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THE FOREIGN INVESTMENT REVIEW AGENCY: A STUDY IN GOVERNMENT DECISION-MAKING

by

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submitted by Brenda Gajecki

in partial fulfilment of the requirements for the degree of Master of Arts

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ABSTRACT

The purpose of this thesis is to review the operations of the controls on foreign direct investment established by the Foreign Investment Review Act in 1974 and to determine how well the Foreign Investment Review Agency (FIRA) has implemented those controls. The Agency was created to screen investment applications for takeovers of Canadian businesses and the establishment of new businesses in unrelated fields on the basis of "significant benefit" to Canada. A number of factors have influenced the efficiency of Agency operations in deriving investment benefits. In this regard, it is argued that FIRA must be credited with achieving limited results in trying to meet its original objectives.

A number of variables have been considered in this study and they include factors that are both internal and external to actual Agency operations. The internal variables include the complex administration of the bureaucratic process itself as well as the development of the roles of the Minister and Commissioner of the Agency in administering the Act. The characteristics of the individuals who have held these positions and the influence of their operating "styles" on the work of the Agency are also considered. The external indicators considered include the domestic political milieu, provincial involvement in the review process, the reactions of foreign investors to the screening mechanism as well as the effects of the global economic environment on inflows of foreign investment. Taken together these variables constitute a checklist of factors that may tell us something about the type of decisions made by the Agency in reviewing investment applications although there is no method employed

for measuring the varying degrees of influences each has had. Given this limitation they can only provide a starting point for determining the degree of success the Agency has had in its operations.

The absence of a clear-cut industrial strategy against which the Agency can negotiate "significant benefit" as well as a complex administrative structure contribute to an ad hoc and piecemeal approach on the part of the Agency. Factors such as global economic trends and changing patterns in investment flows have probably had more impact on foreign investment inflows to Canada than the activities of the Agency itself. Actors working within that process such as the Minister and the Commissioner appear to be effective in facilitating a relatively smooth administrative process and one that does not pose any difficulty for federal-provincial consultation. In general, FIRA has not appeared to be an inflexible tool of government intervention but neither does its work provide much evidence that it has contributed significantly to the development of the Canadian economy.

Introduction

The enactment of the Foreign Investment Review Act and the subsequent creation of the Foreign Investment Review Agency arose out of a perceived need to implement a national policy that would more effectively deal with the direct issue of foreign ownership and control as it has affected the Canadian economy. In large part, this concern has been related to the pervasive external influence over the Canadian economy in general and the influence exercised by the United States in particular. The evolution of governmental assistance and intervention in the interests of national economic independence has had a long history and Chapter One will only review specific and relatively recent policy measures that led up to the enactment of the Foreign Investment Review Act.

In order to set out the various policy measures in a proper perspective it will be necessary to consider factors such as the socio - economic environment, key events that marked turning points in policy development, political party positions on foreign investment, particularly that of the Liberal Party, as well as regional and public attitudes in response to the development of a national policy. These factors will be evaluated within a limited time frame covering the period from the mid - 1950's to the time of the enactment of the Foreign Investment Review Act (1974). The main tenet proposed is that Canadian national policy which dealt with the concern over foreign direct investment has been a piecemeal development and one lacking a systematic approach. At best it has developed in a reactive manner to ad hoc situations rather than anticipating trends and arriving at an integrated

policy approach.

Subsequent to a review of the events that led up to the passage of Bill C-132 Chapter Two provides a more comprehensive examination of the objectives of the legislation, the purpose of the Agency, the terms and conditions of the Act and the guidelines under which they operate. In recognition of the inherent complexity of the terms and conditions of the legislation it has become necessary to provide interpretive comments on issues such as the legal and constitutional implications of the Act in order to arrive at a general understanding of the basic meaning of the legislation. Following an outline of the basic features of the screening process Chapter Two also introduces a review of some of the representations made to the federal government by business and industry groups as well as by certain provincial governments that chose to present briefs regarding their perceptions of the implication of the Act. This information provides a better understanding of the key concepts of the legislation as well as a framework of reference for the assessment of the success of the legislation which follows.

In order to gain a better understanding of the bureaucratic process involved in the implementation of the Act Chapter Three investigates the organization and operation of the Agency and the manner in which a potential investor proceeds in attempting to obtain approval for an investment application. Although the actual organization of the Agency is a simple hierarchy of functional units, the manner in which this administrative body obtains information and negotiates for foreign investment benefits is more complex. The Agency's main goal is to ensure that every investment application conforms to the law before it can be referred to the Minister for his recommendation and then

forwarded to Cabinet for a final decision. This procedure allows for a number of considerations that can be applied on the basis of the particular merits of individual cases. The disposition of certain cases reflects a review process that was developed to facilitate a negotiating procedure for obtaining the most desirable foreign investment benefits for Canada. As a result, the Agency maintains a bargaining stance that provides an underlying strength in meeting its objectives.

The cornerstone of the Act is the "significant benefit" clause and Chapter Four provides a performance evaluation or operations review of the Agency in terms of the benefits extracted through the screening process. In an attempt to provide some form of a yardstick for determining the type and level of "significant benefit" obtained, the outcome of resolved cases will be analysed with respect to qualifying factors such as investment trends, market changes and political influence. This analysis will rely only on data that are available up to the end of March, 1979. Any noteworthy developments since that period will be discussed in the following Chapter.

The influence of the review process in obtaining significant benefits from investment inflows will be evaluated by looking at the modus operandi employed by the various Ministers of Industry, Trade and Commerce who have assumed responsibility for the work of the Agency. An assessment of the Minister's role will be made in an effort to account for the fact that the Agency has undergone a change in focus in its operations. It is not an unreasonable assumption that key decision makers have had some effect in creating an image for the Agency that would help it maintain a level of credibility acceptable to both the private and public sectors.

The disposition of actual cases and the reaction to the work of the Agency by provincial governments and foreign investors establishes an environment for the type of decision made by the Agency. On this basis Chapter Five attempts to determine whether FIRA has been successful in achieving its original objectives. It is argued that the Agency can be given credit for achieving limited results and that factors external to the bureaucratic process, such as the global economic environment, have an influence on the effectiveness of a screening process. Moreover, the Agency's work has not disrupted federal - provincial relations or interfered with the economic development aspirations of various regions. The success of FIRA in meeting its objectives will depend ultimately on whether the federal government develops clear-cut guidelines for an overall industrial strategy on which the Agency can depend for negotiating investment benefits. If this happens foreign investors will have a better appreciation of the expectations of the Canadian national policy and will develop their investment plans accordingly. On the other hand, the record of Canadian governments in making economic policy does not inspire confidence that a coherent set of industrial strategy objectives will emerge quickly, if at all.

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In recent years Canada's national policies regarding foreign investment have been largely a response to a growing level of awareness of the extent of foreign ownership of Canadian industry. The far-reaching consequences that have accompanied foreign investment have in turn influenced the nature of the policies adopted. Economic nationalism in Canada, which reached a high point in the late 1960's and early 1970's, provided much of the impetus that generated government response to this issue. The culmination of a various set of initiatives came in the form of the Foreign Investment Review Act (1974) and the administrative body created to administer the Act, the Foreign Investment Review Agency (FIRA). This legislation reviews foreign takeovers of businesses operating in Canada as well as foreign applications for new investments.

At first glance the provisions for a formal screening procedure seem to diverge from what has been generally considered a relatively open policy toward foreign direct investment. Notwithstanding the foreign and especially American ownership and control of Canadian industry, it has been the policy of both the federal and provincial governments to permit and actively encourage foreign investment.[1] This open attitude to foreign investment has been maintained throughout the history of Canada's economic development with particular emphasis placed on a number of roles that foreign capital has played. It is not the purpose here to go into a history of the amount and type of capital that contributed to the development of Canada's economy. Let it suffice here to mention that in the changes and trends in foreign investment in Canada direct investment comprised sixty per cent of total foreign capital invested by the end of

1967, compared to thirty per cent in 1926. The other important factor is that United States investment accounted for eighty-one per cent of total foreign capital invested in Canada by 1967.[2]

In addition to the open policy that the federal government has adopted towards incoming foreign capital a couple of other key elements have combined to foster foreign investment in this country. The development of Canada's natural resource base in response to market demand has been a major motive for direct investment in terms of developing and guaranteeing sources of supply for investing countries. A third element that has affected foreign investment is the level of foreign capital in Canada's manufacturing industry. The policy of providing tariff protection including preferential access to Commonwealth markets, early in the life of this secondary industry resulted in rapid growth of the manufacturing industry starting in the early 1950's. The tariff which was essentially designed to help infant Canadian industry also provided foreigh manufacturers the means to make further inroads into the economy by allowing them to locate their production plants in Canada or taking over an existing Canadian business.[3] At the end of 1967, non-resident control in manufacturing was estimated at fifty-seven per cent or $11.8 billion out of $20.5 billion total capital with the United States significantly controlling eighty per cent of that total.[4]

Although the three elements mentioned are not exclusive features of foreign investment in Canada, they serve as distinctive factors in the type of predominant foreign economic activity that has occurred in Canada in the recent past. The United States has been the main actor since the early 1950's in this regard and has introduced direct investment in the form of branch plants and wholly-owned subsidiaries of American firms.

While there are a number of economic factors that have accounted for the development of this type of investment[5] it is more relevant for the Canadian experience to discuss the political consequences associated with direct foreign investment.

Foreign direct investment that enters the country in the form of subsidiaries and branch plants differs substantially from the import of foreign capital by the sale of bonds or non-controlled equity stock and the distinction is a critical one. Kari Levitt borrows a definition that aptly describes the difference between direct and portfolio investment particularly as it applies to the Canadian-American experience:

> Direct investment refers to an investment made to create some kind of permanent organization abroad - plants, refineries, sales offices, warehouses - to make, process and market goods for local consumption and, in some instances, for sale in third areas. Such operations typically combine U.S. personnel, technology, know-how, machinery equipment, to expand the productive capacity of the countries in which the investment was made and to open important markets for the products of the investing country.
> ... A portfolio investment may take two forms - purchase of foreign bonds and debentures or purchase of foreign stocks by a U.S. resident. Purchases of bonds and debentures are, like bank credits, at fixed terms with no equity interest; purchases of stocks involve equity interest, but generally not controlling interest.[6]

The essential difference between direct and portfolio investment is that legal control of the capital invested is involved in direct investment. In acquiring this type of control the investor also retains the power of decision-making or voting control over a particular investment. One government source has also included in the definition of direct investment

> "... all concerns in Canada which are known to have 50 per cent or more of their voting stock held in one country outside Canada. In addition, a few instances of concerns are included where it

> is known that effective control is held by a parent firm with less than 50 per cent of the stock. In effect, this category includes all known cases of unincorporated branches of foreign companies in Canada and all wholly-owned subsidiaries, together with a number of concerns with a parent company outside of Canada which holds less than all of the capital stock."[7]

Portfolio investment on the other hand does not involve any legal control of the assets and involves no important element of ownership, control or management. It therefore has fewer political implications, although political implications are not entirely absent.

Another distinction of direct foreign investment must be made here before a further discussion on national policy evolution can be continued. Political concern regarding foreign investment revolves primarily about the issue of foreign ownership and control. While control has become synonymous with the aspect of legality there is a difference between the legal position of effective control and the extent to which that control is actually exercised. In other words, quantitative levels of ownership do not in themselves indicate the extent to which major shareholders exert influence in a particular investment.[8] The determination of levels and type of ownership can become a complicated exercise and has been dealt with in greater detail in another study.[9] For the purposes of this endeavour it is sufficient to state that non-resident ownership will wield more political clout when it is concentrated in fewer hands than when it is widely scattered. Voting stocks retain their power of decision-making and responsibility and this creates the relative advantage over other types of capital ownership. A further qualification here is that in some cases there may be a diffusion or decentralization of

ownership while no single group holds a controlling position. The reverse situation where only one group or company maintains control through substantial levels of ownership also exists.

Certain variables other than the ownership of voting stock play an integral role in the pattern of influence and control that is exerted in capital investments. Where foreign ownership of voting stock is small, factors such as dependence on the non-resident for specific research and technology, access to patents, as well as new markets and supplies may influence the decision-making processes in the Canadian company. On the other hand, such factors as overall company policy on decentralization, operations in a foreign country and leadership styles of top executives may leave substantial discretion in the hands of Canadian management.[10]

In the history of foreign investment policy leading up to the Foreign Investment Review Act it appears that the federal government has reacted to foreign investment as a weighing of cost against benefits; costs creating problems from a political point of view while benefits stem from an economic basis. At the risk of simplifying this cost-benefit aspect it is the vehicle of direct investment, the multi-national corporation, that has stimulated a growing sense of unease about foreign control in the Canadian economy. In the Canadian-American scenario which has dominated the foreign investment issue in this country, the multi-national corporation has helped to provide the entreprenuerial benefits of the marketplace ranging from managerial expertise to sophisticated research and technology. At the same time however, the dimension of decision-making has transcended national boundaries via foreign affiliates or subsidiaries and resulted in a series of compromising moves by the Canadian government. The relationship between American-based multi-

national corporations and Canadian industry has witnessed a host of varying experiences. Only a few key issues will be discussed in order to provide the setting for government policy development prior to any specific legislation aimed at screening the entry of foreign investment.

In a series of piecemeal legislation which was encouraged in large part by economic nationalist sentiment, Canada dealt with the political inroads of foreign ownership, particularly American, in an ad hoc fashion. Beginning with the 1950's decade a number of government measures were undertaken to deal with different sectors of the economy as well as various types of economic activity. In 1957, for example, the Canadian and British Insurance Companies Act was provided by Parliament in reaction to the foreign acquisition of six Canadian life insurance companies. It specifically required that a majority of board of directors be Canadian and that directors be granted the power to refuse to allow the transfer of shares from a resident to a non-resident.[11]

In 1958 the first government commissioned report that drew attention to the extent of foreign control in Canadian industry was the Royal Commission on Canada's Economic Prospects or the Gordon Report, named after Walter Gordon, the Commission's chairman.[12] The report arose out of a number of problems related to the economic development of Canada. The general thrust of the report indicated a need to re-evaluate Canada's traditional attitude respecting foreign investment. The report recommended action to increase the degree of Canadian control of foreign subsidiaries by employing Canadians in management positions, to increase Canadian equity in subsidiaries and to encourage publication of financial reports thus allowing full disclosure of operations.[13]

Government intervention into the activity of foreign owned firms

adopted the strategy of obtaining more information to serve as a basis for determining policies. Thus, in 1962, the Corporations and Labour Union Returns Act (CALURA) was passed and it empowered the government to collect basic financial and other data on the affairs of foreign controlled firms and labour unions carrying on activities in Canada.[14] This strategy was strengthened by the adoption of the Winters Guidelines and Corporations Act amendments which will be discussed later. For the most part, the information obtained was largely confidential in view of the general respect held for the private enterprise activities being carried on.

In 1963 Walter Gordon, the Finance Minister of the new Liberal Government headed by Lester Pearson, introduced his first budget which included the most stringent measures ever directed toward foreign ownership of Canadian business corporations. Although two of his tax proposals were eventually withdrawn - a thirty per cent takeover tax and a twenty per cent withholding tax for firms with a lower proportion of domestic ownership - his other provisions were enacted. They included a reduction to ten per cent of a withholding tax on dividends paid to non-residents whose shares were at least one-quarter Canadian-owned as well as a faster rate of depreciation to companies with twenty-five per cent Canadian ownership.[16]

Government intervention of a different kind arrived in the form of amendments to both the Income Tax Act and Customs Act in 1965. The former affected the establishment of new foreign-controlled newspapers and periodicals as well as the foreign takeover of Canadian-controlled newspapers and periodicals. Furthermore, no deduction could be made for the cost of advertising which was aimed at the Canadian market but issued in a

non-Canadian periodical or newspaper. The only publications falling into this category at the time were the Canadian editions of the Readers Digest and Time and they were eventually exempted. One reason that has been given for this exception is the pressure exerted by the United States in accepting the terms of the Auto Pact.[17] The amendments to the Customs Act had the effect of disallowing the entry of foreign periodicals containing advertisements directed at the Canadian market.

In a series of events that began in 1963 and extended to 1968 Canada became involved in a set of issues that arose as a result of unilateral extension of United States law. In attempting to improve a deteriorating state of affairs with the American balance of payments position the United States imposed three separate measures that would apply to Canada in whole or in part. In 1963 the Interest Equalization Tax designed to reduce the use of American capital markets by foreigners was imposed on certain types of international capital transactions which included Canadian stocks and bonds. When a financial and monetary crisis followed due to the anticipation by investors that an American flow of capital to Canada would be decreased severely, Canada was able to obtain a special exemption from the Kennedy administration. In 1965, the Voluntary Co-operation Program proposed new capital flow restrictions from which Canada was only able to gain partial exemption. Canada was affected by the Department of Commerce provision that outlined limitations on new foreign investment by American corporations and stipulated an increase in the return flow of earnings and short term assets to the United States.

Shortly after this second set of measures was enforced the Joint Canada - United States Committee on Trade and Economic Affairs met in

March, 1966 to discuss the balance of payments position of both countries. The most significant result of this session was an official statement which qualified that the United States Commerce Department guidelines were not intended to induce Canadian subsidiaries of American corporations "to act in any ways that differed from their normal business practices."[18] Canada's official concern about the potential impact of the voluntary directives on direct investment resulted in Ottawa issuing its own guidelines - The Guiding Principles of Good Corporate Citizenship for Foreign Subsidiaries. These were issued by the Minister of Trade and Commerce, Robert Winters and were essentially voluntary in nature but, as one source has noted, an effort at subtle pressure by the government to alter the behavior of foreign-owned firms to conform to Canadian interests.[19]

The 1968 direct investment guidelines of the United States Johnson administration were even more strict in their implications for Canada - United States capital flows. During this time period United States involvement in Vietnam created an added strain on the country's balance of payment situation. Consequently, the American government chose to tighten up on foreign investment abroad by imposing guidelines that would check capital flows. Although the guidelines were aimed primarily at investments in Western Europe corporate repatriation of capital put pressure on the Canadian dollar due to a substantial transfer of funds from Canadian subsidiaries to United States parent companies. In the subsequent reaction from the Canadian financial community the Canadian dollar came very close to devaluation and it was this critical factor that pointed out serious repercussions for American currency. Although Canada was exempted from these guidelines in March 1968 the United States managed to extract certain

financial commitments that would benefit the American dollar.[20]

Protection over key sectors of the economy instigated other government measures throughout the latter portion of the 1960's decade. In 1967, a revised Bank Act was drafted which specified that banks hire Canadians in at least three-fourths of directors positions, no chartered bank would be permitted to have more than ten per cent ownership by an individual and a limit of twenty-five per cent ownership by a group of non-residents, and no foreigners were allowed to establish a new bank. The significance of this government undertaking lay in its additional provision of placing growth limits on banks that had maintained a foreign ownership level of twenty-five per cent. In a case involving the Mercantile Bank the government was able to attach conditions to a takeover attempt at a time when no organized legislative machinery existed for that purpose.

