the foreign takeover of

domestically owned firms ... would provide no opportunity for FIRA to increase the net domestic economic benefits of the takeover."[547] In other words, only to the extent that a foreign firm, in the case of a take-over, can realize a "rent" on domestic acquisitions, can a governmental agency increase the price of the acquisiton without discouraging the investment from taking place.[548]

The task to determine whether or not such a rent is realized by foreign investors is, however, not an easy one. An American economist wrote in 1969:

> "If my understanding of the process is valid, any simple model of the sort an economist is capable of producing is too naive to capture the critical long-term effects of [U.S. investment in Canada]. Estimates of that sort, as a number of recent studies in the United States and Britain have shown, involve an extraordinarily complex and involuted series of judgements, guesses and assumptions. If Americans had not invested in manufacturing facilities in Canada, would they have continued to export manufactured products to Canada? If Americans had not invested in raw materials in Canada, would they have invested elsewhere? What would the Canadians themselves have done in the absence of U.S. investment? Would Canadian skills have been lower because the opportunities for their application were less; or would Canadian skills have been greater because they

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547 Globerman, supra, note 129, at 65 f.

548 Ibid. at 66.

were not locked in and restrained by the inhibiting influence of U.S. corporate structures?"[549]

The quotation underlines the difficulties which occur when dealing with foreign investment control legislation. The result of the assessment depends on complex assumptions on how the domestic economy and international trade function which can hardly be proved.

Basically, economic integration tends towards the most efficient use of resources, to improved international relations; it provides economic opportunities otherwise not available. The Foreign Investment Review Agency claimed in its reports that its activities resulted in a number of considerable gains to the Canadian economy in terms of employment opportunities and Canadian participation in the management of foreign-controlled corporations. A closer examination revealed, however, that in many cases it was not easy to produce fact for this allegation. A negative impact of foreign investment on employment, research and development, competition or the balance of pay-

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549 R. Vernon, "U.S. Enterprise and the Canadian Economy" Canadian Forum (April 1969), quoted in Government of Ontario, supra, note 20, at 1.

ments was not as evident as often suggested.[550] In particular the proposition that the control of foreign direct investment in Canada created jobs which would not have been created without this form of regulation is open to question: In general, the performance of foreign-controlled firms does not differ significantly from that of Canadian-controlled firms.[551] Though the impact of foreign investment on competition in the Canadian economy is causing problems[552], foreign investment control legislation is not directly addressing the issue and has adverse effects on competition of its own.[553]

All this is not to say that the deficiencies of the Canadian economy, which induced the screening of foreign investment, do not exist. Yet, it is submitted that Canada's economic problems, like unem-

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550 Supra, at 32 ff.

551 This is the conclusion of A. E. Safarian, The Performance of Foreign-Owned Firms in Canada (Canadian-American Committee, 1969) at 5.

552 Cp., e.g., Government of Canada, supra, note 162, at 183 ff.

553 Cp. Hadden, Forbes & Simmonds, supra, note 16, at p. 41; J. D. Fleck, "The Royal Commission's Analysis of Direct Foreign Investment" in: Perspectives on the Royal Commission on Corporate Concentration, ed. by P. K. Gorecki & W. T. Stanbury (Toronto: Butterworths, 1979) 181 at p. 188.

ployment, the lack of research and development or the concentration of economic power, can hardly be solved by means of a general control of foreign investment. The review of foreign investment in all industrial sectors tends to increase the problems rather than solving them.[554] As H. I. Macdonald stated twenty years ago:

> "Since it is the tariff (the cause) rather than foreign investment (the effect) that has prevented the achievement of a national economic identity, the remedy is not to be found in the process of buying into foreign-owned firms. Rather, we should be adopting policies that will enable these firms to adapt themselves to the Canadian interest of greater specialization. The buying out of foreign firms (far less giving Canadians nominal participation) will not of itself meet our basic difficulties. Such a policy might well add to our troubles by producing two effects of an unwelcome kind. In the first place, while we were buying up the existing enterprises, foreign capital would likely find its way into the new and more profitable ventures. A more damaging possibility is that we might succeed only in discouraging foreign capital from coming to Canada, leaving ourselves without the capacity to finance our future economic development."[555]

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554 This proposition is confirmed by the fact that the Liberal Government, strongly supporting the idea that Canada should review foreign investment, increased the rate of approval during the recession of 1982.

555 Macdonald, supra, note 97, at 78 f. See also I. R. Feltham & W. R. Rauenbusch, Multinational Enterprises in Canada, Foreign-Owned Enterprises in Canada, paper prepared for the International Conference on Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects (Montreal: McGill University, 1971) at 6

2. Political Reasons for a Distinction between Foreign and Domestic Investments

Although most of the arguments brought forward in favour of the screening of foreign investment are economic, one has to bear in mind that the major reason for the introduction of foreign investment review in Canada was a feeling of discontent with the high level of foreign ownership in Canada. Many Canadians were concerned that Canada could lose her political independence due to foreign economic interests.[556] This concern created a very positive image of the Canadian entrepreneur. Quite frequently, Canadian economic nationalism supports the idea that Canadian companies are "virtuous do-gooders".[557] As Feltham and Rauenbusch have pointed out,

> "[t]he picture of "good guys" (Canadian resident owners of industry) going about their business day by day doing good works for Canada gives a comfor-

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ff. (published in H. R. Hahlo, J. G. Smith & R. W. Wright, editors, Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects (New York: Oceana, 1973) 39 at 43 ff).