Despite the fact that the Mercantile Bank had been permitted entry into Canada in 1953 its status as a foreign banking institution was not looked upon favourably, particularly by a banking commission that undertook review of the laws under the chairmanship of Walter Gordon. When the First National City Bank of New York (Citibank) purchased the bank from Dutch owners in 1963 it was viewed as taking advantage of an unforseen regulatory loophole. The federal government sought to act retroactively to persuade the American company to divest itself of the ninety per cent ownership it held. In a series of diplomatic exchanges Walter Gordon, then Finance Minister, argued that management of the Mercantile interest under Citibank would become a critical factor in that an American manager and American subsidiary would be more responsive to Citibank's interest and those of the United States than Canadian interests.[21] An additional

negotiating point was that if Citibank were permitted to enter the country there would be a high probability that applications from other foreign banks would follow suit. The resulting compromise was that Mercantile was given a temporary five year exemption from Canadian ownership provisions in order to build profitability and thus be able to bring the level of Canadian stock ownership up to seventy-five per cent.[22]

In a series of government commissioned reports that began with the Gordon Commission (1958) and followed with the Watkins (1968) and Gray Report (1972) the cost-benefit element that has seemed to prevail through much of the earlier Liberal Government initiatives continued with the belief that there was a trade-off between economic benefits of foreign investment and loss of control of national affairs that could be tolerated if strategically oriented. One author has pointed to the Winters Guidelines of 1966 as a starting point in Liberal Party initiatives in this regard. It was considered that this undertaking "was indicative of the prevailing Liberal viewpoint that, except in key sectors, the activities of foreign owned firms should be subject to only pursuasive influence."[23] Further to this philosophy, the resolution adopted at the 1966 liberal party convention that constituted the overall policy decision stated, "the government should take steps to encourage greater Canadian ownership of the economy, without discouraging foreign investment."[24] By and large, Parliamentary debates that raised questions about the manner in which foreign takeovers had been dealt with by government administration were met with defensive responses regarding the conscientious record of government initiatives, such as a statement made by Finance Minister Benson in 1969:

> "... this government's policy has been to proceed by way of a carefully designed series of detailed measures appropriate to different sectors of the economy and to different types of economic activity."[25]

An argument raised in favour of foreign investment flows is that Canadian investors have benefitted by the relative lack of restriction on international flows of capital. Canada's relative position of economic strength in this regard has been discussed in terms of its own level of investment abroad. In 1969 Finance Minister Benson made this statement about investment growth figures up to 1965:

> "Foreigners owned $35.2 billion worth of assets in Canada. In the same year Canadians owned foreign assets totalling $13 billion - more than double the figure a decade earlier. Over the past three decades the rate of growth of Canadian investment abroad has been faster than the rate of growth of foreign investment in Canada."[26]

The continuous output of government studies addressed the foreign investment question further and identified new and strengthened measures for dealing with incursions of foreign capital. However, there were no legislative undertakings in any real economic sense until the mid 1970's.

Before Walter Gordon returned to the Pearson Liberal government in 1966 he requested that a White Paper be undertaken to investigate possible solutions to foreign economic dominance. A Task Force under the chairmanship of Professor Melville Watkins carried out a study which was published in 1968 as the report "Foreign Ownership and the Structure of Canadian Industry." The Watkins Report as it also became known acknowledged the benefits resulting from foreign direct investment but focused primarily on the problems associated with the foreign ownership and control of economic activity in Canada.

The problems identified as major issues included, among others, the benefits and costs of multi-national corporations, restrictive trade practices by foreign firms and extraterritoriality. The report warned however, that the most serious cost associated with foreign direct investment was the tendency of the American government to practice a unilateral

extension of law abroad in regard to American-owned subsidiaries. This practice has manifested itself with respect to American laws on freedom to export, United States anti-trust law and policy as well as balance of payments policy.[27] In view of the Canadian government's past experience with the issue of American extraterritoriality it would be useful to relate a few significant instances to which this country has been exposed.

Canada's experience with the American balance of payments policy basically resulted in a limitation in Canada's monetary independence. Although the main issue here applied to outflows of capital from the United States, the aspect of extraterritoriality that was significant was the attempt by the American government to influence the import and export policy of American controlled firms abroad through its network of parent and subsidiary companies. Canada managed to gain exemptions from each of the guidelines imposed in 1963, 1965 and 1968 but not without providing some financial concessions that compromised the strength of the Canadian capital market.

American laws regarding export controls related to regulations that were imposed under the United States Trading with the Enemy Act. In the late 1950's this legislation regulated the commercial transactions of all American citizens in any dealings with China (except Formosa), North Korea, North Vietnam and Cuba. The implications for Americans who owned Canadian subsidiaries or who served as directors or managers of Canadian companies were seen as an extraterritorial imposition of American policy on Canadian trade policy. A number of cases including the refusal of the Ford Motor Company of Canada to sell trucks to China in 1957 and the involvement of American owned flour mills in the early 1960's in refusing to honor a shipment of flour to Cuba that was linked to a wheat sale to

the Soviet Union resulted in a strained relationship between countries as well as a strengthening of economic nationalist sentiment in Canada.[28]

United States anti-trust laws were provided to protect American business against any situations which pose unlawful restraints on competition such as monopolies. The effect of these provisions in the case of American subsidiaries operating in Canada point to another exercise in extraterritorial assertion. David Leyton-Brown has reviewed a number of scenarios in the American multi-national extension of policy. He cites examples that have included activities ranging from the divestiture of Canadian holdings by American parent companies to attempts by the United States courts in obtaining corporate records concerning the activities of American owned companies in Canada.[29] In determining the results of such activity for Canada the Watkins Report judged that the legal and administrative machinery utilized by the United States in this regard

> "... poses for Canada a basic political problem, namely, that for an uncertain future the "elbow room", or decision-making power of the Canadian government has been reduced in regard to economic relations involving American subsidiaries. The essence of the extra-territorial issue is not the economic costs ... but rather the potential loss of control over an important segment of Canadian economic life."[30]

The main recommendations of the Watkins Report included the establishment of a special agency to coordinate government policies with respect to multi-national enterprises, establishment of a government export trade agency to ensure that export orders conformed with Canadian law and foreign policy, and creation of a Canada development corporation to act as "a catalyst to mobilize entrepreneurial talents in consortia, in conjunction with the private Canadian sector and as an alternative to

full foreign ownership."[31] As an interesting point of reference the notion of a Canadian development corporation first conceived by Walter Gordon was held as a conception of a large mutual fund to buy back Canada. This issue of a development fund was to be introduced by the Liberals on future occasions and finally enacted in 1971 after much debate in the House. The recommendation that held the most significance for future policy development however, was the concept of a special agency to deal with foreign corporations. Although there would be a host of additional qualifications added to this original concept this was in effect a forerunner to the Foreign Investment Review Agency.

As soon after as 1970 the work of a Parliamentary Committee (the Standing Committee on External Affairs and National Defence Respecting Canada - United States Relations) examined foreign investment as one element in a study of Canada - United States relations and also endorsed the creation of a special agency. Chaired by Ian Wahn the committee pointed out that last minute and ad hoc measures taken with respect to takeovers in certain key sectors could proye inhibiting to necessary capital developments. With this in mind it opted for a definite statement of government policy on foreign ownership and an effective screening agency.[32] It recommended that the agency should take the form of an Ownership and Control Bureau working under the direction of a Minister and empowered to identify key sectors where takeovers would or would not be allowed,[33] to license and screen foreign ventures, and enforce requirements for major subsidiaries to sell fifty-one per cent of stock to Canadians.

Further to the matter of takeover activity in key sectors it should be noted that the Wahn Report had been issued in the wake of a series of legislative acts that from 1957 to 1968 restricted foreign ownership in

sectors such as finance and communication.[34] More notably however, government intervention in the national interest thwarted takeover attempts in two significant cases; Denison Mines in 1970 and Home Oil Company in 1971.

In early 1970 a substantial portion of Denison Mines Ltd. of Toronto, which controlled about forty per cent of Canada's uranium reserves, was on the verge of passing into foreign hands. Subsequent to much speculation about possible bidders for control of Denison,[35] it was determined that Stephen Roman, president of the Roman Corporation which owned twenty-five and one half per cent of Denison intended to sell his share to the United States based Hudson's Bay Oil and Gas Company. A completed sale would have meant that less than ten per cent of the country's uranium resources would remain in Canadian hands at a time when the mining and smelting industry was already fifty-nine per cent foreign controlled and the petroleum and gas industry seventy-four per cent.[36] The government learned about the negotiations for transfer of ownership of Denison on March 2, 1970, when Prime Minister Trudeau interrupted a wheat-sale debate in the House to state government reservations concerning this transaction. If necessary the government had been prepared to introduce an amendment to the Atomic Energy Control Act to prevent this move.[37] The government was successful in frustrating foreign interests in this particular case and on March 19, 1970, Energy Minister J. J. Greene announced regulations to place limits on foreign ownership to a thirty-three per cent maximum of any productive uranium operation in Canada. At this time there was also some speculation that the government would look at regulating Canadian ownership in other energy resources including coal, oil and natural gas.[38]

In 1971 the federal government disallowed an acquisition by Ashland

Oil Company of Kentucky of Home Oil Company Ltd. of Calgary, the only major independent petroleum company in Canada. Although the government acted under no apparent legislative authority, one source has stated that Ashland withdrew its bid after a special parliamentary debate February 18, 1971 in which members of all parties opposed the idea of having control pass into American hands.[39] Following this the government made money available to ensure that certain private Canadian interests had an opportunity for purchasing the company. Thus, the government had again managed to find a successful, albeit ad hoc, measure in protecting the national interest.

Government commissioned studies to this time were successful in achieving little more than a heightened awareness of the Canadian experience with foreign investment. No legislative action was precipitated as a result of these investigations but the next series of events created the momentum for a more directed approach to foreign investment. Generally speaking, current policies of the day were not geared closely enough to specific circumstances in order to maximize the benefits and minimize the costs of direct investment. The lack of a comprehensive industrial strategy provided the additional momentum required for a special study to be undertaken. In 1969, the federal government commissioned Herb Gray, then Minister without Portfolio in the Department of Finance to propose specific measures dealing with the control of multi-national corporations. The final report, Foreign Direct Investment in Canada was published in 1972.

The main recommendations that were offered as strategies for dealing with the investment controversy were: screening by a government agency to block investment that does not make a net contribution to the Canadian

economy; delineation of further "key sectors" in which foreign ownership would be regulated; the introduction of across-the-board ownership rules (e.g. fifty-one per cent Canadian ownership of all firms) and other changes relating to the use of Canadian managers and directors. The commission selected the screening agency as the primary mode of government intervention. The objectives of the agency would allow for a selective bargaining tool for generally "better deals" from foreign interests. At the same time this body was viewed as a blocking agent in a selective process to protect Canadian entrepreneurship. Most importantly, the agency was to involve the use of criteria and guidelines based on an industrial strategy. The implications for this approach included the basic reasoning that to bargain for more of everything would have the process become an "agent of incrementalism," e.g., bargaining regardless of the impact on industrial development.[40] It could be mentioned here that the "significant benefit" criteria that were adopted as the basis for selective screening of foreign investment in the future Foreign Investment Review Act were implemented on the same foundation.

The advantages of this approach as opposed to gaining protection of key sectors or fifty-one per cent Canadian ownership was viewed in terms of bargaining leverage and relative flexibility. If the decision-making power of negotiating for foreign investment rested with one central agency as opposed to an arbitrary procedure of dealing with individual provinces, fewer costs would be involved. The agency was also meant to be a flexible instrument by applying policy that would vary for different geographical regions and for different industries depending upon local conditions and needs.[41]

The Gray Report and the subsequent proposal of the Foreign Takeovers

Review Bill seemed to represent a fair consensus of Liberal Party policy thinking on foreign investment which was to achieve greater control of the economy. Neither effort however, was sufficiently convincing to affect concrete policies. In the words of one author,

> "The Gray Report is a disappointment for what it failed to include ... the report has added little to our knowledge concerning such basic and still unresolved questions as the overall impact of foreign direct investment on Canadian growth, employment, prices, product diversity and the balance of payments."[42]

During this time the Progressive Conservative Party remained consistent in its political tenor concerning the means by which it perceived foreign investment could be dealt with most effectively. Robert Stanfield, leader of the opposition, made public statements throughout the course of 1972 that reflected most of the criticisms held by the Party. He opposed a general screening system which would restrict the inflow of foreign capital. He stressed the divisive effects of any system which did not consider consultation with the provinces. Finally, he condoned the regulation of foreign investment, particularly in key sectors, but placed the emphasis on action to strengthen the initiative of Canadian firms.[43] This last issue concerning regulation tends to reinforce the basic difference between Liberal and Progressive Conservative policy approaches; namely, that the Liberals place more emphasis on direct influence over operations of firms while the Conservatives stress general indirect influences such as encouraging Canadians to invest.

As an immediate follow-up to the Gray Report findings, the Foreign Takeovers Review Bill (C-201) was introduced in the House of Commons in May, 1972. The bill proceeded to second reading when Parliament dissolved in 1972. The proposed bill was to vest Cabinet with the power to review

all acquisitions by foreign investors of Canadian firms with assets of more than $250,000 or gross revenues of more than three million dollars. Before this document died on the order paper however, it became evident that the measure was oversimplified and too limited in scope to be able to deal effectively with the large implications of assessing the costs and benefits of foreign investment. The inadequacy of the bill created some disagreement within the Liberal party as well as in opposition ranks. Ian Wahn, together with thirteen other Liberal members of Parliament, endorsed the stand of the Committee for an Independent Canada that the bill was inadequate. Robert Kaplan, chairman of the Commons committee which reviewed the bill, publicly spoke in favor of the screening of all foreign investments recommended by the Gray report.[44]

The Conservative view upon immediate pronouncement of the bill did not convey a strong opinion either for or against the proposal. It seemed apparent at the outset that no clear policy had been formulated on which the entire Conservative party could agree. As the Commons sessions concerning the bill progressed however, Stanfield's comments generally espoused the party's traditional policy stance. His main objection was that the proposal did not do anything to increase Canadian participation or Canadian ownership. Also, no provision had been made for provincial consultation either in connection with the final decisions or with the guidelines. He further stated that, "... this policy does not ensure the continuation, let alone the expansion of Canadian companies in the teeth of competition that they face."[45]

This bill exemplified the piecemeal and ad hoc manner in which the Liberal party approached the foreign investment issue. Commons debates indicated that there was a general confusion over a policy that was

attempting to deal with a weighty problem in a short term and limited manner as opposed to searching out the implications of legislative action in a longer term perspective. One author has suggested that this form of adhockery was a commonly perceived role of government in Canada.

> "Expectations for Canadians have been geared by and large to a government which acted only when pressures required it do so and then only in a moderate manner, avoiding actions which would disrupt the main body of private enterprise decision-making upon which the overall dynamics of the economy are expected to depend."[46]

The bill was, however, consistent with the Liberal policy approach to not limit foreign investment but rather maximize further benefits. As Industry Minister Jean-Luc Pepin stated in his speech to the bill: "The objective ... is to ensure that foreign takeovers of Canadian corporations take place only when such takeovers will bring appreciable benefits to Canada."[47]

Following the re-election of the Liberal Government in 1972 and due to political pressure largely arising from the government's minority position, a broader bill (C-132) received first reading in the House in January, 1973 and was passed by Parliament in December, 1973. The bill differed from the previous takeovers bill in that it provided for the eventual review of some forms of new foreign direct investments as well as takeovers. This new feature accounted for the additional requirement of Cabinet to take into account the industrial economic policy objectives of any interested provincial government. The enactment of the bill proceeded in two stages with Phase I or the takeovers segment commencing in April, 1974 and Phase II which was extended to the review of establishment of new businesses by foreign investors and opening of new businesses by existing foreign controlled firms in Canada in unrelated

lines of activity to commence October, 1975. In the interim the government requested that representations be offered by provincial governments and business and industry groups. A presentation of this substantive material will follow in an upcoming section.

Substantial opposition to the proposed legislation existed within different groups. Various interests of industry and business accepted only certain provisions of the bill and those provinces that submitted their views were not entirely convinced that the legislation would serve their better interests. Although the NDP supported this initiative on the part of a minority government, nationalists within the former party ranks still viewed the attempt as "too little, too late."

Prior to any further investigation of the initial impact of the new Act a final brief comment should be made regarding Canadian attitudes towards foreign investment in general and how these combined to create a setting for the national policies that evolved. Indicators of attitudinal trends are numerous and varied but this section will only include the perceptions of Canadian citizens as to the effects of foreign investment, regional differences and a look a Trudeau's political philosophy as an influence on public policy.

It has been generally conceded that trends in foreign investment situations are not automatically reflected as changes in trends in public attitudes. Furthermore, the degree to which we become cognizant of trends depends to a large degree on the type of information being gathered. It would appear from the material that is available that a growing trend towards less favourable views of foreign investment became evident in the latter part of the fifties and throughout the sixties. Various polls and surveys were conducted to determine the reaction of the Canadian public to

the increasing degree of foreign capital (mostly American) entering the country. In response to annual surveys of the Gallup Poll that asked whether people thought there was enough U.S. capital in Canada or if they would like to see more capital invested in Canada the following results were tabulated for the period indicated below:

		Enough now	Like more	Undecided
National -	1963	46%	33%	21%
	1967	60%	24%	16%
	1970	62%	25%	13%
	1972	67%	22%	11%
Regional -	Maritimes	61%	22%	17%
(1972)	Quebec	58%	31%	11%
	Ontario	73%	18%	9%
	Prairies	72%	17%	11%
	B.C.	65%	21%	14%

Source: The Gallup Poll.[48]

In another poll which asked whether United States ownership of Canadian companies was good or bad for the Canadian economy, results of annual surveys of 5,000 Canadians reported the following increase in negative opinions:[49]

	Bad(%)	Good(%)	Good & Bad	No opinion(%)
1969	34	43	7	16
1970	41	38	13	8
1971	44	39	7	10
1972	47	38	7	8

Whether these types of surveys are an accurate reading of the Canadian public attitude and changes in trends is a matter of conjecture. At the least they can provide an estimate of the awareness of general citizens regarding issues communicated via the media and experienced at a higher political level.

In terms of regional differences there is some tendency for opinions on the foreign investment issue to be related to the economic

viability of a particular province or group of provinces. Further in this study provincial government concerns will be documented in relation to government intervention of foreign investment. In certain areas such as the Maritimes foreign investment is looked upon in a more positive light due to a perceived need for further industrial development and new capital and technology. New investment in those economies is also considered helpful in alleviating severe unemployment difficulties. Quebec also depends on specific advanced technologies and the infusion of rapid development to create a demand as well as absorb large numbers of skilled workers. Ontario's level of regional development and industrial predominance over other regions has made it less favourably disposed towards foreign incursions of investment capital. Finally, despite Saskatchewan's concern over the levels of American investment in the potash industry, the west, or at least Alberta has probably benefitted the most in terms of the development that accompanies foreign capital and would most likely encourage this trend but on a selective basis.[50] Throughout much of the literature that has been published concerning foreign investment the issues of national identity and economic independence have been posed as dominant characteristics in the comments made by political and academic thinkers alike. The complex evaluation of these philosophies will not be expounded here but it would be useful to note the basic philosophy of the Liberal party leader who entered federal politics at a time when political consequences of national economic conditions necessitated a hard look at concrete policy alternatives.

On the issue of nationalism it became evident through his statements and writing that Pierre Trudeau was not a believer of nationalism and chose instead to support a "direction of the rational structuring of

economic and political organization."[51] While this statement lacks further qualifications to Trudeau's sentiments concerning a wider scope of nationalism which might include cultural nationalism and political identity for a nation and biculturalism it basically reflects his orientation to the foreign investment issue. In an interview with the New York Times (November, 1968), Trudeau responded to a question concerning the influx of American capital and the question of foreign economic domination by responding,

> "... I don't worry over something which is somewhat inevitable, and I think the problem of economic domination is somewhat inevitable, ... I would want to make sure that this economic presence does not result as I say in a real weakening of our national identity. I use that general expression too. The way in which I do that is to try and balance the benefits against the disadvantages. It is obvious if we keep out capital and keep out technology, we won't be able to develop our resources and we would have to cut our standard of consumption in order to generate the savings to invest in ourselves..."[52]

In one of his writings, Federalism and the French Canadians (1965) Trudeau discusses the issue of foreign capital in terms of movement of capital and its relationship to economic dependence:

> "The answer is not to chase away foreign capital ... The answer, in the first place, is to use foreign capital within the framework of rational economic development; and, secondarily, to create indigenous capital and direct it towards the key sectors of the future..."[53]

In an address to the Kitchener Chamber of Commerce in May, 1968, Trudeau responded to the question of whether it was the government's policy in terms of foreign investment to foresee controls or limitations on future capital imports. He responded by stating that

> "The Canadian government's policy is that Canada needs foreign investment in order to develop. The point is that this foreign investment should

> be directed by Canadian governments, not controlled, but it should be encouraged in areas which are conducive to the political and social goals of all of Canada."[54]

Trudeau seemed to acknowledge that Canada is not always in control of its economic status but political manuevering can try to ensure that the ingredients for nation-building are retained in the proper sphere. It would appear than, that Trudeau's rationale has not run counter to the political tenet of the Liberal Party which has appeared to support the existence of a trade-off in the cost benefit nature of foreign direct investment.

FOOTNOTES

[1] H. Heward Stikeman, Q.C., The Foreign Investment Review Act: The Shape of Things to Come, (Toronto: Richard de Boo Ltd.) 1974, p. 1.

[2] For more comprehensive data on the changes and trends in foreign investment in Canada see Tables 1 and 2 in Government of Canada, Foreign Direct Investment in Canada, 1972.

[3] Canadian Foreign Investment Review Seminar. Text of addresses given by the principal speakers. April - May, 1974.

[4] Foreign Direct Investment in Canada, op cit. For a more concise breakdown of ownership and control of selected Canadian industries please refer to Table 4, p. 20.

[5] Peter Russell (ed.), Nationalism in Canada (Toronto: McGraw-Hill Ryerson Ltd.), 1966, pp. 192-200.

[6] For original source see The United States Balance of Payments, An Appraisal of U.S. Economic Strategy, International Economic Policy Association (Washington, D.C.: 1966), pp. 24.25. This source quoted in Kari Levitt, Silent Surrender: The multi-national corporation in Canada (Toronto: Macmillan of Canada), 1970, p. 59.

[7] This is a Dominion Bureau of Statistics definition cited in Foreign Ownership and the Structure of Canadian Industry (Ottawa: Privy Council Office), 1968, p. 418.

[8] Ibid., p. 419.

[9] A. E. Safarian, Foreign Ownership of Canadian Industry (2nd ed.), (Toronto: University of Toronto Press) 1973, p. 13.

[10] For a further discussion of this aspect of ownership and control please refer to I. Brecher & S. S. Reisman, Royal Commission on Canada's Economic Prospects. Canada - United States Economic Relations, 1957, pp. 132, 133.

[11] Canadian Foreign Investment Review Seminar, op cit., p. 2. As a result of further acquisitions being undertaken amendments were enacted in 1964 and 1965 placing a limit on the proportion of shares that could be transferred to non-residents at twenty-five per cent.

[12] Mr. Gordon requested that a commission be set up to review the issue of foreign ownership as early as 1955. The proposal was included in the 1955 Liberal Government budget speech and Gordon was requested to become chairman of a Royal Commission. However, a preliminary report was rejected by the St. Laurent Liberal Government prior to its 1957 defeat. The final report was in fact delivered to the Conservative Government in 1958.

[13]Royal Commission on Canada's Economic Prospects. Preliminary Report, (Ottawa: Queen's Printer), 1956, p. 10.

[14]J. Fayerweather, Foreign Investment in Canada, (White Plains, New York: International Arts and Sciences Press, Inc.), 1973, p. 151.

[15]Ibid., p. 171.

[16]Ibid., p. 61.

[17]Ibid., p. 140.

[18]House of Commons, Debates, March 9, 1966, p. 2348.

[19]Fayerweather, op cit., p. 11.

[20]For a detailed account of the entire balance of payment guidelines history see, Maureen Appel Molot, "The Role of Institutions in Canada-U.S. Relations: The Case of the North American Financial Ties" in Continental Community, A. Axline, J. Hyndman, P. Lyon, M. Molot (eds.) (Toronto: McClelland and Stewart Ltd.), 1974, pp. 106-178.
As a further result of these guidelines and as a return for the exemptions approved Canada issued a series of guidelines for Canadian banks in May, 1968, non-financial institutions in July, 1968 and on non-financial corporations in September, 1968 to ensure that unlimited access to the United States market would not result in by-passing the United States balance of payments guidelines. For other effects of the "guidelines" issue see Foreign Direct Investment in Canada, op cit., pp. 287-289.

[21]D. Godfrey and Mel Watkins (eds.), Gordon to Watkins to You, (Toronto: New Press), 1970, p. 28.

[22]As a final note on the subject the seventy-five per cent level of Canadian ownership has been attained.

[23]Fayerweather, p. 178.

[24]Ibid..

[25]House of Commons, Debates, May 29, 1969, p. 9222.

[26]Ibid.

[27]Foreign Ownership and the Structure of Canadian Industry, (Ottawa: Privy Council Office), January, 1968, p. 360.

[28]David Leyton-Brown, "Canada and the Multi-National Enterprise", in Foremost Nation, edited by Norman Hillmer and Garth Stevenson, (Toronto: McClelland and Stewart), 1977, pp. 71-73.

[29]Ibid., pp. 73-75. For a more detailed discussion of anti-trust

legislation see, Foreign Direct Investment in Canada, (Ottawa: Information Canada), 1972, pp. 270-272; also referred to as the Gray Report.

[30] Foreign Ownership and the Structure of the Canadian Economy, op cit., p. 339.

[31] Gordon to Watkins to You, op cit., p. 255.

[32] Eleventh Report of the Standing Committee on External Affairs and National Defence Respecting Canada-U.S. Relations, 28th Parliament, 2nd Session, 1970, p. 30. It should be noted that a well published account of a couple of incidents in the resource sector at this time faced government intervention that was significant to the recommendation of the Wahn Report. An affiliate of the Continental Oil Company of the United States sought to purchase Denison Mines, Canada's largest uranium producer. Due to the high level of foreign company control of Canada's uranium industry the government prevented the takeover and introduced regulations to restrict further ownership in this industry.

[33] Eleventh Report of the Standing Committee on External Affairs and National Defence Respecting Canada-U.S. Relations, op cit., pp. 49, 52.

[34] For a brief chronology of events and legislature acts concerning the development of Canadian policy on foreign direct investment see, John Fayerweather, op cit., Appendix 1, pp. 169-174.

[35] "Large Oil Firms May be Bidder for Control of Denison Mines", Globe and Mail, February 28, 1970, p. B2.

[36] The details of this case have been succinctly reviewed in M. Levin and C. Sylvester, Foreign Ownership, (Don Mills, Ontario: Paperjacks), 1972, pp. 9-18.

[37] Canada, House of Commons, Debates, March 2, 1970, p. 4253.

[38] Canadian News Facts, March 15-31, 1970. See also, Canadian Annual Review for 1970, Edited by John Saywell, (Toronto: University of Toronto Press), 1971, p. 418.

[39] Canadian News Facts, March 16-31, 1971.

[40] A Citizen's Guide to the Gray Report. Prepared by the editors of the "Canadian Forum", (Toronto: New Press), 1971, p. 148.

[41] M. Levin and C. Sylvester, Foreign Ownership, (Don Mills, Ontario: Paperjacks. A division of General Publishing Co. Ltd.) 1972, p. 98.

[42] Carl Beigie, "Foreign Investment in Canada", in Columbia Journal of World Business, November-December, 1972, p. 24.

[43]Fayerweather, p. 184. In addition to these three issues, Progressive Conservative policies respecting foreign investment have generally revolved about the following set of factors: effective guidelines for the behaviour of firms; financial disclosures; Canadianization of boards of directors and protection from extra-territorial applications of foreign laws.

[44]Original source, Toronto Globe and Mail, August 9, 1972 as cited in Fayerweather, p. 59.

[45]House of Commons, Debates, May 2, 1972, p. 1830.

[46]Fayerweather, p. 74.

[47]House of Commons, Debates, May 29, 1972, p. 2631.

[48]As reproduced in, J. H. Sigler and D. Goresky, "Public Opinion on U.S. - Canadian Relations" in, "Canada and the United States and Trans-governmental Relations", International Organization, Autumn 1974, vol. 28, no. 4, pp. 646, 647.

[49]J. Alex Murray and Mary C. Gerace, "Canadian Attitudes Toward the U.S. Presence", Public Opinion Quarterly, Fall, 1972, p. 390.

[50]For a more quantitative analysis of results of past surveys please see the following: Ibid. and Toronto Daily Star, February 12, 1972.

[51]Fayerweather, p. 31.

[52]P. E. Trudeau, Conversations with Canadians (Toronto: University of Toronto Press), 1972, pp. 171-72.

[53]P. E. Trudeau, Federalism and the French Canadians, (Toronto: Macmillan Company of Canada Ltd.), 1968, p. 11.

[54]P. E. Trudeau, Conversations with Canadians, (Toronto: University of Toronto Press), 1972, p. 102.

II Interpretation of Key Concepts of the Act

The federal government's attempts to provide concrete policy alternatives to deal with the issue of foreign investment and its effect on the national economic environment gave rise to a number of sequential moves in Parliament. With the dissolution of Parliament in 1972 the House had to forego further discussion of the proposed Foreign Takeovers Review Bill (C-201) which had already received second reading by May, 1972. The minority position in which the Liberal Party found itself subsequent to the 1972 election was a major factor in the introduction of a broader piece of legislation dealing with the same foreign investment issue. The Foreign Investment Review Bill (C-132) received first reading in the House in January, 1973 and was proclaimed as legislation in December, 1973.

Whereas the Foreign Takeovers Review Bill was limited in its operations to takeovers of Canadian businesses by non-Canadians, the new Review Act was extended to act as a screening process in the case of establishment of new business by non-Canadians as well as takeovers. The purpose of this new legislation is outlined in Section 2(1) of the Act and states that

> ... control of Canadian business enterprises may be acquired by persons other than Canadians and new business may be established in Canada by persons, ... who are not already carrying on business in Canada or whose new businesses in Canada would be unrelated to the business already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses ... is or is likely to be of significant benefit to Canada, ...[1]

Simply stated, the mandate of the Act is to review and assess two types of activities; first, the "acquisition of control" or takeover of

Canadian business enterprises by "non-eligible persons",[2] and second, the establishment of new businesses in Canada by "non-eligible persons."[3] Any proposed investment to which the Act applies is subjected to this review in order to determine whether it will be of "significant benefit" to Canada and thus receive approval. The criteria of "significant benefit" would be applied however, only after presumptions of "non-eligibility" and "control" are established. The terms and conditions of the Act are applied by the administrative arm of the Act which is the Foreign Investment Review Agency. The Agency ensures that investors comply with the legislation by considering reviewable applications and making recommendations on the outcome of proposals to the Minister of Industry, Trade and Commerce. The final resolution of any case rests with the Cabinet which makes a decision based on the Minister's recommendation.

The Act was meant to facilitate adequate growth in the economy by maintaining sufficient levels of capital in the country and at the same time regaining control of Canada's economic environment. One source has stated that the legislation was premised on the fact that with sufficient domestic gross capital formation the federal government could gain the leverage to screen the entry of new foreign capital into Canada as well as bargain with foreigners for better terms.[4] The basis on which such leverage could be established and utilized was discussed in the House in terms of the following objectives: to support the development of strong Canadian-owned business enterprises, to ensure that future foreign takeovers and the establishment of new foreign-owned businesses would be of significant benefit to Canada, to help arrest and reverse the increasing degree of foreign control of the economy, and to contribute to the development of a Canadian identity.[5] The means by which these objectives could be realized

were the main focus of early debate regarding the application of the legislation.

Staunch nationalists pointed out that much foreign investment was not affected by the legislation, namely, existing foreign investment in Canada and continued expansion within current areas of operation by existing foreign controlled firms. They argued that money invested in Canada by foreign-owned enterprises was actually Canadian funds, for example the re-investment of retained earnings and moneys borrowed on the Canadian financial market. Alastair Gillespie, then Minister of Industry, Trade and Commerce responded to this concern in the Finance, Trade and Economic Affairs Committee of the House in June, 1973. The federal government had to be sensitive to the costs and benefits of investment already existing in the country as well as be aware of the possible repercussions to the Canadian economy of applying certain restrictions to this type of investment. In the first instance, such a move would have retroactive implications by affecting ongoing and presumably related expansion of a company already doing business in Canada. Secondly, by encouraging firms to expand their businesses the government was hoping to realize the advantage of added employment by absorbing a growing labour force. Lastly, the government did not want to impose regulations that would be seen as a further degree of government intervention in the private sector.[6] In support of this argument Gillespie made the following statement:

> Given the large number of firms that are already foreign controlled in Canada, a review of normal expansion would call for an enormous amount of intervention .... In addition, I think there is a difference in kind between the normal growth which takes place as a business prospers and expands its activity on the one hand and the opening of unrelated business on the other. It

> seems ... that there is almost an element of retroactivity in intervening in the process of normal growth.[7]

In addressing the advantages and disadvantages of foreign investment in the country Gillespie's rationale was simply a further extension of Liberal policy on the subject. In a more direct statement, then Finance Minister John Turner also supported the notion that foreign direct investment was the means necessary for the future development of the economy. In an address to the U.S. Council of the International Chamber of Commerce in 1973, he admitted that Canada would continue to welcome foreign capital but with a "... determination to ensure that foreign investment is, in fact, necessary and that it will contribute to the greatest extent possible the kind of economic development that is in keeping with our national objectives."[8] The manner in which the government considered that investment was necessary and that its contribution was viable for economic development was determined by the terms and conditions of the Act itself.

The screening procedure as outlined in Phase I of the Act stipulates that applications for "acquisition of control" by "non-eligible persons" of Canadian businesses whose assets are valued at more than $250,000, or whose gross revenues exceed three million dollars are subject to the screening process. There are a number of terms that are specific to the meaning of the Act in this provision and they include "non-eligible person" and "acquisition of control." In the first instance, applicants who are considered non-eligible persons as stipulated by the Act, include individuals who are neither Canadian citizens nor landed immigrants, Canadian citizens who are not residents, landed immigrants who have not taken out citizenship within a year after their eligibility, governments of other countries and corporations controlled in fact by non-eligible

persons.[9] Although there are exceptions for Canadians who have been resident outside of Canada for five or more consecutive years, (for example, full-time employees of the federal or provincial government, full-time employees of a Canadian business enterprise) these cease to apply after a period of ten years. A further qualification to the status of corporations as non-eligible persons is the determining factor stated in subsection 3(1) of the Act as "control in fact;" it could be through shareholdings, a trust or contract. This is basically interpreted as going beyond share ownership in determining de facto control (beyond the legal control which more than fifty per cent of the votes provide) and, as one author states, "the Agency will have the ability to look beyond all varieties of schemes which are designed to conceal or shelter the identity of the true controller...."[10] On the basis of share ownership a corporation is presumed to be a non-eligible person where twenty-five per cent of the voting rights in the case of a publicly traded corporation are owned by one or more non-eligible persons. The necessity of establishing that share ownership does not represent control in fact will entail time and added expense on the part of certain affected individuals. One study of the Act, for example, notes that in a case of a publicly traded corporation, when twenty-five per cent or more of the voting rights are in the hands of a non-eligible person,

> ... there may be questions of trying to prove who voted which way on what issue and whether other shareholders or those in the presumptive twenty-five per cent block have acted in concert, which can be like trying to put a leash on a cloud.[11]

In the case of corporations generally the Act does not consider the national jurisdiction of the corporation relevant for proof of non-eligibility but looks instead to the national status and residence of the

controlling individuals.[12]

Subsequent sections in the Act go into further detail and extensive qualifications regarding small holdings shares (section 3.5), arm's length dealings (section 3.6), and groups of persons and board of directors (section 3.7). In attempting to determine where control does in fact lie the Act has attempted to provide answers to questions such as: what constitutes a group?, when is control presumed to exist?, how can share-holdings be proven? The complexity of the rules and regulations pose various problems for determining the status of those persons and corporations proposing investment activity or trying to establish a new business. It would appear that in anticipation of such a problem the Act has made provisions (section 4) for permitting a corporation to apply to the Minister for an opinion on whether or not it is "non-eligible."[13] This type of ruling would be binding on the Minister for two years or for as long as the facts disclosed remain substantially unchanged.

The types of business activities carried on by non-eligible persons constitute another major category that is subject to the screening procedure. Basically, there are two types of activities that are screened: first, "acquisition of control" of existing Canadian business enterprises, and second, the establishment of new businesses which have not been previously carried on in Canada by the non-eligible person and any new business which would be unrelated to the existing business (as introduced through Phase II, October, 1975). In dealing with the first category we find that "acquisitions of control" have also been referred to as takeovers and the Act establishes two methods by which an acquisition of control of a Canadian business may be accomplished: first, by the acquisition of shares to which are attached the voting rights of a Canadian corporation; and, secondly, by the acquisition of all or substantially all of the

property used in carrying on a business.[14] While it would not seem difficult to determine the acquisition of substantially all of the property used in carrying on a business, the determination of the acquisition of shares is a different matter. It becomes more complicated because the Act extends to the assets of a division of a company, or in the words of the legislation, to a "part of a business that is capable of being carried on as a separate business."[15]

Presumptions or inferences applied to the definition of a "non-eligible person" are similarly found in the definition of "acquisition of control." In the case of the latter, the Act imposes the presumption that control is acquired when a person obtains five per cent of the voting rights in the case of publicly traded shares and twenty per cent of the voting rights of corporation shares which are not publicly traded. Furthermore, the acquisition of more than fifty per cent of the voting rights is regarded as being a definite "acquisition of control."[16] Critics of the Act pointed out that with the definition of control the legislation was made to be technically complicated. Difficult questions of interpretation arose with "control" meaning one thing for "acquisition of control" and another thing when the status of being controlled by a non-eligible person was considered. Disputing the assumption that five per cent ownership was sufficient as a presumption of control, critics also observed that there were a number of Canadian public companies in which a foreign shareholder owned an aggregate of five per cent or more of the voting stock but was not in a position to influence control.[17] It should be noted that unlike the provision made for the determination of non-eligibility, the Act does not make provision for obtaining binding opinions from the Minister on whether there has been an acquisition of control. The

possibility therefore exists that each case would be exposed to a subjective examination by the Agency having its basis in the particular merits of individual cases. In any case where there is a question of control being acquired the Agency may demand, under subsection 8(3) of the Act, a filing of all the information required to screen the transaction. Needless to say, disclosure of facts for individual cases will entail a substantial amount of paper work for all the parties involved.[18]

The various situations that could conceivably fall under the ambit of "acquisition of control" provisions further illustrate the complex nature of the legislation. They include for example: the acquisition of an option to acquire shares, corporate re-organizations which involve the transfer of shares or assets, or the acquisition of a leasehold interest in any property used in carrying on a business. In any business transaction in which a potential acquiror is unsure of the status of the claim the Agency recommends that the most feasible course of action is to subject the transaction to the screening process.

In the first phase the new Act applies to the takeover of "Canadian business enterprises" whether or not they are already foreign-controlled. The former term simply refers to a business carried on in Canada by

> a) an individual who is either a Canadian citizen or a person ordinarily resident in Canada.
> b) a Canadian corporation that maintains one or more establishments in Canada, i.e., a corporation incorporated federally or provincially, or
> c) any number of individuals or corporations, or combination thereof, if any one of them either is a Canadian citizen, Canadian resident or Canadian corporation.[19]

The only exception to this definition is a business that is carried on in Canada by an individual (or group) who is a non-resident alien. An additional qualification arises with respect to real estate. For greater

certainty the Act provides that the acquisition and holding of land is not, by reason only of holding the land, considered carrying on a business.[20] In general, the screening provisions of the Act would apply in cases where a transaction "involves substantial rental properties and the activities of the investor in administering the property (development) can be characterized as business activities."[21] Business enterprises that are exempt from review are those carried on by a corporation incorporated by the federal or a provincial government, those exempt from certain tax provisions and ones with gross assets which do not exceed $250,000 and gross revenues not exceeding $3,000,000.[22]

Phase II of the Act affecting the establishment of new foreign-owned businesses came into effect on October 15, 1975. Under its terms, a screening procedure would apply if a new business is established by persons, other than Canadians, who are not already carrying on business in Canada or whose new business in Canada would be unrelated to the business already being carried on in Canada. On the other hand, non-eligible persons already carrying on a business in Canada are still entitled to expand their existing business by virtue of internal growth without being subject to the screening process. The terms and their respective guidelines that should be defined are "new business" and "related business." A further qualification to these terms is the distinction between a "related" and "unrelated" business.