556 Supra, at 56 ff.

557 McGregor, supra, note 76, at 78.

table sense of security. It implies a Canadian society with the characteristics of a small private club - one for all and all for one."[558]

The fact that the Canadian owner of a private enterprise resides in Canada leads to the assumption that he can be influenced more easily. Yet, in view of Canadian experiences the notion that economic benefits are provided by a company simply because it is Canadian-owned is a fallacy.[559] It has to be remembered that Canadian-controlled firms show increasing efforts to use investment opportunities were they see the best return on capital. Very often, they invest elsewhere than in Canada.[560] Their behavior challenges the assumption that Canadian investors will be better for Canada than foreign investors and shows that Canadian ownership cannot be a sufficient

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558 Feltham & Rauenbusch, supra, note 555, at 29 (paper); 49 (Hahlo, Smith & Wright).

559 McGregor, ibid., gives an interesting case study. Cp. also supra, at 43.

560 A study published in 1985 by the International Business Council of Canada has pointed out that in order to surmount foreign trade barriers, Canadian corporations aquire substantial interest in other countries. Cp. "Study Shows Canadian Corporations Acquiring Substantial Interest Abroad", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition), Report Bulletin B13-7.

end by itself.[561] As Feltham and Rauenbusch have stated:

> "A high level of Canadian ownership and control will not likely produce such a cozy atmosphere even among those in positions of ownership and control, let alone have any directly felt effect on the lot ot the mass of people who are employed in industry and who exercise little direct comprehensive influence on the organization, whoever owns it."[562]

This statement is all the more correct considering the structure of mature economies. Many commentators doubt that the basic rationale underlying Canadian company law - shareholders controlling management- is still valid.[563] In fact, in large publicly held corporations, quite frequently no single shareholder holds enough shares to gain a dominant influence on

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561 P. R. Hayden, "Reflections on Foreign Investment Regulation in Canada", in Foreign Investment in Canada, ed. by P. R. Hayden, J. H. Burns & G. W. Kaufman (Scarborough: Prentice-Hall, loose-leaf edition) 2167.

562 Feltham & Rauenbusch, supra, note 555, at 29 (paper), 49 (Hahlo, Smith & Wright).

563 Cp. J. K. Galbraith, The New Industrial State (Boston: Houghton Mifflin, 1967), ch. VII; Berle & Means, The Modern Corporation and Private Property, 2nd edition (New York: Macmillan, 1969); M. Eisenberg, "Corporate Legitimacy, Conduct and Governance - Two Models of the Corporation" (1983-84) 17 Creighton L.R. 1 at 14 f. See also T. Hadden, Company Law and Capitalism, 2nd edition (London: Weidenfeld & Nicolson, 1977) at 425 f.

the corporate affairs. A widely dispersed stock makes it difficult if not impossible for the shareholders' meeting to act as an effective control of management.[564] Voting by proxy and bankers' depository vote further increase the power of those who run the business.[565] The separation of ownership and control in large publicly held companies became commonplace.[566] More and more shares being held by mutual funds, investment and insurance companies, and banks, the gap between ownership and control is still

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564 B. Grossfeld, "Management and Control of Marketable Share Companies", in International Encyclopedia of Comparative Law, Vol. XIII (Business and Private Organizations), chief editor A. Conard (Tuebingen: Mohr, 1972) 4; Hadden, ibid., at 426; Bonanno, "Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States" (1976-77) 14 Har. J. Leg. 947 at 948.

565 Grossfeld, ibid., at 4; Hadden, Forbes & Simmonds, supra, note 16, at 200.

566 Berle & Means, supra, note 563, were the first to make the public aware of the fact. However, as Grossfeld, ibid., at 4, points out, the separation of ownership and control is not a distinguishing feature of North American companies in the 20th century but a characteristic of developed capitalistic economies. See, on the other hand, the study by M. Eisenberg, The Structure of the Corporation: A Legal Analysis (Boston: Little Brown, 1976) at 64 ff. It concludes that even in large corporations a number of shareholders is in a position to exercise effective control over the board of directors. See also Hadden, Forbes & Simmonds, supra, note 16, at 285.

widening.[567] Given the separation of ownership and control, it is in many cases not easy to see the political advantage of Canadian instead of foreign ownership.[568] At least, to concentrate on ownership instead of defining a set of principles to improve Canadian industrial organization seems to be misleading.[569]

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567 Grossfeld, ibid., at 5. Thus, I. Macneil, The New Social Contract (New Haven: Yale University Press, 1980) at 78 ff. stated that business today is conducted by agents without principals.

568 Cp. Feltham & Rauenbusch, supra, note 555, at 27 (paper), 47 f. (Hahlo, Smith & Wright): "Many of the problems attributed to the [multinational enterprise] and foreign ownership are really part of a much wider problem. It is often said that Canada is losing her identity and culture and that foreign, particularly American, ownership is responsible. To be sure, we do have problems on that score, but it is not correct to blame foreign ownership for them. The owners of the mature corporation ... exercise little control over the technostructure; the autonomy of the technostructure is nearly complete. Can it be said that if General Motors sold all their shares in the Canadian operation to the Canadian public, the technostructure would not find it necessary to engage in the same kind of planning as it has done so far? Or that the motivations would be any different? Is the motivation of the technostructure of General Motors of Canada any different from that of the technostructure of Massay-Ferguson or Stelco? Ownership is not the proper focus of attention; it is the power of the technostructure. If we are concerned about such things as our culture, the quality of life and the like, we will have to approach them on a far broader front than simply tinkering with ownership requirements."