The primary factor in determining the meaning of "new business" is the goods or services produced by the additional investment activity. If the goods or services are substantially similar to those produced by the established business, then this activity is considered to be an expansion of the established business and thus not a new business.[23] If

similar, the additional activity constitutes an expansion, not a new business, and is therefore not reviewable. It is recognized that in determining the degree of similarity the onus of making a subjective evaluation will fall to Agency officials. There is also an inherent flexibility in this provision whereby, failure to meet the criterion of substantial similarity does not automatically imply that the additional activity is a new business. In fact, such activity may be considered an expansion of business, e.g., if all goods and services produced by the new activity are used by the established business.[24]

In distinguishing between a "related" and "unrelated" business the Act has provided guidelines for determining the concept of relatedness. First, vertical integration within service industries is related. In one instance, for example, a store selling mechanical parts could add repair shops to its business without notice, or in more general terms a subsidiary company may have been a manufacturer and decided to acquire a company that was a distributor. The significant qualification here is that the linkage must move forward so that a company does not gain undue advantage by going back to start the manufacture of the goods it sells. Vertical integration in goods producing industries where for example, an acquired company is a supplier, is also within the guidelines for relatedness. If the product produced is used as an input or output for an existing process or activity then relatedness is established. One example here would be a food manufacturer who establishes a vegetable farm or goes into wholesale distribution of products that he has not made. A third factor is the direct substitution for an existing product or service of the established business, e.g., a residential on-site contractor starting to build prefabricated homes. Similarity of technology and

production processes in the different product of the new business is a fourth factor. One instance, for example, would be the case of an apparel manufacturer shifting from men's clothing into women's and children's clothing. The fifth criterion allows businesses to introduce products, services or new production processes if they are a result of research and development undertaken by the businesses themselves. A final factor that is considered under the guidelines is diversification within the limits of the same industry as per the same Standard Industrial Classification.[25]

It should be noted that these broad guidelines take into account as many facets of industry as possible and are not exclusive of the Agency's discretion to allow for further consultation about special cases. Although one study claims that there are built-in biases with each of the criteria,[26] none is so restrictive as to take away from the flexible and tolerant provision if taken as a whole. In fact, for a business activity to be exempted from reviewability only one of the six criteria needs to be met. If none of these guidelines can be met, relatedness would still be possible if "quantitative requirements of those guidelines are inappropriate to the particular economic or industrial situation."[27] In other words, if the guidelines do not appear to appropriately apply to a particular situation and the new business will most likely result in enabling the established business to be carried out more effectively then it can be safely assumed that a go-ahead would be issued by the Minister.

If a proposed or actual investment is subject to review by the screening process it is the obligation of the investor concerned to demonstrate that the investment is likely to be of "significant benefit" to Canada. Section 2(2) of the Act outlines five broad criteria upon

which the Cabinet makes an assessment of "significant benefit" and subsequently provides a decision as to whether a proposed investment is acceptable or not acceptable. It should be noted that the criteria are substantially more specific than those set out in the previous Foreign Takeovers Review Bill. In brief they include:

> "a. the effect of the acquisition or establishment on the level and nature of economic activity in Canada ...;
>
> b. the degree and significance of participation by Canadians in the business enterprises or new business ...;
>
> c. the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
>
> d. the effect of the acquisition or establishment on competition within any industry or industries in Canada;
>
> e. the compatibility of the acquisition or establishment with national industrial and economic policies ... and ... policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment."[28]

Provisions that have been added since Bill C-201 include the effect that foreign investment may have on the economic activity of Canada which includes effects on "employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada." Another feature that was not contained in Bill C-201 is the consideration given to the industrial and economic policy objectives of the provinces. When the Act was first enacted critics speculated that this particular provision would be the one most likely to create a battleground for diverging opinion. More importantly, it begged the question whether or not the individual and peculiar needs of the provinces would be recognized. The federal government was quick to respond to this

query in statements such as the one made by Alastair Gillespie, then Minister of Industry, Trade and Commerce:

> In connection with the role of provincial priorities, I would like to assure the House that the bill will not have an adverse impact on regional development. Foreign investment needed for the growth and development of a province is likely to be of significant benefit and would be allowed. On the other hand, this bill is not an instrument of regional development policy. It does not contain the bias which is deliberately built into the policy of regional economic expansion. We will not be directing proposed investments from one part of Canada to another under this proposed act. But the economic realities of the region concerned will be emphasized in meeting national economic goals.[29]

Practical consideration must be given, however, to the ambitions of the individual provinces, as well as to those provinces such as the Maritimes that are grouped into regions, for purposes of developing economic policies suited to their needs. In determining which provinces would be significantly affected by an investment proposal both levels of government would have to come to some sort of agreement on issues such as the development of secondary industry as well as primary resource industries such as oil and gas. Other areas of interest including land use controls and control over raw materials and other resources constitute a few of the considerations with which both the federal and provincial governments will have to contend.[30]

The benefit criteria are considered the cornerstone of the Act and were meant to be general and all-encompassing. They were expected not only to cover all manufacturing, resource and service industries but they are also concerned with employment in Canada, and employment of Canadians in the business enterprises, the utilization of raw materials, productivity and the acquisition and development of technological and products innovation.[31] In this regard, the criteria provide the Agency with a

negotiating tool that can be applied to practically any kind of specific activity undertaken by an investor. The test of "significant benefit" was also chosen because the existing high proportion of foreign controlled industry seemed to justify something more positive than a "non-detriment" clause.[32] In other words, the onus is placed on the investor to prove that his activity is beneficial, rather than on the Agency to prove that it is harmful. Thus, the government opted for the alternative benefit criteria as a more positive base for negotiation and bargaining standards in screening foreign investment proposals. The outcome of the application of these criteria will be investigated further in this study.

The key terms and conditions just outlined posed a multitude of interpretive problems for many of the business enterprises, associations, provincial governments and foreign investors affected by the legislation. Beyond the complexity of meaning of these terms, the overall impact of this legislative undertaking had various implications for different groups. The Act was adopted in a somewhat piecemeal fashion that was due, in part, to the substantial opposition directed at certain provisions. Following its first reading in the House in January, 1973, Bill C-132 was finally enacted in December, 1973. The Act did not actually apply however, until Phase I was proclaimed in April, 1974, and it finally came into full force October, 1975, when Phase II was made operational.

One of the primary reasons affecting this gradual implementation of policy was the level of interest indicated by several business, industry and governmental groups. These sectors were given the opportunity to voice their support or opposition for the new legislation in a series of committees and conferences initiated by the federal government. At the outset, a number of provincial premiers and industry representatives were

encouraged to submit briefs to a Standing Committee of the House. Although there were only four provinces that chose to comment formally at this time (New Brunswick, Ontario, Saskatchewan, Quebec) their reactions to the new legislation generally dealt with two main reservations. The first speculation was that such a policy would create uncertainty and delays in obtaining approval for investment projects as well as make investment even less attractive in certain regions, such as the Maritimes, by virtue of additional drawbacks. Federal-provincial conflicts of interest in terms of respective investment and development priorities was the other major concern.[33]

Each participating province submitted a brief that reflected the peculiar characteristics of its economic region. New Brunswick saw the proposed legislation as a stumbling block to its attempts to attract and accelerate industrial development. The provincial premier, Richard Hatfield, made a statement to the Committee of the House that illustrated the economic characteristics of the region in this regard. He stated,

> "There is no need for it in our region because those characteristics of industrial development which incite societies to consider government controls - large scale concentration of industrial and commercial activity, controlled substantially by foreign interests and situated in the main population, commercial and power centre of the country - simply do not exist in the Maritimes.[33]

He argued that the economic situation of the province created the need for foreign investment because of the disproportionate difficulty in attracting technology and product development from Canadian firms. It is more practical in economic terms to manufacture elsewhere and bring goods into the Province. In more positive terms the premier anticipated that the larger scale of foreign projects would lend more viability to regional industry.[35]

The government of Ontario generally supported the new legislation by maintaining that the prime responsibility for the development of a foreign investment policy rests with the federal government. However, the government criticized the limitation of the legislation in affecting areas of investment, such as takeovers and the expansion of existing foreign controlled corporations in "unrelated" areas of business which have traditionally accounted for a relatively small proportion of the growth of foreign direct investment in Canada. The government of Ontario argued that the major limitation of the Bill was the broad definition of the assessment criteria for "significant benefit." The provincial government preferred a clearer indication of Canada's objectives in the following four areas: to ensure export development by foreign subsidiaries rather than the adoption of domestic market orientation; to ensure that equipment and components are purchased in Canada where economically feasible; to increase incomes and processing returns in the area of resource processing; to develop a strong research and development capability in Canada.[36]

In rather ambiguous terms the government of Saskatchewan gave its support to the new Bill because it was considered an improvement over past national economic policies. Although the Saskatchewan government recognized the value of foreign capital if channelled in a manner consistent with the achievement of Canadian goals in general, it also stressed the need for compatibility of foreign investment with provincial and regional priorities.[37] Saskatchewan perceived the costs of foreign ownership, e.g., regional disparities and lack of development in certain sectors, as detrimental to its own objectives. It viewed the new legislation as a means for developing its secondary manufacturing and service industries.

In much the same vein as the rationale provided by New Brunswick, the Quebec government opposed the legislation on the basis of an indiscriminate application of federal economic policy on regional economies that were at varying stages of economic development with varying structural characteristics.[38] Provincial representatives claimed that in order to meet provincial objectives of gaining more direct control over their own economy Quebec still had to depend on the influx of a foreign advanced technology and development that would help absorb its large number of skilled workers. The constitutionality of the Act also came into question. Before the province could accept the federal policy, the government of Quebec suggested that the bill explicitly recognize regional economies as well as respect provincial jurisdictions. It was considered that the wide powers of the federal government in accepting or rejecting proposals or takeovers were an "instrument of economic intervention."[39]

Many of the arguments contained in provincial briefs were re-iterated in the submissions from the business and industrial sector. Individual reports by companies representing these sectors as well as various interest groups contributed a fairly wide range of opinion. For the most part, the criticisms were of a specific nature relating to the effects of the legislation on the vested interests of the company or group. The main issues that dominated most of the representations included a negative influence created by the Act on potential sources of incoming capital on which Canadian industry relies, the perception that the screening process would act as a disincentive to foreign investment in Canada, and compatability with provincial legislation generally. A cross-section of opinions and statements from the various groups will serve to broaden

these perspectives.

The industry and business sectors were represented by companies such as Imperial Oil Ltd. which was mainly concerned with the potential for federal-provincial frictions, administrative difficulty with certain portions of the Act and the external posture of Canada's foreign investment policy at a time when the country was trying to negotiate trade agreements and new monetary arrangements with other countries.[40] Representatives of the Independent Petroleum Association of Canada voiced their concern over the umbrella-type nature of the legislation in attempting to cover every industry. The basic weakness of the legislation lay in its inability to adapt to variations between industries particularly in terms of diversification and expansion.[41] Interpretive difficulties in the application of "acquisition of control" were anticipated by the Canadian Bar Association. This organization also pointed to the potential of duplication in government legislation in respect to provisions that were found in the National Transportation Act, the Bank Act and others.[42] The Canadian Labour Congress was very concerned that in no way did the Act deal explicitly with the factor of extraterritoriality that accompanies certain investment undertakings nor did it take into proper account the individual needs of the provinces.[43] The Canadian Institute of Public Real Estate recognized a possible constitutional conflict as the Act appeared to encroach upon the provincial jurisdiction over land use and property rights. This organization, in one of its recommendations also pointed out that because of the wide definition in the Act of "business enterprise" the legislative provisions would most likely apply to almost every ownership of property. It was also anticipated that most real estate transactions would be rejected under the "significant benefit" test because

they would have a relatively neutral affect on the economy.[44] The Canadian Real Estate Association was discouraged generally by the loose structure of the legislation which, it argued, was further complicated by its ambiguous definitions.[45] As a final example of the commentary provided, Slater, Walker of Canada, Ltd., representing the investment and merchant banking sector, considered the screening agency a detriment to business because it involved excessive government intervention. The administrative obligations imposed by the Act would work against merchant banking operations which must be conducted quickly.[46]

More than a year and a half passed between the implementation of Phase I and Phase II of the Act. The federal government claimed that it required the administrative experience in applying the screening process before the Act became fully enforced. More importantly, however, the government utilized this interim time period to consult with the provinces and re-draft and issue certain provisions that would thus become more compatible with provincial concerns. This was accomplished in a series of consultations and conferences subsequent to the representations made to the Standing Committee in the House.

Although the Alberta government did not choose to submit a formal brief to the Committee in the House, it issued a statement on foreign investment in a report to the Legislative Assembly in 1974. A Select Committee, which studied the legislation, raised a number of concerns not dissimilar to those raised by other provinces. The Committee viewed the administrative procedures as a time detriment that could be costly to those requiring capital on short notice. In the case of takeovers, the province did not consider that the legislation took into account the rights of the Canadian seller or vendor in terms of the lost opportunity for

obtaining benefits when foreign companies withdrew their proposals. The other concerns included the costs of providing an excessive amount of information, discretionary control of incoming capital and the discouragement of foreign investment due to administrative burdens.[47]

In a meeting of provincial industry ministers held in Newfoundland at the start of 1975, a request to postpone the implementation of Phase II of the Act was based on the facts that the provinces did not feel they had been sufficiently consulted, nor did they know enough about the Act or the guidelines that the government would use to determine "related business." They also expressed concern that Phase II would limit expansion by foreign firms which were attracted by regional industrial incentive programs.[48] This had the effect of moving the target date for implementation ahead and receiving assurance from Mr. Gillespie that regional and local situations would be considered in any decision-making regarding the screening of foreign investment. In a federal-provincial conference of industry ministers called for that purpose and held in Ottawa, March, 1975, all ten provincial representatives agreed that it was not urgent to extend the controls and another delay was imposed. British Columbia, Newfoundland and Ontario issued further complaints about the federal government's lack of consultation with the provinces concerning the final decisions made on various foreign investments and the government's negligence in supplying the provinces with copies of investment applications and certain administrative forms.[49] These complaints continued despite the fact that subsequent to the second reading of the Bill the federal government had re-drafted portions of the Bill relating to mechanisms of consultation with the provinces and confidentiality provisions. Furthermore, the provinces were assured that their economic and industrial

objectives would be taken into account in any decision-making regarding foreign investment. Also, certain confidentiality provisions regarding application information were altered to facilitate smoother consultations between the two levels of government. The federal government was able to reach a compromise on the specific wording of the rules and regulations concerning criteria for the expansion of business by mid-May, 1975. In June of the same year, however, a further delay occurred when considerable division within the Cabinet became prevalent. In addition to the concern over provincial opposition to the proclamation, the possible impact of Phase II on the balance of payments and the unemployment situation were raised as issues. Finance Minister John Turner speculated that the effect of tighter controls in a year when Canada's balance-of-payments deficit was expected to reach a level of five billion dollars would be detrimental. In other words, he argued that Canada could not afford to create an air of uncertainty in the minds of potential investors about making new investments or expanding their Canadian operations.[50] Furthermore, unemployment figures were high generally at that time and the Maritimes were particularly vulnerable to set backs in foreign capital flows. These and other minor discussions delayed the final proclamation date of Phase II to October 15, 1975.

FOOTNOTES

[1]Foreign Investment Review Act, Section 2(1), December 12, 1973. Hereafter sections of the Act will only be cited.

[2]Ibid., Subsection 5(1).

[3]Ibid., Section 6. The term "non-eligible persons" will be cited hereafter as "n.e.p.s".

[4]R. H. Stikeman, "Foreign Investment Review: Canada's New Medicine", Business Quarterly, vol. 39, 1974, pp. 77-78.

[5]House of Commons Debates Official Report 29th Parliament, 1st session, March 30, 1973, p. 2777.

[6]House of Commons Standing Committee on Finance, Trade and Economic Affairs. Issue No. 27, June 7, 1973, pp. 26, 27.

[7]House of Commons Debates May 30, 1973, p. 2782.

[8]Canadian Annual Review for 1973, Edited by J. Saywell, (Toronto: University of Toronto Press) 1974, p. 335.

[9]Foreign Investment Review Act, Section 3(1).

[10]S. Hartt, "Who is Affected by the New Law", Canadian Foreign Investment Review Seminar. Text of Addresses given by the Principal Speakers (Toronto: Richard de Boo Ltd.) 1974, p. 7.

[11]Ibid., p. 8.

[12]Heward Stikeman, Foreign Investment Review Act: The Shape of Things to Come, (Toronto: Richard de Boo Ltd.), 1974, p. 7.

[13]Section 4 also applies to the status of a particular business and whether or not a business is unrelated to any other business which may be carried on by a n.e.p. or group of persons.

[14]Section 3(3).

[15]Section 3, paragraph 6(g).

[16]E. James Arnett, "What Activities are Screened: Takeovers and New Business", Canadian Foreign Investment Review Seminar, op cit., p. 15.

[17]Hartt, Stanley H. "Who is Affected by the New Law". Canadian Foreign Investment Review Seminar. (Toronto: Richard de Boo Ltd.) 1974, p. 8.

[18]This discussion is dealt with in further detail in the Canadian Foreign Investment Review Seminar, p. 16.

[19]E. James Arnett, op cit., p. 12. For specific wording see Section 3(1) of the Act.

[20]Subsection 3(9). This exemption is also granted to a person who acquires an interest in a farm-out agreement, which in almost all cases does not pertain to all or substantially all of the assets of the business but rather to a portion of the land holdings.

[21]Government of Canada. Foreign Investment Review Agency Businessman's Guide to the Foreign Investment Review Act, n.d., p. 21.

[22]Section 5(1)(a)(b)(c).

[23]T. Abdel-Malek and A. K. Sarkar, "An Analysis of the Effects of Phase II Guidelines on the Foreign Investment Review Act", Canadian Public Policy III, no. 1, Winter, 1977, p. 38.

[24]Ibid., p. 42.

[25]H. Byleveld, "Foreign Investment Review Act: now fully hatched", The Canadian Banker and ICB Review, vol. 82, no. 6, 1975, p. 29. For further discussion of these guidelines refer to Foreign Investment Review Act: The Shape of Things to Come, op cit., p. 14, and, Businessman's Guide to the Foreign Investment Review Act, p. 19.

[26]T. Abdel-Malek and A. K. Sarkar, pp. 42-45.

[27]Ibid., p. 38.

[28]Section 2(2).

[29]Foreign Investment Review Seminar, p. 66.

[30]Ibid., pp. 76, 77.

[31]James A. Robb, "Administrative Procedures Under the Foreign Investment Review Act", Canadian Foreign Investment Review Seminar, pp. 30, 31.

[32]Herbert C. Byleveld, "Foreign Investment Review Act: now fully hatched", The Canadian Banker and ICB Review, November-December, vol. 82, no. 6, 1975, p. 26.

[33]House of Commons Standing Committee on Finance, Trade and Economic Affairs. 29th Parliament, 1st session. Issue no. 42, vols. II, III, July 19, 1973.

[34]Ibid., p. 4.

[35]Standing Committee on Finance, Trade and Economic Affairs, op cit., Issue no. 42, vol. II, p. 9.

[36]Standing Committee on Finance, Trade and Economic Affairs, op cit., Issue no. 32, vol. III, 1973, pp. 7, 8.

[37] Standing Committee on Finance, Trade and Economic Affairs, op cit., Issue no. 32, vol. III, Appendix T, 1973.

[38] Ibid., Issue no. 42, Appendix 2F, p. 593.

[39] Ibid., pp. 593, 597.

[40] Standing Committee on Finance, Trade and Economic Affairs, Issue no. 29, June, 1973, Appendix L.

[41] Ibid., Issue no. 30, Appendix M, June 1973.

[42] Ibid., Issue no. 32, June, 1973.