569 Feltham & Rauenbusch, ibid., at 31 (paper), 50 (Hahlo, Smith & Wright).

This analysis does not exclude that certain sectors of the Canadian economy are in fact sensitive to foreign direct investment. It is, however, submitted that in view of the economic benefits which result from foreign investment, legislators should be careful not to extend this concept. In order to determine which sectors should be regarded as sensitive, the basic question should be: "What difference does it make whether a given plant or resource is foreign- or domestic-controlled?"[570] To answer the question, a clear statement as to those sectors where the economic benefits of foreign capital participation are outweighed by non-economic drawbacks is necessary. Legislators are facing a problem of selection.

The concept is familiar to Canada, since the so-called "key sector approach" had been used long before the Foreign Investment Review Act became effective.[571] In fact, there are a number of sectors where it is widely accepted internationally that ownership and control should be restricted to nationals of the host country. Of prime importance in our

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570 Hinton, supra, note 58, at 36.

571 See supra, at 19.

context is the defense sector. Probably all nations regard domestic control of strategic industries as imperative.[572] Other sectors, like financial institutions, energy or farming could also be mentioned. Finally, the cultural sector may also be put into this category.

However, since it is the performance of a firm and not the ownership that is most important and which should concern governments, Canada's interest will probably be served best if in most cases foreign investors are accorded treatment not different from that accorded domestic enterprises.[573] Hayden has pointed out that the arguments in favour of foreign investment control involve "a confusion between the ideal world and the real world":

> "[I]n the real world it is not usually a matter of choosing between having Canadians or foreigners make certain investments in Canada; the choice is more likely to be whether certain investments are made by foreign capital or not made at all."[574]

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572 Government of Canada, supra, note 52, at 335; P. Le Fèvre, Regulation of Foreign Investment in the United States of America, LL.M. thesis (Montreal: McGill University, 1982) at 12; Hinton, supra, note 58, at 36 f.

573 This was also suggested by Richard J. Smith, then Minister at the embassy of the United States in Ottawa. Spence, supra, note 63, at 337.

574 Hayden, supra, note 561, at 2168.

Chapter 7: Alternatives to a General Screening Procedure

It has been shown that the ostensible premise of both the Foreign Investment Review Act and the Investment Canada Act - i.e., to achieve an efficient and competitive Canadian economy by reviewing certain foreign direct investments - is at least open to question. The case has been made that the general screening of foreign investment imposes net economic costs on Canada. Thus, alternative ways to achieve the economic goals of foreign investment review will be examined.

1. Key Sector Legislation

Although the complete elimination of all forms of foreign investment control would have some merit on purely economic grounds, it is unlikely that Parliament will completely give up the principle of having a screening mechanism for foreign investments in Canada.[575] Foreign investment review law in Canada is to a large extent politically motivated. Many Canadians are concerned that their country might

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575 Cp. Barrett, Beckman & McDowall, supra, note 14, at 80.

lose political independence due to the process of economic integration.[576] The control of foreign investments in Canada is frequently considered to be a protective barrier which enables Canadian firms to use investment opportunities which otherwise would have been used by foreigners.

In the light of this political concern, it would be unrealistic to opt in favor of the complete abolition of foreign investment control legislation. Canadian ownership and management in certain areas is probably required by "overall national satisfaction."[577] However, the scope of the foreign investment review process could probably be restricted to sensitive areas of economic activity.[577a] This

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576 Cf. supra, at 58 ff.

577 Feltham & Rauenbusch, supra, note 555, at 30 (paper), 50 (Hahlo, Smith & Wright).

577 a Other countries also follow this approach. In Spain, foreign investors are not permitted to invest in a number of industry sectors, such as national defence and private security services, public information agencies, newspapers and publishing, film production and broadcasting, the exploitation of mercury mines, and water for public consumption. In the air transport, shipping, oil refining, mining and public utilities sectors, the foreign investor does not require authorization provided that his investment does not reach certain threshold figures. In Portugal, the foreign investment promotion program provides a variety of fiscal and financial incentives to foreign investors.

approach would limit the economic drawbacks which result from barriers to the free flow of capital; it would minimize the costs of foreign investment control.

In this context it must be remembered that entry into many Canadian industries is already restricted by federal and provincial laws. For example, there are certain limits on the degree and type of foreign participation in banking, broadcasting, farming, securities and trust companies, to name a few.[578] The review of foreign investment in areas of business activity related to Canada's cultural heritage and national identity under the Investment Canada Act also follows this concept.[579]

There are a number of economic reasons which make the key sector approach a more appropriate solution. First of all, it forces Parliament to consider the

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However, foreign direct investment is not permitted in banking, insurance, public services and armaments. For details see P. F. R. Artisien & P. J. Buckley, "Investment Legislation in Greece, Portugal and Spain" (1983) 17 J.W.T.L. 513 at 517 ff.

578 For details see Donaldson, supra, note 49, at 550 ff.

579 Cp. supra, at 182 ff.

economic benefits of foreign investment and enables the legislator to determine whether or not these benefits are outweighed by non-economic drawbacks.[580] Although the definition of a sensitive sector has varied over the years and will probably still change in the future, the concepts of cultural sovereignty and national strategic importance can be the guidelines for the definition of sensitive sectors.[581] In addition, the creation of a barrier to the free flow of capital implies in certain cases that there is some form of inefficiency in the Canadian industry concerned. The key sector approach would make the Canadian public aware of these inefficiencies; it would probably help to establish a more positive policy to overcome this inefficiency and make the industry internationally competitive in the long run.[582] Finally, the key sector approach would satisfy the desire of foreign investors "to operate

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580 Cp. Feltham & Rauenbusch, supra, note 555, at 35 (paper), 52 (Hahlo, Smith & Wright): "If there are some aspects of the operations of foreign interests that are detrimental to the Canadian public interest, then let us identify those aspects and regulate them appropriately."

581 Barrett, Beckman & McDowall, supra, note 14, at 85. See also supra, at 207 f.

582 See also the discussion of this problem by Feltham & Rauenbusch, supra, note 555, at 32 (paper), 50 f. (Hahlo, Smith & Wright).

in a clear and consistent policy environment" and, thus, would not act as a deterrent.[583]

2. Definition of a Canadian National Economic and Industrial Policy

Beside the review of foreign investments in sensitive sectors of the Canadian economy, foreign investors should be free to invest in Canada. For countries which economically depend upon a free flow of goods and capital, restrictions on foreign direct investment are more dangerous than any ill-defined danger of alienation. Instead of creating barriers to the free flow of capital, Parliament could elaborate efficient rules to bring all enterprises (Canadian and non-Canadian) into line with domestic policy.[584]

This, however, requires a Canadian economic and industrial policy. Fifteen years ago, Feltham and

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583 Barrett, Beckman & McDowall, supra, note 14, at 85 f. The authors point out, however, that political pressure might lead to an expansion of the list of sensitive sectors, thereby again creating uncertainty on part of foreign investors as to whether their investments are reviewable or not. Ibid.

584 From a European point of view, this is also suggested by Behrens, supra, note 101, at 268.

Rauenbusch have pointed out that Canadians "need first of all a definition of national policy, of national goals and norms of behaviour and predict the effect of foreign ownership and of the [multinational enterprise]".[585] Basically, this statement appears still to be valid. Although the Foreign Investment Review Act, the National Energy Program and the Investment Canada Act were attempts to develop such a Canadian economic policy, they all focused on the impact of foreign participation, thus leaving aside the more fundamental regulatory problems. The economic problems which led to the introduction of foreign investment review legislation in Canada are familiar to all developed countries and have only little to do with the high level of foreign ownership in Canada. Indirect control of foreign-owned businesses through general economic laws promises to be more effective than screening foreign investment in every sector of the domestic economy. The behaviour of foreign-controlled enterprises can be influenced

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585 Feltham & Rauenbusch, supra, note 555, at 28 (paper), 49 (Hahlo, Smith & Wright). Cp. also Cole, supra, note 239, at 333 f.: "Canada has never clearly enunciated its industrial and economic policy either at the federal or provincial level."

by these laws to a large extent.[586] A more systematic use - based on stated policy - of the traditional tools of controlling the business environment (tax law, tariffs, competition law, monetary policy) could achieve the economic goals now pursued by foreign investment review law.

Consequently, it is suggested that laws of general application should be used by which a certain performance would be required from all firms doing business in Canada. Provided that foreign investors adhered to the laws of Canada, they would be free to invest here; no further government intervention would be necessary.

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586 Behrens, supra, note 101, at 268. Cp. also W. O. Twaits, "Imperial Oil Says ..." in Foreign Ownership: Villain or Scapegoat?, ed. by T. E. Reid (Toronto: Holt, Rinehart & Winston, 1972) 37 at 40: "I realize that ... there are people who reject even economic gains as a justification for loss of sovereignty. These people complain of alleged foreign decision-making powers, of American personnel in top jobs and of the sinister implications of imported technology. There is one thing wrong with all this. By trying to cast the American investor as some sort of nationalistic agent blind to his own economic gains, it defies the whole purpose of foreign investment. Indeed many studies have shown that the decisions of American-owned businesses in Canada are and must inevitably be based on Canadian economics under Canadian law and regulation." (emphasis added)

Some of the possible measures will be discussed in the following.

a) Strengthening of Corporate Disclosure Provisions

The rules for corporate disclosure could be strengthened so as to allow Canadian shareholders and employees of a corporation as well as the Canadian public to control the performance of a company and to determine whether or not the corporation is meeting its responsibilities.[587]

Currently, there is a substantial difference between public and private companies with respect to continuous and transactional disclosure requirements.[588] Even where continuous disclosure of substantial information is required, it is in practice primarily a matter of the company to decide what is to be included and how it is presented.[589] As to the content, financial statements have to be prepared in accordance with the standards as prescribed from time

587 This opinion is shared by the Canadian Labour Congress, supra, note 60, at 28.

588 For details see Hadden, Forbes & Simmonds, supra, note 16, at 274 f.

589 Cp. the vague wording of sec. 149 Canada Business Corporations Act, 1984 (CBCA).

to time by the Canadian Institute of Chartered Accountants in the Institute's Handbook.[590] However, there is a wide range of matters on which there are different accepted methods of presenting the same data.[591] No statutory provision exists which would enumerate the information to be contained in the financial statements of corporations so as to promote uniformity and to make the statements of all corporations comparable.[592] Shareholders or prospective shareholders are not given the right to ask for further information on particular points.[593]

In addition, subsidiary corporations are exempted from the financial disclosure provisions of the Canada Business Corporations Act if the financial

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590 Cp. sec. 44 Canada Business Corporations Regulations.