[43] Ibid., Issue no. 35, Appendix 2C, 1973.

[44] Standing Committee on Finance, Trade and Economic Affairs, Issue no. 30, vol. II, Appendix P, 1973.

[45] Standing Committee on Finance, Trade and Economic Affairs, Issue no. 33, vol. III, Appendix V, 1973.

[46] Ibid., Issue no. 34, Appendix X, 1973.

[47] Alberta Select Committee of the Legislative Assembly on Foreign Investment. Final Report. December, 1974, pp. 54, 55.

[48] P. Hayden, J. Burns and I Schwartz, Foreign Investment in Canada. Report Bulletin no. 3, paragraph 3-2, January 1, 1975. This particular source does not utilize the usual system of page numbering, rather paragraph numbers are assigned to specific sections. Hereafter, paragraph numbers only will be cited.

[49] Ibid., Report Bulletin No. 4, paragraph 4-1, February 28, 1975.

[50] Ibid., Report Bulletin No. 7, paragraph 7-1, May 30, 1975.

III The Review Process

The Foreign Investment Review Agency constitutes the modus operandi of the Review Act by providing the means for administrative intervention which is the screening process. The Gray Report issued in 1972, and also referred to as the blueprint for the review legislation, stated that the primary aim of a review process was "to obtain greater benefits from foreign investments, better economic performance and stronger growth of employment and real incomes in Canada."[1] The subsequent work of the Agency has attempted to meet these and other determining factors in terms of the "significant benefit" provisions. In the development of a means -ends strategy to procure foreign investment benefits the Agency has become a bargaining instrument with which prospective investors have to deal. The process by which proposed investments are handled necessitates a review of the organizational structure and bureaucratic process. This investigation will also provide a reference point for the types of recommendations that can be made to the Minister by the Agency.

The groundwork for the development of appropriate administrative procedures was set out in the Gray Report. This document anticipated the implementation of a chronological sequence of procedures involving the maintenance of a register or file of investment proposals, an initial assessment of proposals, a further examination of proposals based on bargaining most appropriate to the particular circumstances of each case and a follow-up or surveillance procedure to ensure compliance.[2] The actual procedures constitute a decision-making process that applies a number of legislative and regulatory provisions throughout a fairly open

organizational structure. In effect, the application and subsequent screening procedure has become fairly explicit in "setting out what decisions can be made, when and how they can be made and who can make them."[3]

Section 7 of the Act creates a Review Agency which is directed by a Commissioner or chief executive officer appointed by Cabinet. The legislation states that the Agency is an administrative body which has a basic purpose to "advise and assist" the Minister in reviewing proposals for foreign acquisitions of control of Canadian business enterprises and new business proposals. In this capacity the Agency is also responsible for "other statutory functions which are defined in relation to the receipt of notices, the processing of notices, the referral of matters to the Minister and the number of areas defined in the enforcement aspects of the statute."[4] The responsibility for these administrative duties rests with the Agency's three main branches; the Compliance Branch, the Assessment Branch and the Research and Analysis Branch, all reporting to the Commissioner.

The administrative process that guides the Agency in arriving at a referral for Ministerial consideration begins when a written notice is submitted to the Commissioner. An analysis of the investment proposal is carried out by the administrative hierarchy of the Agency with the initial responsibility falling to the Compliance Branch. In brief, the Rulings Section of this branch determines whether an application is reviewable, i.e. whether the applicant is a "non-eligible person," and whether the notice conforms to the required standards. In addition to its legal function the branch is responsible for exercising surveillance, investigative, enforcement and general administrative functions. Duties

such as surveillance of transactions that have been or are about to be undertaken without proper notice and the enforcement of undertakings dealing with allowed investments come into the scope of authority of the Compliance Branch.[5] Additional requests for information, consultations with other interested groups and the negotiations of additional commitments also falls within the working scope of this branch. If the proposal is considered reviewable it is passed to the Assessment Branch which performs the important task of determining the "significant benefit" of the proposal for the Canadian economy. If further substantive information is required to prove "significant benefit" it is usually requested during this stage of the assessment either from the applicant or through consultation with branches of the Department of Industry, Trade and Commerce concerned with the industrial sector in which the investment is made. It is also at this stage of the evaluation that the notice is forwarded to the governments of those provinces that may be affected by the investment proposal for the purpose of obtaining their views. Although the Act does not require that the applicant notify the affected provinces, it has been recognized that such a practice may benefit the applicant if provincial support for an application is sought.[6] A completed analysis is then referred to the Minister of Industry, Trade and Commerce for subsequent recommendation to the Cabinet.

The responsibilities of the Research and Analysis Branch are not directly involved with the screening process. This third branch primarily maintains the effective administration of the Act and conducts ongoing research into what constitutes "significant benefit" in Canada "on an industry-by-industry and province-by-province basis."[7] One evaluation of the Agency's administrative framework considers both the Research and

Analysis Branch and the Compliance Branch as providing supportive functions while the work of the Assessment Branch constitutes the raison d'être of the Agency.[8]

Once the investment information is analyzed and the Agency is satisfied that the prospective investor has submitted all the necessary information in support of his proposal, the application is referred to the Minister. As a further check in the process the Minister is responsible for completing the assessment of an application on the basis of the Agency's evaluation as well as any other information submitted by any party to a proposed transaction. Section 9 of the Act also allows the Minister to consider any written undertakings by the investor as well as representations made by the government of the province that is likely to be affected by the investment. The implications of these additional considerations will be discussed later. In terms of basic procedure the Minister may grant an opinion on the resolution of the proposal in one of two ways. He may simply recommend to Cabinet that the investment be allowed or he may notify the Agency that he is unable to recommend the investment on the basis of the information provided. In the latter case the Agency is obliged to notify the investor of the Minister's decisions and inform that person of his right to make further representations. There is a time limit of thirty days for the investor to take advantage of this provision after which time the Minister forwards a final recommendation to Cabinet. In either case, the Governor-in-Council is the final authority and is not bound by the Minister's recommendation in judging whether the proposed investment is likely to be of "significant benefit" to Canada.

This sequence of events comprises the basic administrative procedure

for the notice of any investment that is subject to review. There are, however, numerous qualifications imposed on this process by various regulatory and organizational provisions which are meant to provide the investor with an explicit set of guidelines. Further administrative safeguards protect the government from making any premature assessments without all the necessary information and provide the investor with greater incentives to make a proposal as attractive as possible in order to gain approval. In this manner the screening procedure allows room for negotiation and bargaining with the objective of obtaining some economic benefit.

A more detailed examination of the administrative procedures involved in the resolution of an investment submission begins when the Agency receives notice of a proposal. The Act requires that every notice of investment subject to the Act is submitted in writing as prescribed by the Regulations. Once this is completed the Agency issues a certificate which confirms receipt as well as initiates a 60 day procedure deadline in which the Cabinet is obliged to make a decision. The Act provides the Minister with some additional leverage in cases where he has reasonable grounds for believing that a reviewable investment has proceeded without proper notification. Section 8(3) allows the Minister to demand a notice in the event of any suspicion that proper procedures where warranted have not been undertaken.[9] An inherent problem in providing notice, however, is the question of proper timing in submission. Although the Agency prefers to receive notice as soon as possible so that it can initiate its administrative responsibilities, an investor may face circumstantial difficulties in attempting a takeover or establishing a new business that may affect the timing of a notice.

Graeme Hughes, author of a study of foreign investment, discusses three potential problems that an investor could face when proposing to make a share takeover of a public corporation. One difficulty in timing a notice is related to confidentiality of information. In negotiations for a takeover any early leaks of information, such as notice to the Agency and hence to the federal and affected provincial governments, may disrupt a successful bid; the assumption being that there is a risk of an increase in the market price of shares of the target corporation. Another problem is the amount and type of information that is required for a proper notice to be given. The investor must usually wait for investment negotiations to become well advanced before he can obtain a substantial amount of information that would no longer be considered secret. In either case a notice to the Agency would be incomplete because of the nature and timing of the business negotiations. A third matter with which an investor may be confronted is conflicting provisions of various provincial Securities Acts. In certain provinces such as Alberta, Ontario and British Columbia, Securities Acts require that where a takeover bid is made for more than twenty per cent of a public corporation's voting shares, the bid can remain valid for only a certain period of time (usually thirty-five days). The investor is then faced with incompatible time frames in trying to satisfy different government deadlines. If a takeover notice is filed with the Agency at the same time as a takeover bid is mailed to shareholders the thirty-five day period allowed for outstanding shares under the Securities Act may expire before Cabinet has time to make a final decision under the review procedure.[10] By virtue of this type of situation the Agency has granted preliminary assessments or informal opinions about proposed takeovers in order to allow for some

flexibility in shortening the time frame for a formal review.

An investor seeking approval for an investment proposal will find that a number of alternatives are available for making a proposition attractive enough for approval. In cases where a transaction is potentially reviewable an investor apparently has the option of undertaking certain alternatives to "Canadianize" a corporation. In their study of the Act Hayden, Schwartz and Burns suggest three methods by which investors can re-arrange their company's ownership structure to avoid being classified a "non-eligible person." It has been discovered that investors have the option of becoming landed immigrants or Canadian citizens, they may dispose of their controlling shares or shares may be retained but voting control must be passed to resident Canadians.[11] In examining these methods more closely it can be assumed that gaining landed immigrant status and applying for citizenship once permanent residency is established is the most straightforward procedure. The only condition considered a drawback in this situation is the stipulation that income of foreign corporations becomes taxable (Income Tax Act, January, 1976).[12]

Disposition of control shares is another method of achieving Canadianization. At the risk of losing equity control in a corporation, foreign investors may choose to sell their control shares to resident Canadian citizens. Disposition of shares can also be undertaken by a Corporation which purchases shares for cancellation leaving resident Canadians with the decision-making control of the corporation. Another example is an arrangement whereby a share exchange guarantees Canadian shareholders at least fifty-one per cent of the voting rights.

The transfer of voting rights is the third method that Hayden, et

al, propose as a way to Canadianize a corporation. In this type of situation actual control is simply not given up but merely transferred to resident Canadians. One instance, for example, is the case of the Canadian company Bovis Corporation (sixty-one per cent owned by Bovis Ltd., London, England) which chose to transfer the voting rights of its controlling shares to three Canadian non-management directors for five years. During that time period the Bovis Corporation claimed that it was an "eligible person" under the Act and thus legally permitted to undertake "acquisition of control" or takeovers of Canadian business enterprises. The act of recalling the voting rights however, would be considered an acquisition of control by a "non-eligible person" and subject to review. The position of the Agency respecting this type of arrangement has been clarified by a past Commissioner, Richard Murray:

> "... the transfer of voting rights by non-Canadians, without the corresponding transfer of equity ownership, is not by itself sufficient to change the ultimate control of the corporation. This is patently so in cases where the voting rights may revert to non-Canadians at sometime in the future. ... it has become clear that the retention of the beneficial ownership of equity by foreign parents is sufficient to bring the Canadian company within the scope of the review requirements." [14]

This explanation suggests that reversion of such voting rights may not be the most dependable method in attempting to Canadianize a corporation. By and large, all these various approaches to becoming Canadianized have one ultimate goal which is to avoid the provisions of the Act that prevent a "non-eligible person" from making a successful bid for a takeover or the establishment of a new business. If acceptable alternatives are discovered a proposed transaction may be able to avoid the review process. The success for such undertakings seems to depend ultimately on the amount of control that will pass into Canadian hands and remain there.

In addition to the consideration given for the timing of a notice the foreign investor is obliged to submit detailed information that will help to determine "significant benefit" in an application. The type of information required is set out in the "Foreign Investment Review Regulations." These are prescribed by the Cabinet and oblige the investor to produce information that is organized into five schedules or formats for which the Agency has provided forms and these include details regarding the applicant, the Canadian business enterprise to be acquired and the business to be established. Previous regulations had been revoked and replaced with the new Regulations in order to simplify and reduce the information that is normally required to complete a notice.[15] In the interests of greater administrative efficiency the Agency also introduced regulations for an abbreviated notice with respect to small business investments. Any applicant intending to acquire a business which, as of the end of its latest fiscal period, had less than $2,000,000 in gross assets and fewer than one hundred employees could submit an abbreviated notice (form FIRA IV). These thresholds also apply for the first two years of operation in the plans for a new business establishment (form FIRA V). Within ten days of receipt of these notifications however, further information may be requested at the discretion of the Minister in the case of an abbreviated notice.[16]

Regulations governing investment applications for takeovers and new businesses generally, are organized in a series of forms (FIRA I, II, III) and supplementary "Guide Items" which deal more specifically with the information requested in the forms. The information requested in these respective forms is highly detailed, but may be briefly summarized as follows. Applications for both acquisitions and new business

establishments necessitate the submission of form FIRA I (or Schedule I) which identifies the status of an applicant i.e. determination of non-eligibility, as well as a description of the nature and type of business activities of both the applicant and associates or affiliates[17] and the new or acquired business.[18] If the notice relates to a proposed or actual acquisition of control of a Canadian business enterprise applicants are also obliged to submit further information required in form FIRA II (or Schedule II). These regulations require extensive detail regarding the investor's prospects for the acquisition including the determination of gross assets and gross revenue in the acquisition, acquisition of shares or property, and the nature of research and development activities and technology. For this submission it is mandatory that applicants also provide a detailed account of the anticipated plans for the Canadian business enterprise and the significant benefit that will result. The information in which the Agency is particularly interested includes employment prospects, new products development and plans for Canadian participation in management and control of the business enterprise.[19] In the alternate situation of an application for a new business the Agency provides form FIRA III (Schedule III) for completion. In addition to more specific information on the new business such as the type of facilities utilized, the type and cost of machinery required and the number of persons to be employed, the applicant is obliged to provide a general description of the industry in which the new business will be involved. The Agency is also required to know the proposed arrangement for ownership and control of the new business, the nature of the activities of the business such as the goods and services produced or sold by the business enterprise as well as the anticipated effect of the new business in terms

of significant benefit to the industry.[20]

Following the submission of a formal notice the assessment of an application is undertaken by the various administrative units previously discussed. The Agency may suggest further that certain commitments be undertaken by the investor to enhance the overall application although this process is more likely to occur in later negotiations. Under Section 9 of the Act the Minister may also assess other information submitted by "any parties to the investment or by a province likely to be significantly affected by the investment."[21] Hayden, Burns and Schwartz have also examined the administration of the Act and provide a concise interpretation of what constitutes "other parties to the investment" as

> "... namely, the institutions financing the investment, potential suppliers of the inventory, parts or raw materials to the Canadian business enterprise, potential purchasers of the products or services produced by the Canadian business enterprise, or unions whose members would be employed in connection with the Canadian business enterprise."[22]

As part of the Agency's responsibility for assessing a particular investment proposal it must be determined that investments be compatible with provincial industrial and economic policies. Applications are forwarded to any provincial governments likely to be affected by a proposed investment. With respect to this and other information that may be provided by the applicant, the provincial governments have an "opportunity to state their views regarding the compatibility of the investment with their policies."[23] The Minister is responsible for taking provincial views into account when making his recommendation.

It is also necessary for individual investment proposals to be assessed against the programs and policies of all relevant Federal

departments and agencies. The Second Annual Report (1975-76) concerning the Act points out, for example, that "an extensive consultative procedure has been established with the Department of Industry, Trade and Commerce with respect to industrial development policies related to manufacturing, industry and tourism."[24] Similar working arrangements have been established with other government agencies. The Department of Regional Economic Expansion (DREE) undertakes to investigate those applications which are subject to review under both the Regional Development Incentive Act (RDIA) and the Foreign Investment Review Act.[25] In situations where investment proposals have an effect on competition in the industry, the Department of Consumer and Corporate Affairs (Bureau of Competition Policy) maintains a close working relationship with the Agency. If a proposal had obvious effects on competition a ruling would have to be obtained from the Combines Division to avoid any potential delays in an investment review under the Act. Generally, consultations with other departments are conducted according to the nature of the case.

With regard to the applicant's attempts in supplementing an application with additional undertakings, various sources have observed that applicants have an advantage if they use discretion in outlining factors that will be considered in determining "significant benefit".[26] It would appear that in certain instances an applicant's interests would be better served if additional undertakings or further commitments were negotiated with the Agency subsequent to the submission of notice. An attempt to produce a statement that appears too self-serving may be, in the long run, detrimental to the applicant's cause. It is reasonable to assume therefore, that negotiations between the Agency and the applicant will provide a more solid base on which to make commitments that will

reflect the needs of a particular industry. This bargaining procedure serves as a means to satisfy foreign investment policy objectives which are based on the realization of "significant benefit" criteria. Although the Agency does not make the final decision to approve or reject an investment bid, its role in assisting applicants to determine the best means for presenting proposals is instrumental in influencing a decision. Moreover, the Assessment Branch of the Agency is in a commanding position to advise an applicant of certain requirements that may be looked upon favourably by the Cabinet. A completed recommendation by the Assessment Branch is submitted to the Minister together with all the pertinent information regarding the notice of investment. The Minister is then responsible for formulating his own assessment on the basis of three criteria which include: the Agency's recommendation together with information submitted by involved parties to the investment, all negotiated undertakings that relate to the investment, and representations submitted by the province(s) affected by the investment.[27] It is at this point in the assessment phase that the Agency may become involved in additional negotiations which are critical to the process of final decision-making. The Act provides for an administrative loophole which may extend the assessment period indefinitely. Section 11(1) of the Act empowers the Minister to delay making a recommendation in cases for which he is unable to forward a complete assessment to Cabinet on the basis of available information. His inability to complete a recommendation may stem from various circumstances. As one study notes, "tardiness, lack of information about the applicant or investment or a request by affected provinces for further opportunity to assess the investment,"[28] may result in no action being taken until further information is submitted and reconsidered. In

situations where the Minister is unable to complete or make a recommendation or considers that an investment should not be allowed he is obliged to notify the Agency which in turn advises the investor of the Minister's opinion. The investor then has the option to make further representations concerning the proposal. The maximum time allotted for receipt of these additions is thirty days unless another arrangement is agreed upon, owing to individual circumstances. Essentially, this time period becomes a bargaining session where decisions are based on the amount of greater economic benefit accruing to Canada. The Gray Report anticipated that negotiations for foreign investment would proceed on the basis of a final cost - benefit judgement in that

> "Each of the elements over which bargaining takes place represents an attempt by the screening agency to severe (sic) the direct investment package and obtain the distinctive capacity at a lower cost, e.g., by reducing or removing export restrictions, ...[29]

The quantity and quality of the investment package is determined through a process of negotiation not only with the applicant who exercises his right to make further representations, but also with any other party involved with the investment. This procedure protects the applicant indirectly by virtue of the fact that an unfavourable decision cannot be made without taking into account further arguments in favour of the proposal.

Following this particular set of consultations the Minister reconsiders the proposal and then recommends to the Cabinet whether or not the investment is likely to be of "significant benefit" to Canada.[30] An investment is approved only when the Minister recommends to Cabinet that a proposal meets the benefit criteria and Cabinet agrees with the terms of the decision and allows the investment by Order-in-Council. If

Cabinet disagrees with the proposal it may either refuse to allow the investment, regardless of the Minister's recommendation, or choose the alternative of directing the Minister to proceed as if he had not been able to make any recommendation in the first assessment.[31] The matter is again reviewed by the Minister and the applicant and the latter is granted another thirty day extension. Conceivably then the Cabinet could review the investment twice.

In the normal course of affairs the Cabinet has sixty days from the day that the Agency issued receipt of the notice of investment in which to refuse to allow an investment proposal. This schedule can be interrupted however, either at the Minister's own request for additional information or as a result of Cabinet's inability to make a decision on the basis of information already submitted. It would appear that, in practice, the attempt to meet the sixty day deadline is difficult. The government has taken advantage of the provision for extension that is built into the Subsection 11(1) notice on numerous occasions. The difficulty in meeting this deadline was examined by Richard Murray, the first Commissioner of the Agency, in an address to the Law Society of Upper Canada in May, 1975. He stated that

> "The subsection 11(1) notice is used with great frequency because we are unable to complete the cases in sixty days; sixty days is too short a time ... for the first sixty days the onus is on the government, under the law, to perform or else a case is deemed to be allowed. Thus when the subsection 11(1) notice is issued, it does not stop the clock, it destroys the clock, never to be resurrected again. The entire onus switches from the government to the applicant. He may have a purchase agreement with time running out. Labour negotiations can be in a state of great unease and so on ... There have to be time constraints of some kind. The decision is not appealable and it gives an undue amount of power, in my view, to the government side."[32]

If the assessment period can be extended indefinitely Cabinet can avoid having to provide a formal decision on a proposal by "deeming" the proposal approved. This means that an affirmative judgement or consideration is given to a proposal when a final decision cannot be reached within the time frames specified by the Act.

Section 13(1) of the Act sets out three requirements whereby investments may be "deemed" or considered to be allowed. In any case where: a) sixty days have elapsed since the date since receipt was issued for a notice of investment, and, b) no decision has been made by the Cabinet regarding a proposed investment, and, c) the Agency has not advised the applicant of his right to make further representations, the Act considers the investment to have been allowed.[33] In other words, the government concedes that an investment proposal has been approved if it fails to act within sixty days either by not taking advantage of the Section 11(1) notice or in situations such as real estate cases, where economic benefits may not be explicitly outlined but the proposal offers other long term economic advantages. Theoretically, this would appear to allow Cabinet to dictate certain time frames and have investment decisions approved by default. In reality, however, these "deeming" provisions are far more restrictive. In Richard Murray's understanding the provision "does not allow the Governor-in-Council to escape his responsibility of allowing or disallowing. The provision is valid only, in fact, if we literally lose or burn the file. Then, a case would be deemed to be allowed."[34] Although this provision would seem to ensure that some kind of decision is made within a sixty day period, Ministerial discretion in re-considering new or further information and the application of administrative loopholes such as the subsection 11(1) notice may extend

this designated period of time indefinitely.

A final type of decision-making situation which warrants some examination is the case that involves the reassessment of a notice once rejected by Cabinet. While neither the Act nor the regulations make explicit provision for this arrangement, the Agency together with the Cabinet has adopted a policy of "re-assessing a proposal, where re-consideration is warranted by sufficient change in the circumstances of the transaction."[35] Although no guidelines have been issued in terms of the degree of change that would be needed to warrant a re-assessment the example of the Bluebird-Corbeil takeover can illustrate the kind of situation that might be re-considered. The proposed takeover of J. H. Corbeil Ltee. of St. Lin, Quebec, a manufacturer of schoolbus frames, (wholly Canadian owned) by Canadian Bluebird International Inc. (wholly American owned) was rejected by Order-in-Council (November 8, 1974). The Quebec government initially opposed the takeover but subsequently decided to obtain an equity, but not controlling, position in Corbeil. This was achieved by requesting the province's Industrial Development Corporation to purchase enough shares to constitute a vested interest. Bluebird still maintained control of the Canadian company but with the strong support of the Quebec government and the submission of an amended notice the Agency approved the application on December 23, 1974. In this particular submission the company provided undertakings that would double the present workforce, infuse new capital into the plant and equipment, increase local manufacture of parts as well as increase export.[36] This example indicates further, that decisions made on the basis of negotiation and bargaining rely on the individual merits of each case.

In attempting to meet the objectives of the Act vis-à-vis the

significant benefit attainable from investment proposals the Agency undertakes negotiations that are most suitable to a particular situation and that allow it to obtain the most beneficial aspects of a proposal. Thus, in refusing a proposed investment on the basis of the benefits provided at the time, the Agency may suggest alternate means of undertaking direct investment such as licensing or franchising Canadian businesses, obtaining more new technology, developing a joint venture with a Canadian partner, or lending key employees.[37] These techniques would permit the imposition of fewer restrictions on activities in Canada as well as allow a greater degree of Canadian influence over industrial activity. In applying a cost - benefit assessment, the Agency can use other tactics to obtain economic benefits for the country and thus secure approval for the applicant. In situations, for example, where the foreign direct investment proposed by a particular industry is distinctive in terms of cheaper access to factors of production, technological superiority, or market power, the screening authorities might seek a role for the Canadian subsidiary in the corporate strategy of the industry. Or, in cases where a Canadian business enterprise has the ability to develop the distinctiveness of a foreign industry, the Agency may suggest the establishment of a joint venture in order to stimulate competition.[38] The scale of possibilities that could become negotiable would seem to depend on the ingenuity of the negotiator and the level of commitment of the investor involved.

In the Gray Report, a number of situations were discussed in which an investment would possibly be refused. Among other possibilities, these included instances where foreign investment would not be beneficial because of the established strength of an economic sector, where foreign investment

was simply the "extension or entrenchment" of a particular market, where the investment could be detrimental by distorting industrial priorities, and where foreign investment had anti-competitive effects.[39] Other situations in which refusal was justified would be based on the application of the "significant benefit" criteria to individual circumstances.

By and large, it is difficult to discern any particular trend in either approvals or rejections because of the lack of publication of specific undertakings and the cursory manner in which the resolution of cases is dealt with in News Releases issued by the Minister. The main factor to consider however, is that a test of "significant benefit" is not a legal evaluation but rather a policy test whereby Cabinet undertakes the political and economic assessment of an investment. This suggests that a potential investor could obtain a judicial review of certain procedural aspects of the Minister's administration, e.g. failing to provide the investor with an opportunity for further representation, or failing to provide official notice of an investment, but he probably could not appeal a decision to the courts by contesting the application of benefit criteria. This, however, has yet to be tested in the courts. In the final analysis the decision to allow or disallow a proposal will become primarily a subjective exercise taking into account all the facts submitted by applicants, further representations from and consultations with other parties involved with the investment as well as probable consultations with the provincial governments with respect to regional and local situations. The bargaining process that takes all these factors into account is the crux of all decision-making that involves the input of the Agency.

FOOTNOTES

[1]Government of Canada, Foreign Direct Investment in Canada, 1972, p. 481. The reasons for implementing a review process were set out in detail in this same report at pp. 453, 454.

[2]Ibid., pp. 481, 482.

[3]Graeme C. Hughes, A Commentary on the Foreign Investment Review Act, (Toronto: The Carswell Company Ltd.), 1975, p. 61.

[4]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, (Toronto: The Law Society of Upper Canada), p. 43.

[5]For a more concise description of the various sections that comprise the working areas of the Compliance Branch, i.e. - Rulings, Legal Policy, Surveillance and Enforcement, and Control and Administration refer to Graeme C. Hughes, op cit., pp. 62, 63.

[6]Ibid., p. 72. Although the Act does not require that the applicant notify the affected provinces, it has been recognized that such a practice may benefit the applicant if provincial support for an application is sought.

[7]P. Hayden, J. Burns and I. Schwartz, "Administration and Review", Foreign Investment in Canada: A Guide to the Law, (Scarborough, Ontario: Prentice Hall of Canada), vol. II, 1974, paragraph 130,003.

[8]Graeme C. Hughes, p. 61.

[9]Ibid., pp. 64, 65. The manner in which a notice can be served, i.e., registered mail, and the various circumstances that may initiate such action is discussed here in further detail.

[10]Ibid., pp. 70, 71. A hypothetical example of this type of situation is discussed in Hayden, Burns and Schwartz, vol. II, paragraph 32,010.

[11]P. Hayden, J. Burns and I. Schwartz, "Canadianization Under the Foreign Investment Review Act", Foreign Investment in Canada: A Guide to the Law, vol. I, 1974, paragraph 2,005-3.

[12]Ibid., paragraph 2005-4. The tax falls under the foreign accrual property income provisions of the 1976 Tax Act. This method also obliges the investor to take up permanent residence in Canada under penalty of losing his landed immigrant status.

[13]Ibid., paragraph 2,005-6. This article also cites a specific example of this type of transaction in the case involving Slate Walker of Canada Ltd.

[14]Hayden, et al, vol. II, paragraph 3-1.

[15]New Foreign Investment Review (Acquisition) Regulations were tabled in Parliament on April 10, 1975, to replace those issued on March 7, 1974. Notification by an applicant can now be processed through the use of the forms, FIRA I - FIRA V which are comparable to the former schedules.

[16]Government of Canada, Foreign Investment Review Agency, A Guide to Filing Notice with the Foreign Investment Review Agency, n.d., p. 13.

[17]Associates and affiliates are those pertaining to the applicant, the person who controls the applicant and any intermediary in the chain of control between the applicant and his controller. Please refer to Hayden et al, vol. II, paragraph 32,011. Affiliates and associates are further defined in the Foreign Investment Review Regulations 2(2) and 2.

[18]Canada Gazette, Part II, vol. III, No. 6, Foreign Investment Review Regulations, March 10, 1977.

[19]A Guide to Filing Notice with the Foreign Investment Review Agency, op cit., pp. 17-19. See also, Canada Gazette, Part II, vol. III, No. 6, Schedule II.

[20]A Guide to Filing Notice with the Foreign Investment Review Agency, op cit., pp. 20, 21. See also, Canada Gazette, Part II, vol. III, No. 6, Schedule III.

[21]Section 9 of the Act.

[22]Hayden, Burns and Schwartz, vol. II, paragraph 32,031.

[23]Foreign Investment Review Agency, Foreign Investment Review Act, Annual Report, 1975/76, p. 9.

[24]Ibid.

[25]If, in this type of case, the application to the Agency is the subject of a concurrent application for incentive under programs of DREE and the investment involves less than $2,000,000 in gross assets and fewer than one hundred employees, the Agency uses the same notice form as that used by DREE.

[26]Please refer to both, Graeme C. Hughes, p. 67, and Canadian Foreign Investment Review Seminar, Text of Addresses Given by the Principal Speakers, (Toronto: Richard de Boo Ltd.), 1974, p. 27.

[27]Hayden, et al, vol. II, paragraph 33,002.

[28]Ibid., paragraph 33,008.

[29]A Citizen's Guide to the Gray Report, Edited by The Canadian Forum, (Toronto: New Press), 1971, p. 137.

[30]Subsection 11(4) of the Act.

[31]Subsection 12(2) of the Act.

[32]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, (Toronto: The Law Society of Upper Canada), 1976, p. 42.

[33]In situations where an investment has been "deemed" to be allowed the Agency is obliged to notify the respective applicants as well as send a copy of the notification to the Clerk of the Privy Council who registers it as a statutory instrument under the Statutory Instruments Act of Canada, R.S.C., 1970. Also see Section 12(2) of the Act.

[34]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, op cit., p. 41.

[35]Hayden et al, vol. II, paragraph 33,022-1.

[36]Ibid., vol. I, paragraph 3-3.

[37]Canada, Foreign Direct Investment in Canada, p. 468.

[38]Hayden et al, vol. II, paragraph 33,024.

[39]Canada, Foreign Direct Investment in Canada, p. 459.

IV Performance Evaluation

The application of significant benefit criteria in screening foreign investment has been in effect for more than six years. In that time period the Review Agency has experienced a number of "growing pains" in its capacity as a regulatory government body. The responsibility for procuring economic benefit from potential investments has not been a simple task. The Agency has had to deal with internal pressures such as administrative inconsistencies, changing government policy and varying economic circumstances. External factors which have ranged from negative reaction on the part of business and industry sectors to variations in investment capital flows have also had an effect on the work of the Agency. Over time, the government has gained valuable expertise in the process of negotiating for investment benefits. The question that now remains is whether the accomplishments of the Agency have brought the government any closer to realizing its original objectives.

When the legislation was passed in 1974, the federal government stressed that it was not its intention to alter significantly the quantity of foreign investment entering the country. Alastair Gillespie, then Minister responsible for the administration of the Act, defended government policy by stating that

> "... these measures are not against foreign investment in any absolute sense, but seek to recognize the existence of costs and benefits in particular projects, and ... to help Canadians develop an expanding economy for the benefit of Canada."[1]

Figures cited later will help to indicate that the quantity of foreign investment coming into the country in the last few years has remained at a substantially high level. An

important qualification to the government's main objective was that any increasing benefit derived from foreign investment was to be directed towards improving the "quality" of that investment. The primary mandate of the Agency was, in the words of an Alberta legislative committee concerned about government motives at the time, to "arm the Federal Government with negotiating power to extract such commitments from future foreign investors as the Federal Government felt would be of significant benefit to Canada."[2]

In any assessment of "significant benefit" the Agency must consider five criteria which, in brief, take into account the effect that foreign investment may have on economic activity in Canada (including effects on employment, on resource processing, on exports, on the utilization of parts, components and services produced in Canada), on Canadian participation, on productivity and the technological development, the beneficial impact on competition, and the compatibility with industrial and economic policies of both the federal and provincial governments. At first glance these criteria appear wide in scope and general in meaning. These five factors, however, were meant to be general in nature and to cover all manufacturing, resource and service industries. In parliamentary discussion before the Act was passed the government emphasized that the prescription of benefits would assure investors that the government would not make decisions for reasons which they, the investors, could not anticipate. Moreover, the listing of specific benefits was also intended to assure the public that the government could not be forced into approving an investment for reasons which were only beneficial to the investor but not to Canada.[3] Further qualification was provided by Mr. Gillespie, who stated that the benefits were aimed at long term restructuring to make Canadian industry

more rationalized and specialized as well as more efficient and competitive.[4] The common characteristic of the benefits was that they were performance oriented; that is, that they could be acted upon in terms of specific undertakings by the investor. An additional characteristic of the benefits is that they were not intended as a straightjacket measure. One source has recognized that "as national and economic policies might evolve over time ... so would the interpretation of the benefits. FIRA is not living in a petrified forest."[5]

An important aspect of the "significant benefit" test is the fact that it is a policy, not a legal, evaluation. This basically means that any disagreement over the application of the criteria becomes a political matter to be resolved strictly between the applicant and the government rather than a legal controversy that has its final resolution in the courts. One speculation that could be raised in this regard is whether the nature of this process makes it easier for investors to escape from their commitments. Critics of the process point to the confidentiality and disclosure of information provisions which are part of the policy test that have made it difficult to assess the level of commitment maintained on the part of the investor. A number of incidents which will be discussed in another chapter raise questions regarding government accountability for this process.

By and large, the measurement of benefits in an investment proposal becomes a subjective interpretation by Agency officials based on current government policy. The absence of strict and precise guidelines has had the disadvantage of creating uncertainty in the minds of new investors who are not always sure if their proposal meets the expectations of the Agency. The general nature of the criterion has a key advantage, however, in its

flexibility and adaptability to changing economic circumstances.

It is generally recognized that benefit criteria accompanying foreign investment cannot be a standardized item. There exists a fairly wide variation in the quality and distribution of benefits. Undertakings can range from specific plans expressed in numerical terms to general strategies regarding the plans for the organization of the Canadian business enterprise. Essentially, the determining factors vary from case to case "depending on the circumstances and capabilities of the investor and the particular characteristics of the sector in which the investment is made. Every application cannot be expected to provide benefits under each of the criteria of significant benefit."[6] Although this type of flexibility could pose all kinds of interpretive problems, the Agency has developed a range of response mechanisms based on the types of undertakings received.

The Annual Reports issued by the Agency review the types of undertakings that have been considered beneficial from one year to the next. A brief summary of the ten pertinent factors against which the Agency assesses proposals will help to illustrate the types of benefits obtained through the review process. Most of the investment proposals allowed under the Act have provided some employment benefits. Investor undertakings have either increased employment in the acquired business or created new jobs in a new business establishment. An investor may tailor a proposal to create more jobs if he simply recognizes the increases in Canada's unemployment rates in various sectors. Apart from job creation, employment benefit plans can also take the form of improvements in the conditions of employment including employee pension plans, training programs as well as opportunities for employees to share in the profits of a business. Another

factor outlined in a more recent Annual Report is the commitment to safeguard the jobs of Canadians involved in the takeover of a Canadian business.[7] In cases where financial or other circumstances have forced the sale of a Canadian business the retention of certain jobs may be jeopardized. If the investor is willing either to maintain the level of employment in the takeover business or provide alternative job opportunities in cases where lay-offs are unavoidable, the Agency considers this a positive means for exhibiting "significant benefit."

Planned new investment is another factor that has proved successful as a beneficial criterion. Most proposals in this regard involve capital expenditures for the purchase of new equipment, the expansion or development of existing facilities or the construction of new plants. The Agency also recognizes that in certain instances the manner in which a particular undertaking is conducted may have a greater significance than the type and amount of investment. The financing of planned investment or the re-investment of earnings that is consistent with Canadian fiscal and monetary policy are noteworthy considerations.[8] Moreover, if the applicant is submitting an application at a time when Canada is experiencing a balance of payments deficit it would be favourable for the financing to come from other than Canadian sources.[9] As a further point of qualification, the Agency admits that the review process itself has little effect on the eventual size of the investment. Although investors have increased amounts for investment in order to enhance their proposals, by and large ... the "scale of an investment is usually dictated by the amount of funds available to the investor, the projected market size and other factors which are beyond the control of the investor."[10]

The potential for new or increased exports is a welcomed opportunity

particularly in view of the Canadian government's view that export activities of subsidiaries in Canada have been often restrained by their parent companies. Export related undertakings can range from specific commitments based on obtaining a market for a particular venture to agreements that designate a Canadian company as the sole producer of a particular product bound for other markets. Undertakings have also been arranged whereby parent companies have encouraged and assisted the Canadian subsidiary to sell its products in the applicant's home mark or even to penetrate third-country markets.[11] In any event, a proposal to develop export markets for a Canadian business during a time when Canada is experiencing a balance of trade deficit would also enhance an investment application.

Investments that undertake the processing of Canada's natural resources within Canada and that involve the use of goods and services from Canadian sources are also considered to have an effect on economic activity in Canada. It is a stated government objective to "extend the processing in Canada of natural resources wherever it is economically feasible and consistent with the development of a sound industrial structure."[12] The nature of resource processing includes undertakings such as further processing of mineral ores, resource upgrading of natural gas and other raw materials processed by Canadian sources that offer competitive terms. In the acquisition or establishment of businesses the Agency encourages the use of Canadian goods and services where feasible. Experience has shown that investors are willing to consider such an arrangement provided the sources are competitive in terms of price, quality, availability, etc. Opportunities to tender for investors' needs are also arranged when Canadian machinery and equipment manufacturers are in a

position to provide the required items. It is important to note that commitments to purchase goods and services in Canada have a high priority in applicant negotiations. The Agency claims that it is in this area that the review process has the greatest impact in obtaining indirect benefits for the economy.[13]

The assessment procedure also considers the extent to which Canadians will be able to occupy senior management positions and the degree to which the Canadian business enterprise will be allowed to operate in an autonomous manner. One study has considered that the costs of foreign investment in this regard include a shortage of Canadian entrepreneurial skills and a restriction on the operations of Canadian businesses in various industries.[14] The Agency therefore looks to Canadian participation in the form of ownership, management or direction to mitigate the harmful effects of truncation that is sometimes associated with foreign investment. Commitments to give Canadians the opportunity to acquire equity holdings in a business are usually arranged in terms of the current market position and future outlook. Undertakings regarding the appointment of Canadians to boards of directors usually proceed without any difficulty and appropriate levels are almost always maintained. The employment of Canadians as senior managers depends on the availability of qualified Canadians as well as the specificity of the undertaking. This latter qualification may include the production of a product or utilization of production techniques that are new to Canada and therefore require specialized knowledge and skills that are only available outside the country.

Enhanced technological development most frequently involves commitments by an investor to establish, maintain or expand research and develop-

ment facilities. In a recent Annual Report provided by the Agency, research and development expenditures also included the introduction of advanced technology associated with new types of production, new machinery or new products, access to patents, trademarks and "know-how" of a parent company and support for research institutes in Canada.[15] These types of benefits have been most frequently associated with investments in the manufacturing industry with specific interest in the metal fabricating, machinery, chemicals and food and beverage sectors.