591 Hadden, Forbes & Simmonds, supra, note 16, at 448.

592 Even in the European Economic Community, the comparability of financial statements of companies in all member states has partly been achieved. Directives of the Commission of the European Communities on accounting prescribe the content of financial statements. Under the Treaty, member states are bound to transform the provisions into national law. Cp., for example, the German law on accounting, sec. 238-339 of the German Commercial Code.

593 Hadden, Forbes & Simmonds, supra, note 16, at 275.

statements of the holding corporation are in consolidated or combined form.[594]

A reform of the corporate disclosure provisions of the Canadian Business Corporations Act would allow the general public to get the information necessary in dealing with a company. With respect to foreign-controlled firms, better information about their performance would probably remove public concern that their activities are to the detriment of Canada. All corporations in Canada being subject to the same disclosure provisions, no harmful effects of the upgraded disclosure provisions on competition or collective bargaining are foreseeable.[595]

b) Competition Law

A major reason for the screening of foreign investment was and still is the potentially adverse

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594 Subsec. 154 (5) CBCA.

595 For a discussion of the problems see Hadden, Forbes & Simmonds, supra, note 16, at 450. See also the recommendations of the Canadian Labour Congress, supra, note 60, at 28.

effect of foreign investment on competition.[596] It has already been suggested that the review of foreign investment is not a very effective way to monitor competition in Canada.[597] Concentration of economic power should be addressed in a direct manner, not indirectly through foreign investment review law. Until recently there was, however, reason to doubt that the Canadian Combines Investigation Act (CIA)[598] could fulfill this task.

Historically, Canadian competition law has been primarily criminal in character.[599] It was only in 1976 that the Combines Investigation Act was amended to enable private litigants who had sustained loss or damage as a consequence of a violation of the criminal provisions of the Act to recover civil damages. In addition, a number of trade practices[600] not in

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596 Cp. supra, at 51 ff. See also para. 2 (2) (d) FIRA; subsec. 20 (d) ICA.

597 Supra, at 52 f.

598 S. C. 1970, c. 23, as am. S. C. 1974-75-76, c. 10, c. 76 and S. C. 1976-77, c. 28.

599 As to the history of the Combines Investigation Act see Bakken, supra, note 58, at 999 f.; J. T. Kennish, "Competition Law and Enforcement in Canada" (1986) 20 Int'l Lawyer 81 at 90.

600 Such as abuse of industrial property rights, refusal to deal, consignment selling, exclusive dealing, market restriction tied selling, imple-

themselves criminal offences were reviewable by the Restrictive Trade Practices Commission. The Commission could prohibit or make other orders relating to these practices.[601]

However, the creation of civil jurisdiction in the field of competition law by the federal Government was frequently considered to be beyond the federal Governments constitutional authority.[602] The Combines Investigation Act was upheld by the courts only as a valid exercise of the criminal law power vested in the federal Government by the British North America Act.[603] This constitutional law basis was considered to be much too narrow.[604]

For example, due to its criminal law basis, the Combines Investigation Act made it an offence for one or more persons to acquire, "whether by purchase or

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mentation of foreign judgements and orders and foreign laws and directives, and refusal to supply by a foreign supplier. Cp. Kennish, ibid., at 85.

601 Kennish, ibid., at 86.

602 For details see Kennish, ibid.

603 Art. 91, para. 27 British North America Act.

604 Bakken, supra, note 58, at 1000; Kennish, supra, note 599, at 91.

lease of shares or assets or otherwise ... any control over or interest in the whole or part of the business" of any person, whereby competition was or was likely to be lessened to the detriment or against the interest of the public.[605] Similar to this merger provision, it was a criminal offence for anyone to be a party or privy to, or to the formation of, a monopoly.[606] The term monopoly was defined to mean a "situation where one or more persons either substantially or completely control ... the class or species of business in which they are engaged and have operated such business or are likely to operate it to the detriment or against the interest of the public".[607] Because penalties were involved, the standard of proof required for combines offences was the criminal law standard of proof beyond a reasonable doubt. As a result, enforcement of these provisions of the Combines Investigation Act was very difficult.[608]

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605 Cp. sec. 33; 2 CIA.

606 Sec. 33 CIA.

607 Cp. sec. 2 CIA.

608 Kennish, supra, note 599, at 87, 91 and 103.

The lack of clear authority on the part of the Canadian Government to legislate in the area of antitrust law on other than a criminal law basis hindered the development of Canadian competition law and the enforcement of the existing rules.[609] Nevertheless, the case can be made that the regulation of competition is a general regulation of trade and commerce throughout Canada for the benefits of Canadians, thus being within the authority of the federal Government.[610] Consequently, on December 17, 1985, the Minister of Consumer and Corporate Affairs introduced Bill C-91[611] into the House of Commons.[612] It was assented to on June 17, 1986, and entered into force on July 1, 1986.[613]

Already the new name of the Combines Investigation Act indicates that the new legislation has brought about a number of significant changes: The short

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609 Kennish, ibid., at 91.