Benefits derived from enhanced productivity and industrial efficiency vary within different industries. Productivity gains have been associated with investments in both manufacturing and service sector industries. Generally, these benefits have resulted in instances where there are plans to invest in new machinery and production processes and in the introduction of improved management techniques among others. Industrial efficiency, on the other hand, has been identified as beneficial in cases involving the renovation of retail facilities, the introduction of better marketing skills, the introduction of quality controls on production and other gains in efficiency.[16]

Although the beneficial impact on competition by most investments has yielded marginal benefit, there have been individual cases where a new company which has entered a market served by relatively few firms has had an appreciable effect on stimulating competition. In other cases, company mergers resulting in improved productivity and increased financial strength have also been assessed as having potential for added competition. Furthermore, the introduction of new products, technology or marketing techniques have also been expected to infuse a high degree of competition. In isolated cases involving the acquisition of larger firms, however, the

government's concern over the potentially harmful effects on competition has been a determining factor in Agency decisions to disallow applications.[17]

The final criterion utilized as part of the benefits checklist is compatability with the industrial and economic policies of both levels of government. In assessing "significant benefit" the Agency must take into account not only specific policies designed for particular sectors at the national level, such as maintaining a significant Canadian presence in the book publishing industry, but it must also consider specific industrial and developmental objectives of the provinces. Moreover, this particular criterion emcompasses, by and large, other preceding criteria including economic impact, Canadian participation, productivity and technological development and competition. As a result, any investor is encouraged to develop or reconsider his plans in terms of these broad policy objectives.

The above ten criteria constitute a checklist of factors that the Agency applies to almost every investment application. They are not, however, the only factors considered in a review process. Based on available information provided by the Agency as well as the experience of the legal and business sectors that have had dealings with FIRA, there appear to be a number of additional considerations in determining benefits. These are of a more general nature and go beyond the assessment for unique characteristics and opportunities in each investment proposal. Investors should be sensitive, for example, to the Canadian economic and social environment and when developing a proposal should place appropriate emphasis on aspects of business activity which are important to Canada. In this regard the Agency points to the "Principles of International Business

Conduct" which were issued by the federal government in July, 1975 at the time of the proclamation of Phase II of the Act.[18] Although these principles were not issued under the authority of the Act, the Agency recognizes that "they reflect broad government policy regarding the activities and responsibilities of foreign controlled business enterprises in Canada."[19]

The investor must also be cognizant of the fact that for an investment to be beneficial it must do more than maintain the status quo in any situation. In any acquisition proposal there should exist undertakings which bring a net contribution to an organization or industry sector that would not ordinarily be undertaken by existing ownership and management. Benefit criteria in this regard are also applied in terms not only of the situation as it exists at the time of the proposal, but also as it might be expected to develop if the proposal were not made.[20] Unless an investment can provide benefits that were not in existence prior to any takeover it does not constitute "significant benefit" under the meaning of the Act. The only exception to this rule would be a situation where bankruptcy is imminent and a takeover is the only transaction that can help a business become viable.[21]

It is also common practice for the Agency to take into account the views of other federal government departments and agencies. FIRA consults to a great extent with Industry, Trade and Commerce for industry development in various sectors and with the Competition Board of the Restrictive Trade Practices Commission for rulings on the competition consequences of proposals. It may be in the investor's interests to consult with the federal and /or any provincial governments that may be affected by a particular investment scheme. This practice may provide an applicant not

only with advance information but it may also supply him with the necessary clout to have an investment approved.

It is generally recognized then, that a fairly wide variation exists in the distribution of benefits. While some benefits may be present in almost every type of business, such as increased employment, others are specific to only certain sectors. Resource processing and certain types of technological development for example, are limited to the resource industry sector. Commissioner Howarth of the Agency has qualified the characteristics of the assessment criteria even further. In a special article to the first number of the Agency publication, Foreign Investment Review (1977), he explained that,

> "In the first place, the Government, in deciding whether or not there is significant benefit in a particular reviewable transaction, must take into account all those criteria (in so far as they are relevant and applicable to the particular transaction) and only those criteria. Secondly, there is no requirement, explicit or implicit, that in order for a transaction to be allowed, it must be shown to be beneficial by reference to each, or indeed to any particular one of the criteria."[22]

It would appear then, that the government is obliged to consider every possible benefit or potential benefit that accompanies an application but only within the interpretative boundaries of the categories outlined in the Act.

Interpretation of benefit criteria has been a troubling concern for most new investors, particularly small and medium sized firms which may not have the expertise available to determine beneficial impacts on the Canadian economy. However, the experience gained in dealing with the Agency and its willingness to negotiate terms have helped investors overcome initial fears. Critics of the process have even gone a step further to say that despite the appearance of a diligent effort on the part of the

government to implement "significant benefit" criteria, FIRA has not performed in a particularly selective manner.[23] It has become evident from the annual submission of data by the Agency that a high percentage of resolved cases have been allowed to proceed.

Despite the high approval rate of proposals which has averaged around eighty per cent for both acquisitions and new businesses throughout the five year period ending March 1979, the Agency has readily admitted that there is no entirely satisfactory way of measuring benefits that have accrued to Canada. There has been no clear cut method developed for example, for measuring the quantitative value of benefits such as increased efficiency or improved competition. Other factors such as job creation, increased exports or increased purchases of Canadian goods and services, while measurable in individual transactions, cannot be meaningfully assessed as an aggregate total figure. Investment undertakings are subject to circumstances that may change over time such as the commercial prospects of a venture or the market's acceptance of the investor's products.[24] While the Agency is in a position to determine the potential benefits of a particular transaction and provide some forecast of the possible consequences for the Canadian economy, it cannot absolutely assure that an investment will proceed exactly as planned. Another difficulty associated with measurement of benefits is the weight given to particular factors. With a criterion such as job creation, for example, the Agency has made the following observation:

> But not all new jobs are of equal value. They differ in terms of pay levels and skill requirements. Moreover, the creation of new jobs in one area may relieve unemployment; in another area it could serve mainly to increase the demand for particular kinds of skills that are already in short supply ... it cannot be taken for granted

> that the creation of new jobs ... represents, in all cases, an equivalent net gain in employment opportunities in Canada: sometimes at least a portion of the increased employment might be expected to occur anyway (albeit perhaps later), as a result of expansion by a competitor or competitors, even if the investment proposal had not been allowed.[25]

It would appear then, that some degree of uncertainty should be expected with most of the assessments made for "significant benefit." Nevertheless, screening for investment benefits is viewed as a positive step in ensuring that applicants tailor their proposals to meet Canada's needs and objectives. The results of five years of the Agency's work up to the period ending March, 1979, will now be reviewed.

Operations Review

In the five year period between April 9, 1974 when the Act came into force and the end of March, 1979, FIRA received 2,089 investment proposals. Of this total, 1,152 applications were for the takeover of Canadian businesses and 937 were proposals to establish new businesses in Canada. Agency officials allowed 1,613 or just over seventy-seven per cent of the proposals submitted because they were considered to offer significant benefits to Canada's economy. In cases which the investor had failed to meet the test of "significant benefit" in the first application, thirty revised proposals were allowed. The tally for the five year period also included 136 proposals which were disallowed as well as 161 proposals that were withdrawn by investors before the review process completed an assessment.

In terms of the level of benefits derived from approved applications the following chart provides a general record for allowed acquisition cases and proposals to establish new businesses:[26]

Benefit	Acquisitions	New Businesses
Employment	70%	98%
New Investment	66%	99%
Exports	37%	32%
Resource Processing & Procurement	56%	65%
Canadian Participation	51%	60%
Technological Development	25% of all proposals allowed.	
Productivity and Industrial Efficiency	65%	20%
Competition	26%	34%
Compatibility with Industrial and Economic Policies	100%	100%

Although these figures do not provide year to year comparative differences, they indicate to some extent Agency priorities in determining "significant benefit." Comparative figures in this regard are not always accurate due to pending decisions, revised proposals and the fact that the new business provisions of the Act (Phase II) were not in effect until October of the second year of review. The third Annual Report of FIRA's activities is the first source available with data for both acquisitions and new business proposals. Highlights of yearly activity, however, may serve to explain certain tendencies in the review process as well as provide some understanding of Agency decision-making with respect to screening investment proposals.

The first year of the Agency's operation provided a testing ground for the review procedure. Applications from "non-eligible persons" to acquire control of Canadian businesses indicated a substantial degree of misunderstanding with certain terms of the Act as well as a perceived lack of confidence in being able to satisfy the test for "significant benefit." Thus, out of a total of 230 applications received during the 1974/75 fiscal year, fifty-five were returned as non-reviewable. Table I

indicates the breakdown for applications in the first year of review.[27] Of the ninety-two cases resolved, sixty-three were allowed, twelve were disallowed and seventeen were withdrawn prior to completion of the review process. The Agency determined that ninety-four per cent of the allowed cases offered benefits in terms of productivity, industrial efficiency, technological development and product innovation and variety. The predominant reason for the disallowances was a reduction in Canadian ownership in the majority of cases involving Canadian controlled companies wishing to sell their businesses. In roughly half of the applications that were withdrawn, applicants felt that they could not meet the test for "significant benefit."[28] Other investors withdrew when refusal by the Agency seemed likely or when proposed terms of the application were not acceptable.

A major problem encountered during the first year of the Agency's operation was the length of time required to arrive at a final decision on investment proposals. Delays in the administrative procedures of the Agency were directly attributable to investors unfamiliar with the screening process. FIRA's year-end report recognized that while some applicants failed to submit sufficient information for a proper assessment of benefits to Canada, others were not specific enough in their determination of allowable benefits. In other instances, delays were caused when applicants were obliged to consult with parent organizations for approval of proposed undertakings. Investors were also confronted with changing circumstances such as the availability of funds or general market conditions which caused delays in completing submissions.[29] As most of these factors were beyond the control of the Agency, foreign investors wishing to make a proposal were obliged to become more familiar with the

screening process.

In the second year of the Agency's operation Phase II of the Act was introduced. Proposals for new business establishments not related to a business already being carried on in Canada since October 15, 1975 became subject to review. As these new provisions were in effect for only five and one-half months of the 1975/76 fiscal year no definite conclusions can be drawn from the small sample of sixty-six applications in this category. The Agency only managed to resolve six cases out of the twenty-six cases that were considered reviewable. Table II provides information concerning the resolutions of these cases. There were indications however, that new businesses tended to be more evenly distributed than business acquisitions in terms of the location of the investment in Canada and the nationality of the applicants.[30] In the latter qualification, the predominance of investors from the United States in acquisition cases was not repeated in applications for new business establishments. Other differentiating categories that could have indicated possible future trends were the size distribution of the new businesses (capital investment) as well as the size distribution of the applicants. In more than half of the reviewable cases the capital investment did not exceed $250,000. Compared to the size of acquiree businesses, new business establishments were small as were the total assets in that category for the year under review. Despite the small sample in this second category the conclusion offered by the Agency was "that there may be a tendency for large investors to expand through acquisitions rather than through the establishment of new businesses."[31]

As Table I indicates, there was a decline in the number of acquisition applications for this fiscal year, going from 230 in the

preceeding year to 189 in 1975/76. This was accounted for, in large part, by a reduction in the number of non-reviewable applications. The Agency considered that this development reflected "a better understanding by investors and their advisors of the coverage of the Act."[32] Particular characteristics of acquiree businesses, namely, control and ownership, were determining factors in the disposition of acquisition cases. In proposals where businesses were Canadian controlled, the Agency's rate of approval was lower than in proposed takeovers of businesses already under foreign control. This development arose out of the need to recognize one of the benefit factors that FIRA takes into account in assessing takeovers - "the degree and significance of participation by Canadians in the business." The logic applied to these situations is based on the premise that a foreign takeover of an already foreign controlled Canadian business is more likely to create a net increase in the level of Canadian participation as shareholders, directors or senior managers. Where a business acquisition is already Canadian controlled, there is less opportunity or incentive to increase the level of participation by Canadians.[33] A further breakdown by various other differentiating factors for acquisition proposals indicated a pattern similar to the one in the previous year.

In terms of benefits achieved the effect on the level and nature of economic activity was present in nearly all proposals allowed to proceed. More than ninety per cent of all allowed investments offered some benefit that related to the effect on efficiency and technology to Canada. Some increase in Canadian participation was achieved in sixty-eight per cent of acquiree businesses already under foreign control. The next category of benefits most often obtained was the impact on competition wherein

approximately one-third of all acquisition cases were considered to have a favourable impact.[34]

The operations and activities of the Agency in the second year of its existence reflected an attempt to overcome interpretative obstacles within the meaning of the Act and the need to simplify its administration. Several policy guidelines were issued during this fiscal year to help simplify the work of the Agency and to clarify the interpretation of the Act regarding certain proposals or transactions by investors.[35] Significant changes were introduced into the administration of the Act in an attempt to speed up the processing of applications and reduce the amount of paper work involved in completing submissions. New Foreign Investment Review (Acquisition) Guidelines (April, 1975) allowed applicants to submit an abbreviated form of notice in cases where the business enterprise being acquired had gross assets of less than two million dollars and fewer than 100 employees. New business regulations (July, 1975) incorporated a similar provision for revised information requirements. Another change helped to solve the problem of investment proposals which were also subject to review by the Department of Regional Economic Expansion. The Agency decided to use the same notice form in cases of small investments, less than two million dollars and fewer than 100 employees, and save the investor time and money by referring back to the Department if additional information was required.

Statistics found in Tables I and II indicate an overall increase in activity in Agency operations for the fiscal year 1976/77. This increase was attributable in large part to the review of new business activities being in effect for the full year. Thus the total number of applications considered reviewable in 1976/77 was 424 as compared to 170 in the previous

year. This large difference is mainly the result of the administrative procedures that were put into effect for the review of new businesses. Investors were aware as early as July 18, 1975, that provisions for review of the new business category would come into effect October 15 of the same year. It is reasonable to assume therefore, that prior to the implementation date applicants speeded up their plans to establish new businesses. Consequently, the number of new business cases was very low for at least the latter half of the 1975/76 fiscal year. The figure of 265 new business applications in 1976/77 seems to reflect a rise toward levels considered more normal.

Acquisition proposals that were subject to review for this year rose from 144 to 188. The Agency attributed this increase to two factors. First, the number of applications returned to investors as non-reviewable continued to decline. It seemed likely that investors had gained a better understanding of the legislation through their experience with the review process and hence, submitted more comprehensive applications. The Agency also considered that the Minister's publication of abbreviated guidelines which more clearly defined the types of investments that were reviewable,[36] added to investors' understanding of the screening procedure. However, one might counter this explanation as a statement of government policy rather than a reflection of the experience gained by the business sector. Guidelines implemented to expedite the review process do not necessarily point to a better understanding of that process by the business community. The other reason given for the decline was that the number of applications for which a reviewable decision was pending at year-end fell from twenty-five to nine cases.[37] This decrease would probably be a result of an improvement in administrative efficiency on the part of the Agency. By

and large, the outcome of cases in the acquisition category indicated a pattern similar to previous years in terms of factors such as country of control of applicants, geographical distribution of applications, etc. A continuing decline in transactions involving interests in oil and gas properties and applications to acquire businesses in the finance, insurance and real estate sectors was considered partly a result of the issuance of more restrictive guidelines in that year. One characteristic of business acquisitions that indicated a noteworthy change however, was that applications to acquire foreign controlled businesses rose significantly from seventy-five cases in 1975/76 to 116 cases in 1976/77. The third Annual Report of the Agency suggests that this rise partly reflected a revival of corporate merger activity in both the United States and Europe as financial conditions improved following a worldwide recession.[38]

Of the 207 new business applications resolved in 1976/77, FIRA allowed 166 and disallowed fourteen, while twenty-seven were withdrawn. The percentage of cases allowed relative to the total resolved indicated a greater percentage of applicants who successfully met the requirements under the Act. The experience of the Agency has led officials to conclude that new business proposals can usually demonstrate "significant benefit" with greater ease than applications for takeovers. The third Annual Report notes:

> In many new business proposals, all or most of the increase in economic activity created by the investment can be considered a net gain to Canada. In acquisition cases, on the other hand, the apparent benefit to Canada that would accrue through acquisition has to be measured against any gains that would otherwise occur.[39]

Essentially the, the "significant benefit" clause is best understood in terms of new businesses or net gain. Thus, a proposal that simply maintains

or does little to improve the conditions of a business does not offer as positive a contribution in terms of "significant benefit" achieved.

The higher approval ratio for new business proposals was particularly evident in the industrial distribution of cases reviewed. Unlike acquisition proposals which have tended to concentrate on the manufacturing sector, new business proposals revealed an interest in the service and construction industries. Furthermore, of the sixty-four per cent of cases involved in the service sector, forty-one per cent were heavily oriented towards wholesale and retail trade. Agency officials recognized this emphasis on trade as a common practice of businesses entering a new market, and concentrating on the importation and distribution of their products.[40]

One additional characteristic of most of the reviewable new business proposals was their small size. FIRA found that a little more than eighty per cent of the proposals sought initial investments of less than $500,000 and planned to employ fewer than twenty-five persons. Compared with the characteristics of the reviewable new business cases in the preceding year, the trend for small capital investments of new business establishments seems to have continued. That is, in more than half of the reviewable business cases in 1975/76, the capital investment did not exceed $250,000. As one indication of the Agency's response to this development, Foreign Investment Review Regulations were tabled in the House on March 11, 1977. As mentioned previously these regulations provide for an abbreviated form of notice for small business investments.

Significant benefits derived from all cases in this year of review varied somewhat from the previous year due to the greater number of assessments undertaken for new business proposals. A positive influence on the economic activity in the country was maintained at a high level for both

investment categories at ninety per cent. Increased Canadian participation was also highlighted as a benefit in over sixty per cent of acquisition cases and about ninety per cent in new business proposals. Other benefit categories that witnessed a substantial level of activity were productivity, industrial efficiency, technological development and innovation and product variety. These were present in about eighty per cent of acquisition proposals and about two-thirds of new business applications.[41]

During this particular period of review certain studies discovered that there may be a correlation between trends in the number of cases coming before the Agency and trends in business capital spending. In one such study, Edward Cape has suggested that an upturn in business capital spending in Canada, which began in the fourth quarter of 1976 and continued to the second quarter of 1977,[42] may have been reflected in the upturn of investment applications submitted to the Agency. During the same time frames acquisitions rose from less than ten per month in the first quarter of 1976 to almost thirty per month in the third quarter of 1977. New business cases on the other hand, remained at a stable level at about twenty per month in late 1976 and early 1977, but rose to levels of thirty per month in the second and third quarters of 1977. Cape seems to suggest that this represents a "cyclical" pattern that coincides in timing with that of business capital spending.[43] Although the author admits that to this date there has not been enough experience of trends in FIRA cases the evidence may also prove to indicate trends in the confidence that foreign investors have in Canada as a place to invest.

Speculations made by authors such as Edward Cape should be considered alongside studies that have tried to analyse the impact of the Foreign Investment Review Act on the flow of foreign capital into Canada. In its

Annual Reports for the years 1975/76 and 1976/77, the Agency noted that the inflow of non-resident foreign direct investment as opposed to portfolio investment coming into Canada in 1976 was substantially lower than in either 1974 or 1975. Although portfolio transactions such as foreign purchases of shares and bonds and other forms of long term debt accounted for a greater portion of capital inflow, other significant factors accounted for the decrease in direct foreign investment.[44] During this period a number of large transactions involving transfers of ownership and corporate restructuring rather than additions to capital formation influenced the direct investment category; for example, the purchase by Petro Canada of all assets held in Alberta by Atlantic Richfield at an estimated cost of $340 million. Other similar transactions of this type accounted for almost $725 million of outflow in 1976.[45] More importantly, there was a recognized shift in the pattern of financing of investments by foreign controlled firms. By and large, this was a result of factors such as world-wide recession and inflation, together with upheavals in international capital markets as a result of the oil crisis. Admittedly analysis of this type is restricted by the fact that not all of the investment reviewed under FIRA is represented by inflows of foreign direct investment capital nor is all of the foreign direct investment in Canada subject to reivew under the Act.[46] In this regard the Agency concluded that any direct impact of the Act on foreign direct investment flows was limited in scope.