610 Cp. Art. 91, para. 2 British North America Act. For a thorough discussion of this issue see Kennish, ibid., at 90 ff.

611 An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof.

612 As to the reform see Kennish, supra, note 599, at 100 ff.

613 S.C. 1986, c. 26.

title Combines Investigation Act has been repealed and the short title Competition Act (CA) has been substituted therefor.[614] The purpose of the Competition Act is

> "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[615]

The Competition Tribunal has been established by the Competition Tribunal Act (CTA).[616] The Tribunal consists of not more than four judges of the Federal Court - Trial Division and not more than eight other members all to be appointed by the Governor in Council on the recommendation of the Minister of Consumer and Corporate Affairs.[617] The Tribunal has jurisdiction to hear and determine applications made under Part VII of the Competition Act by the Director of

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614 Sec. 19 of the Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof, S.C. 1986, c. 26.

615 Sec. 1.1 CA.

616 Cp. subsec. 3 (1) CTA, S.C. 1986, c. 26.

617 Cp. subsec. 3 (2) CTA.

Investigation and Research.[618] Part VII of the Competition Act makes a number of significant competition policy issues, such as refusal to deal[619], consignment selling[620], exclusive dealing, tied selling and market restriction[621], and delivered pricing[622], reviewable by the Tribunal. In addition, abuse of dominant position and mergers are also subject to review by the Tribunal.[623] Since the criminal law standard of proof beyond a reasonable doubt no longer applies to merger and monopoly cases, it will probably be much easier for the tribunal to prohibit these practices.

Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that grounds exist for the making of an order by the tribunal, or that a person has contravened or failed to comply with an order made pursuant to the Competition Act, or that an offence has been or is

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618 Subsec. 8 (1) CTA. The Director is appointed by the Governor in Council, subsec. 5 (1) CA.

619 Sec. 47 CA.

620 Sec. 48 CA.

621 Sec. 49 CA.

622 Sec. 52 - 53 CA.

623 Cp. sec. 50 - 51; 63 - 75 CA.

about to be committed, may apply to the Director of Investigation and Research for an inquiry into such matter.[624] The Director also has to cause an inquiry whenever he has reason to believe that any of the aforementioned circumstances exists or whenever he is directed by the Minster of Consumer and Corporate Affairs to cause an inquiry.[625]

Beside the matters reviewable by the Competition Tribunal, a number of practices in relation to competition are still offences under the Competition Act.[626] Moreover, any person who contravenes or fails to comply with an order of the Tribunal under Part VII of the Act is guilty of an offence.[627]

Although the Competition Act retains the distinction between criminal offences and competition matters to be reviewed according to a civil standard, it will be much easier to achieve the purposes of the Act and to give effect to its provisions. However, Canadian competition law could become even more

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624 Sec. 7 CA.

625 Para. 8 (1) (b); (c) CA.

626 Cp. Part V of the Competition Act.

627 Cp. sec. 46.1 CA.

effective if Parliament were to amend subsections 54 and 55 of the Competition Act. Currently, a foreign parent company is not allowed to implement a foreign judgement, decree, order or other process in Canada, or to give effect to a law in force in a country other than Canada, if this would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve such efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages.

According to Samuel Wex, the Competition Act could be widened to prohibit all foreign directives that would have either of the aforementioned effects.[628] Such an amendment would increase the autonomy of subsidiaries of foreign parents in Canada.

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628 Cp. Wex, supra, note 118, at 57. It should be mentioned that the author refers to section 31.6 of the Combines Investigation Act which was repealed in 1986.

In the light of the new provisions of the Competition Act and the Competition Tribunal Act, it is fair to say that Canadian competition law is gaining considerable momentum. The reform of Canadian competition law has given Canadians a more effective tool for dealing with antitrust cases. This being so, foreign investment review law is no longer necessary to deal with the effect of foreign investments on competition in Canada.[629]

c) Protection of Subsidiary Autonomy

The Canadian Business Corporations Act contains only few provisions which regulate the structure and internal management of corporate groups: It provides for the preparation of consolidated financial statements[630] and contains provisions concerning interlocking shareholdings.[631] Beside this, the concept of a group remains essentially economic and has no

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629 Wex, ibid., at 27 ff.

630 Cp. sec. 151 CBCA. For details see Hadden, Forbes & Simmonds, supra, note 16, at 627 f.

631 Cp. sec. 30 ff. CBCA. For details see Hadden, Forbes & Simmonds, ibid., at 625 f.

strict counterpart in company law.[632] Under the Canada Business Corporations Act, each corporation is still regarded as an independent legal entity; no distinction is made between a functionally independent company and a company that is part of a larger corporate group.[633] Only on occasion have the courts disregarded the corporate veil in situations involving parent-subsidiary relationship.[634]

Yet, the emergence of corporate groups, whereby a number of legally independent corporations are linked together in various ways in a hierarchical relationship under the common control of a parent or holding corporation[635] may not only be dangerous for competition, but also for investors and creditors.[636] These dangers result from the fact that the holding

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632 Cp. N. C. Sargent, "Beyond the Legal Entity Doctrine: Parent - Subsidiary Relations under the West German Konzernrecht" (1985) 10 Can. Bus. L. J. 327 at 327 f.

633 Sargent, ibid., at 329; Hadden, Forbes & Simmonds, supra, note 16, at 633.

634 As to examples see Sargent, ibid., at 329, note 5.

635 The most advanced form of the corporate group is the transnational enterprise. Cp. Sargent, ibid., at 327.

636 N. Horn, H. Kötz & H. G. Leser, German Private and Commercial Law, translated by T. Weir (Oxford: Clarendon Press, 1982) at 272.

company can influence the decision-making of the subsidiary in a way so as to make the legally independent corporation factual dependent on the holding corporation.[637] This dependence can harm the interests of minority shareholders and of creditors of the subsidiary.[638]

In Canada, the lack of a legal regime to cover corporate groups is particularly troublesome, given the fact that corporate groups are the dominant form of business organization in Canada[639] and that a large number of subsidiaries have foreign parent companies. It has been shown that one of the reasons for the introduction of the Foreign Investment Review Act was the fact that many decisions which affect Canadian economic life are made abroad.[640] The improvement of the autonomy of Canadian subsidiaries could be a response to the problem of foreign domination.

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637 Horn, Kötz & Leser, ibid.

638 Hadden, Forbes & Simmonds, supra, note 16, at 621 ff.

639 Government of Canada, supra, note 162, at 13 f.; Hadden, Forbes & Simmonds, ibid., at 619.

640 Cp. supra, at 34 and 58 ff.

Presently, minority shareholder disputes and disputes between creditors and subsidiary are viewed within an individual corporate framework. No distinction is made between a factual independent corporation and a dependent subsidiary. In law, the directors of a corporation, even if it is a wholly-owned subsidiary, owe a primary duty of loyalty to the corporation and may not act to the detriment of the company.[641] They are not allowed to follow a direction of the parent corporation if this would result in a breach of their fiduciary duties to the subsidiary.[642] Correspondingly, the directors of the holding corporation owe no fiduciary duties to the subsidiary.[643] They are usually not accountable to minority shareholders of the subsidiary.[644] Every corporation remains fully responsible for its own debts and liabilities; in the absence of fraud or misappropriation of the assets of the subsidiary, creditors of the subsidiary have normally no recourse against the

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641 Hadden, Forbes & Simmonds, supra, note 16, at 633; Sargent, supra, note 632, at 329.

642 Sargent, ibid.

643 Sargent, ibid., at 329 f.

644 There is, however, a duty on the part of the holding company not to use its power of control unfairly. For details see Hadden, Forbes & Simmonds, supra, note 16, at 636.

assets of the parent company, even where the group as a whole remains fully solvent.[645]

This legal situation is not satisfying. Rules which are based on the fiction that each subsidiary of a holding corporation is a separate and independent entity are not in accordance with the facts. It appears to be necessary to increase the autonomy of subsidiaries under Canadian law so as to allow them to act more independently from their parents. In particular, there is a need to clarify the rights and duties of directors in the holding company and in the subsidiary and to give better protection to minority shareholders and creditors. The introduction into Canadian company law of a set of rules covering associated enterprises and corporate groups could use West German experience.[646]

The West German Joint Stock Companies Act, 1965, recognizes that a parent does not have the absolute right to direct the activities of its subsidiary

645 Sargent, supra, note 632, at 330; Hadden, Forbes & Simmonds, ibid., at 639.

646 For a detailed analysis of the West German "Konzernrecht" (law of associated enterprises and groups) see Horn, Kötz & Leser, supra, note 636, at 272 ff.; Sargent, ibid., at 331 ff.; Hadden, Forbes & Simmonds, ibid., at 642 ff.

unless there is a contract of domination or profit-channelling.[647] In case of de facto control, where a corporation by reason of a majority shareholding or otherwise actually exercises its power so as to promote a unitary business policy, a transaction is rendered illegal which is disadvantageous to the dependent corporation, unless compensation is provided. Where compensation has not been provided by the end of the business year, the dependent corporation may sue the dominant corporation and its statutory agents for damages. The claim can be brought on the dependent company's behalf by its creditors and shareholders.[648]

Where there is a control contract, the holding corporation may influence the business of the subsidiary.[649] The parent assumes, however, obligations relating to the subsidiary as well as to the minority shareholders and the creditors of the subsidiary. First, the controlling enterprise must compensate the dependent enterprise for any loss sustained in the

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647 As to the definition of these contracts cp. sec. 291 of the Joint Stock Companies Act, 1965.

648 Sec. 311; 312; 317; subsec. 309 (4) Joint Stock Companies Act, 1965.

649 Sec. 308 Joint Stock Companies Act, 1965.

business year.[650] In addition, the statutory representatives of the controlling corporation are liable to a suit for damages by the subsidiary where they have breached their duty to give reasonable and careful instructions.[651] Again, the claim can also be brought on the dependent company's behalf by the minority shareholders and the creditors.[652]

Finally, the contracts must provide for a fair annual compensatory payment to minority shareholders.[653] They must also fix a fair purchase price for the shares of minority shareholders in case they want to leave the controlled coporation. The fairness of the purchase price offered by the contract is subject to judicial control.[654]

The introduction of a similar set of rules into Canadian company law would strengthen the autonomy of

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650 Sec. 302 Joint Stock Companies Act, 1965.

651 Subsec. 309 (1) and (2) Joint Stock Companies Act, 1965.

652 Subsec. 309 (4) Joint Stock Companies Act, 1965.

653 Sec. 304 Joint Stock Companies Act, 1965.

654 Sec. 305, 306; subsec. 304 (4) and (5) Joint Stock Companies Act, 1965.

Canadian subsidiaries of foreign corporation.[655] In addition, it would also offer better protection to minority shareholders of subsidiaries of Canadian-controlled enterprises.

d) Codetermination

There is no provision in Canadian company law for any mandatory form of employee representation or participation in the affairs of their company.[656] According to Canadian company law, the directors of a company are in day-to-day control of its affairs. They are ultimately accountable only to their shareholders. The supporters of the traditional legislative concept point out that the shareholders have invested money in the company and, ultimately, own it. Their interest is considered to be the primary objective for those who actually run the business. Conse-

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655 Cp. also Wex, supra, note 118, at 54, who also suggests that the parent's right to make decisions for its subsidiaries should be limited by adopting the general principle that the law should recognize an autonomous subsidiary interest.

656 Hadden, Forbes & Simmonds, supra, note 16, at 291.

quently, also the ultimate right to control the management should be vested in the shareholders.[657]

Although this is probably still the prevailing opinion among Canadian corporate lawyers, other models of the corporation have attracted considerable attention. With the emergence of large corporate entities the question how to control their far-reaching economic and political powers arose.[658] The critics of the traditional concept point out that nearly every decision of a large corporation, whether it concerned plant location, levels of production, wages, dividends, or prices for the goods produced, has a strong impact not only on employees, shareholders, and consumers, but also on "the economic and social well-being of the society at large".[659] The way in which the management of large companies is to be controlled became a matter of overwhelming economic and political significance and given rise to an intensive discussion of corporate legitimacy and

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657 For details see Hadden, Forbes & Simmonds, ibid., at 285.

658 There was an intensive discussion of corporate legitimacy and governance in every North-American jurisdiction. See only Berle & Means, supra, note 563.

659 C. Dykastra, "The Revival of the Derivative Suit" (1967) 116 Pa. L. Rev. 74 at 80.

governance in every jurisdiction.[660] Due to the separation of ownership and control[661] and the fact that a huge number of investors is neither able nor willing to monitor the complex activities of management, the validity of the traditional model of the corporation is questioned.

What seems to be more important is the fact that the traditional concept does not address one important question: why is it that only shareholders should control the management and have some influence on the way the business is run? Since the employees of a company contribute as much to the achievement of the company's goals as do its shareholders, one might argue that they should be in a position that allows them to influence the internal decision-making process. The idea of workers' participation gains further support if one considers that the average worker or employee is more dependent upon the company's success or failure than the average shareholder who can make a ready exit if he is not satisfied with the

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660 For critical - even polemic - remarks on this discussion see W. H. Klein, Business Organization and Finance (Mineola: Foundation Press, 1980) at 131 f.

661 Cp. supra, at 204 ff.

course of action decided upon by the corporate management.[662]

Worker participation, however, has only been discussed in Canada with respect to corporate governance and legitimacy.[663] The question has been ignored whether and to what extent worker participation could be a means to maintain effective control over the national economy. As has been seen, Canadians have been concerned with this question in the past. Nevertheless, it has not yet been been suggested to use codetermination instead of investment control measures to maintain Canadian control over the economy. Canadian concern about foreign influence adds to the already strong arguments in favour of some form of mandatory representation or participation of workers in the affairs of their company. In addition, corporate decisions relating to the creation of employment opportunities could be influenced by workers' representatives.

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662 Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell, 1980) at 303.

663 Weiler, ibid., at 303 ff.; Hadden, supra, note 563, at 425 ff.; Bonanno, supra, note 564, at 947 ff.; Hadden, Forbes & Simmonds, supra, note 16, at 291 ff.; Eisenberg, supra, note 563, at 15 ff.

In order to implement codetermination in Canada, the federal legislator can fall back upon European experience.[664] Although it is difficult to make useable foreign legal concepts, it is suggested that the introduction of new forms of industrial democracy would ensure that Canadian interests, namely the interests of Canadian workers of foreign-controlled firms, could be taken into account without limiting the free flow of foreign capital into Canada. Foreign experience, namely in West German, proves that workers' praticipation is no barrier to the inflow of foreign investment.

Although industrial relations in Canada are based on the system of collective bargaining and Canadian legal scholars emphasize the differences between Europe and Canada[665], there appear to be no major

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664 For a detailed analysis of the European, in particular the West German law, see Bonano, ibid.; Summers, "Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective" (1980) 28 Am. J. Comp. L. 367; Grossfeld, supra, note 564, at 136; Hadden, Forbes & Simmonds, supra, note 16, at 291 ff.

665 Cp. Weiler, supra, note 662, at 311; C. Howard, "Corporate Law in the 80s - An Overview" in Law Society of Upper Canada Special Lectures: Corporate Law in the 80s (Toronto: de Boo, 1982) 18 at 20: "... co-determination achieved by ap-

obstacles against the introduction of codetermination into Canadian corporate law. As Hadden, Forbes and Simmonds have stated:

> "The Canadian tradition of selecting the best of both European developments in company law and of those in the United States might be better served by a careful consideration of recent European experience on employee participation than by a rigid adherence to the traditionally strict separation of company law and labour law."[666]

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pointing labour directors is not a simple means to resolve labour-management conflicts. It implies a fundamental transformation of values, ... a transformation from governance by political economy ... to governance by political philosophy ...".

666 Hadden, Forbes & Simmonds, supra, note 16, at 298.