Strategy changes in capital investment flows during 1977 and 1978 appeared to dispel the notion that Canada was a choice location for new investment. Media reports relying on published surveys about the foreign spending intentions of large American multinationals pointed to a slow

rise in foreign spending by their foreign subsidiaries since the 1974/75 recession. Nevertheless, a slowdown in United States spending in Canada was evident in figures released by the Financial Times. New investment for 1978 was valued at $5.9 billion which was not much higher than the $5.5 billion spent in 1974 and less in real terms, because of inflation.[47] The relatively low spending projections implied that the nature of investments would become more selective. This fact was examined by one article that stated

> American capital can be mobilized to meet the challenge of such bonanzas as North Sea oil, or exploiting new lower cost sources of minerals in the developing world. But it is being directed less into manufacturing facilities, and least of all into the high technology industries that foreign countries would "choose" to have developed with outside help.[48]

The implications for Canada became evident when the American government forecasted a planned investment rise of only one per cent to $5.9 billion for Canada in 1978 while larger outlays were to be directed to Britain, the European Economic Community and to Third World countries.

The underlying cause of this change in focus for investment plans was viewed quite simply as a poor climate for investment in Canada. The fall in the North American dollar coupled with poor growth prospects forced multinationals to reconsider ploughing money back into foreign operations. Furthermore, Canada was experiencing internal problems along the way. Subsequent to the Quebec election in November 1976 a mood of uncertainty became prevalent among foreign investors and Canadian businessmen alike. Not only was Quebec's "French-Canadian first" purchasing policy disturbing business plans for Canadian businessmen but companies with Quebec based subsidiaries were becoming more interested in selling their Quebec

operations.[49] Increasing reports about domestic firms wishing to diversify their investments abroad also posed greater uncertainty for foreign investors thinking of entering the Canadian economy.

The wary investment climate affected by the Parti Quebecois victory witnessed corporate re-organization and decentralization to other parts of Canada by major corporations such as Canadian Pacific, Royal Trust Company and Northern Telecom. Underlying issues which concerned business as well had been the threat of economic slowdown aggravated by a falling population growth rate as well as a decline in immigration. In addition to concerns over the economic stability of Quebec however, the province's language legislation also served to frustrate the ongoing operations of some major business interests. In 1974 Quebec's Official Languages Act made French the official language of the province. This was replaced by Bill 101 which became law in August, 1977. Generally speaking, this type of legislation had made it difficult for companies operating in Quebec to recruit English speaking employees from outside major centres such as Montreal.[50]

Language limitations coupled with perceptions of Quebec's political instability were the main reasons for the relocation of the head office of Sun Life Assurance Co. of Canada from Montreal to Toronto. Sun Life which had been based in Montreal since 1871 was Canada's largest insurance company at the time. In its original announcement in January, 1978 about plans to move Sun Life, with eighty-seven per cent of its staff English-speaking, stated that it could no longer foresee an ability to recruit or retain in Montreal sufficient people with the necessary qualifications to carry on daily business.[51] In April of the same year policy holders ratified the management decision to relocate the company's head office to

Toronto.

Interestingly enough the American change of focus in investment spending had little direct impact on the rate of applications for business acquisitions and new business proposals. In fact, the Agency recorded the highest ever increase in these two categories, with an eighty-one per cent rise in the first sector (from 189 in 1976/77 to 342 in 1977/78) and an increase from 265 in 1976/77 to 424 in 1977/78 for new business proposals. Certain qualitative factors regarding the applications, however, may indicate that the investment climate had changed. Proposals to acquire small Canadian controlled businesses more than doubled from seventy in the previous year to 151 in the year under review. In the two preceding years proposals to acquire businesses controlled by Canadians had declined steadily from forty-eight per cent in 1975/76 to thirty-eight per cent in 1976/77.[52] The sharp increase may have indicated that foreign investors had less capital to infuse into the economy as well as a lesser tendency to get involved in larger projects with greater risk. Average planned investment levels of reviewable new business cases dropped from an average of $134,529 in 1976/77 to $58,808 in 1977/78 for the United States and from $202,120 to $98,471 in the same years for Europe.[53] Fiscal 1977/78 was the first year since the Agency was established in which applications to acquire manufacturing businesses represented less than one-half of the total received. Instead, the percentage of acquisitions in the service sector increased with a three-fold increase in the number of proposals to acquire businesses in the community, business and personal service groups.[54] This was also the first year that the allowance rate for cases where the acquiree business was already foreign controlled was on par with the allowance rate for Canadian controlled acquiree businesses. The Agency

attributed this development first, to the increase in acquisitions of small Canadian controlled businesses with the rationale that "frequently, and especially where the acquiree business is in financial or other difficulty, there is no acceptable or realistic alternative to foreign acquisition of such a business if liquidation and consequent loss of employment are to be avoided."[55] Another reason for the increase was that investors were becoming more familiar with the stipulations of the Act. A factor less likely to have a major impact on the increase of reviewable cases but one that should be considered in terms of administrative procedures was the revised and abbreviated form of notice. This was utilized in more than sixty per cent of cases with three out of four investment proposals decided within fifteen days of receipt on average.

More than eighty per cent of allowed acquisition applications and almost all of the approved business applications had a positive effect on benefit factors such as employment, resource processing, procurement of parts and services and exports. Increased Canadian participation was obtained in over forty per cent of acquisition proposals and in over half of the new business applicants. Improved productivity and industrial efficiency was the next most frequently achieved significant benefit, attained in fifty-four per cent and sixteen per cent of both respective categories.

The relatively high rate of investor applications continued for fiscal year 1978/79. The work of the Agency also witnessed some pronounced changes in acquiree characteristics such as size and industrial distribution of applications. There was a reverse trend, for example, in the greater increase of large business cases over small business cases as compared to results from the previous year. The number of large

business cases rose from 101 to 155 while small business cases increased from 198 to 218.[56] There was also a contrast with the previous year in the proportion of foreign and Canadian controlled acquirees. The former category rose to fifty-six per cent or 200 out of the 373 applications reviewed while in the preceding year Canadian-controlled businesses had accounted for sixty-five per cent of acquirees. Significant also was the asset range of acquirees involving gross assets exceeding $25 million. As a total year figure acquisition cases from all sources with assets that ranged from $25 million and over increased to twenty-eight from sixteen in the previous year.[57] From this total twenty-two were foreign controlled and six were Canadian controlled. From the 175 acquisitions and new business applications, thirty proposals had gross assets exceeding $25 million.

The industrial distribution of reviewable acquisition applications had implications for the increase in the value of acquiree business assets. The change in trend in this regard indicated a preference for the primary sector, particularly for the mining and oil and gas industries and witnessed a rise to thirty-two applications compared to twenty-two in 1977/78. The emphasis on primary industry related activity saw the acquisition of large interests such as the acquisition of Anaconda Canada Ltd. by Atlantic Richfield Co., and the proposed acquisition of Husky Oil Ltd., by Occidental Petroleum Corporation.[58] Furthermore, the greatest increase in acquisition activity was found in high technology businesses including metal fabricating, machinery, transport equipment, and electrical and chemical products. In view of this change in focus, the service industry's share of total acquisition applications decreased for the first time since 1975/76 from fifty-one to forty-five per cent.[59]

The most significant development that influenced Agency operations around this time was the concurrent wave of mergers and acquisitions in North America. The sudden wave of activity in this regard seems to have been influenced by a number of economic and political factors. Experts on the economic side reasoned that a number of large corporations suddenly found themselves with extra spending capital due to increased profits, particularly from export sales promoted by a weak Canadian dollar in relation to world currencies. A further qualification to this point is that in view of uncertainties in the economic outlook at the time, large corporations preferred to buy profitable companies in their own or related fields as opposed to expanding their own facilities.[60]

Consideration of a political nature also made it more conducive for this type of activity to proceed. A factor that may have influenced the rise in takeover activity was the Bryce Royal Commission on Corporate Concentration whose report had been issued in the spring of 1977. By and large the Commission's report did not take a hard line stance against corporate concentration with its implications for ownership, influence and control. In the words of one media critic, the Commission "with its almost unqualified endorsement of corporate bigness, has created a somewhat more favourable climate for takeovers."[61] This particular development should also be considered along with the fact that in the period between 1971 and 1977 a number of unsuccessful attempts were made to replace an inadequate Combines Investigation Act with a new Competition Act. Government uncertainty in drafting a policy that would effectively deal with corporate concentration coupled with the disenchantment from the business community regarding current competition laws resulted in the appointment of the Bryce Commission.

A further consideration in this spate of takeovers was the fact that a probable federal election was imminent. It is reasonable to assume, therefore, that the Trudeau government would avoid raising the ire of the business community by not creating an issue over takeovers by major corporations. Unfortunately, the larger issue of the impact of large corporate mergers was not being properly assessed from a broad national perspective and the government was left with no real yardstick with which to measure the undesirable features of corporate concentration.

In view of this upward thrust in foreign mergers activity the Agency's high level of activity reflected a commensurate achievement in terms of benefits obtained. Not unlike previous years, a positive effect on economic activity was achieved in over ninety per cent of acquisition approvals and in almost all of the allowed new business applications. The next benefits most frequently encountered were in Canadian participation with acquisition proposals and new business applicants making up fifty-five per cent and fifty-eight per cent of the total, respectively. Although a high level of industrial efficiency was presented in sixty-two per cent of acquisition cases, only twenty-three per cent of new business proposals offered this benefit. A substantially positive impact on competition was also recognized in this year of review in thirty-two per cent of acquisition proposals and in forty per cent of new business applications.

Following the surge of activity in fiscal year 1978/79 a new government administration under Joe Clark became more involved in matters concerning industrial strategies and a perceived need for competitiveness abroad. Parliamentary discussions concerning the role of the Agency reflected a renewed interest in the development of the Canadian economy. In one Commons session that addressed the subject of the role of the

government in developing a more effective industrial development policy a Liberal Member of Parliament (Roy MacLaren, Etobicoke North) stated:

> "We need to develop more specific sector policies and instruments. We must begin to categorize our industrial activity according to the potential that it offers this country in the immediate and long term. Those industries and sectors which have high potential for producing internationally competitive goods should receive priority in industrial incentives ... Within this framework of a co-ordinated industrial sector strategy, the role of FIRA would be enhanced. It could then realize its potential as a tool of industrial strategy."[62]

In more specific terms, emphasis in this regard was also placed on capital needs. Speaking to the House in November 1979, Mike Wilson, the Minister of State for International Trade in the Clark government, stated,

> "... we have seen as a result of multilateral trade negotiations ... the expectations that there will be a new and very competitive trading environment ... the introduction of technology has become increasingly important to the viability and competitive position of companies in Canada ... All these matters bear on the question of access to foreign capital and the benefits which foreign capital coming into this country brings with it."[63]

The role that the Agency was to play in the Progressive Conservative search for a more co-ordinated industrial sector strategy became subject to re-assessment of the Agency's mandate. This development will be investigated later.

Leadership Review

The patterns of outcome for both acquisition and new business cases provide a general checklist for the number, type and distribution of reviewable cases that are resolved. The quality of the investment is the accountable factor upon which the decisions in a review are based. "Significant benefit" criteria serve as a type of barometer for gauging what the applicant has to offer in terms of Canada's economic needs.

Most important is the fact that assessment criteria are applied with reference to the situation as it exists as well as to the situation as it might be expected to develop had the proposal not been made. Utilization of benefit criteria has become an exercise in being able to determine the growth potential of a business proposition or, in other words, what the Agency refers to as a "dynamic" rather than a "static" view of the situation.

In choosing to apply a flexible review procedure no standard guidelines have been imposed for any of the factors against which benefit is assessed. This process has enabled the government to take into account the particular conditions and circumstances of each investment proposal. Furthermore, the absence of fixed rules allows the Agency to "assist investors in determining means by which the effects of their investment proposals can be described as fully and precisely as possible."[64] In this manner, the Agency fulfills its most important political function in negotiating for the full range of possible benefits from an investment.

While the government has argued that FIRA exists to ensure foreign investment does not enter Canada without certain commitments or concessions, the Agency's performance raises doubts about this premise because of the increasing number of cases approved annually and the results of bargaining with investors for benefits to Canada. An apparent free-flow of foreign investment has led to speculation that the Agency, with the full support of Cabinet, has actively promoted a higher level of foreign investment. In this regard one might question whether the Minister responsible for the administration of the Act has had any real political strength in determining the course of the Agency's work. Although the Cabinet has the final decision-making power regarding investment applications, both the

Commissioner and the Minister act in an important advisory capacity. More importantly, the development of the Minister's role in administering the Act, together with the modus operandi of the individual Ministers who have assumed responsibility for the work of the Agency have made it increasingly evident that the Minister's function provides some influence on the final outcome of investment proposals.

FIRA's performance has been described as more of a reflection of the views of the Minister than of its own thinking.[65] If the Agency were ultimately responsible to the Minister, this speculation would be more accurate. It is more likely, however, that this conjecture simply raises a question concerning the amount of control vested in the Agency for direction over its administrative responsibility. If FIRA had any basic difficulties in this respect they would have surfaced early in its existence. However, after six years of experience in screening investment proposals one would be tempted to lend more credibility to this regulatory body. Perhaps it would be more accurate to state that the views of the Minister are an interpretation of the Agency's findings given the particular circumstances and political climate surrounding an investment proposal.

In order to be able to review the impact of the role of the Minister in Agency operations it is necessary to look at the political and economic environment from which the legislation received its roots. During the latter part of the 1960's and early 1970's the growing foreign control of the Canadian economy produced a highly emotional debate on the same issue initiated a decade earlier by Walter Gordon. One author writing during that period noted that,

> ... the drafters of the Act had to grapple with the fact that the question of foreign investment in Canada is currently a volatile and emotional political-economic issue, raising matters which can only be evaluated by subjective standards.[66]

Thus, a final decision was forced when the Foreign Investment Review Act was conceived by a Cabinet that was badly divided over how to respond to the issue of foreign control of the economy.

Alastair Gillespie, the first Trade Minister responsible for the administration of the Act, practised his own brand of nationalism. As a former member of the Committee for an Independent Canada, he strongly felt that it was time to strengthen the rules on foreign ownership of the Canadian economy. Apart from the effect of his personal bias, FIRA initially chose a hard stance on foreign investment partly because of the prevailing national mood and because for the first eighteen months it dealt exclusively with the question of takeovers of existing companies.[67] Furthermore, as a new political bargaining tool, the Agency was obliged to establish its credibility as an effective screening process. On the other hand, as its chief spokesperson, Gillespie reassured major potential investors such as United States businessmen that the Act was neither to serve as an "impediment to investment in Canada" nor as "an attempt by Canada to shift production, research and development by United States multinational firms towards Canada at the expense of the United States."[68] In an address to the Commonwealth Club of California in San Francisco in 1975, Gillespie was quoted as reassuring the gathering with the following:

> "While Canada is not about to slam the door on foreign investment ... FIRA is an effort to obtain more effective control of this economic environment and to derive greater benefit for Canada from foreign investment."[69]

Essentially, his message was to convey that Canada had decided to do more

in terms of minimizing the costs and maximizing the benefits of foreign investment.

By the time that Phase II of the Act came into force (October 15, 1975) Gillespie had moved on as Energy Minister and Donald Jamieson had stepped in as Minister of Industry, Trade and Commerce. In comparison to the former Minister's nationalist leanings, Jamieson was more an advocate of better Canada-United States relations. He ran the Ministry with a continentalist approach taking every opportunity to point out to the business sector that good relations between the two countries was considered vital. The priorities of foreign investment activity during his administration were outlined in a statement he made to the Third International Trade Conference of the Southwest in Dallas, Texas which recognized that foreign investment in Canada was essential if the country was to develop its manufacturing industries, reduce regional disparities and achieve its energy production goals.[70] Bearing down on foreign investment was not his choice unless it was absolutely necessary. Curtailment of foreign investment never appeared to be a real priority in his administration as indicated by takeover statistics in which only seventeen out of 127 foreign takeover bids were disallowed. While one may speculate that the Canadian government adopted a more laissez-faire approach in its dealings with foreign investors, it is more likely that Jamieson did not take as stringent a course as his predecessor.

Jean Chretien took over as Trade Minister in September, 1976. An avowed anti-nationalist, Chretien adopted an approach that, according to some critics, seemed to conflict with the original intent of the legislation. It has been stated that Chretien sympathized with the concerns of the business community, namely, that FIRA was considered another example of

unnecessary government intervention in the economy.[71] It soon became evident however, that here was an advocate of bigger and better results from foreign investment. Chretien's staunch belief that Canada needed foreign investment was supported in such statements as, "worrying about foreign investment is a Toronto-area mentality. We need foreign investment and we need it across the country. We have to make it clear that we aren't against it."[72] In 1977, he told a Chicago audience that, "a continuing flow of direct investment from abroad is an essential condition of continuing economic progress in Canada."[73] Irrespective of his enthusiasm and support however, some observers felt Chretien would have problems, at least initially, in making close contacts with the business community. In the first instance, Chretien saw himself as a representative of the blue-collar worker both in terms of his background and his outlook that companies needed to be competitive because that was good for the workers. Secondly, Chretien's reputation as past Minister in charge of the Treasury Board led one observer to note

> What will obviously worry a great many businessmen used to working closely with Industry, Trade and Commerce is that Chretien has won a lot of deserved applause in recent years by keeping some sort of control on government spending ... It is a well established tradition that Industry, Trade and Commerce tries to get financial support for industry and push it past the tough Treasury Board.[74]

His greatest concern in terms of "significant benefit" derived from investment was the creation of new jobs. On popularly held belief during his tenure was that FIRA applications would more likely be approved if they promised increased employment, increased purchases of Canadian materials and increased exports.[75] In terms of general administration, Chretien's responsibility as Minister developed into a very active and visible role. By March, 1977, he had modified regulation in order to facilitate a faster

processing of applications including provisions for a new short form application for small investments. What had once been labeled a bureaucratic administrative maze seemed to slowly evolve into a more efficient and expedient process. The Minister was of the view that the whole process of examining applications through the Agency was too lengthy and needed cleaning up. Chretien admitted that although the Agency had originally intended to provide decisions within sixty days, further delays resulted with the difficulty of getting additional information from foreign investors who were based abroad. Another cause for the delays arose out of the consultative mechanism, e.g., those provinces affected by a particular investment had not commented as quickly as expected after receiving notice of the investment.[76]

Paradoxically, the consequence of Chretien's tactics which initially led to a smooth processing of takeover and new business proposals was an administrative backlash. His motto of "less form-filling and more action" seemed to take precedence over some of the original functions for which the Act was created; for example, promotion of public awareness of the problems of foreign investment.[77] That which appeared as a possible solution to an apparent restriction of foreign investment coming into the country was now criticized as an expedient, non-discriminating tactic. Those within the Agency, however, simply viewed this increase as an achievement in greater efficiency. Gorse Howarth, Commissioner of FIRA, supported this general sentiment in his bid to "eliminate any concerns investors may still have about the red tape involved in gaining approval to invest in Canada."[78]

Jack Horner assumed responsibility as Trade Minister on September 14, 1977. He was considered a pro-business advocate with the necessary

abilities to develop a good working relationship with the Agency. At first glance, this would appear to be a normal anticipation from the business community upon a new Cabinet assignment with responsibilities for foreign investment. Horner has quoted figures, however, that indicated that in the first nine months of 1978/79 the number of processed cases were ten per cent higher than in the corresponding period in 1977/78. Furthermore, the administrative process witnessed the expedition of seventy-five per cent of all cases within fifteen days.[79] In terms of administrative expertise Horner showed no signs of departing from the direction taken by his predecessor. Within his department he encouraged confidence in the Canadian industrial and manufacturing sectors. As an advocate of free trade he welcomed any kind of foreign investment that would provide gains particularly in job creating sectors.

When the Progressive Conservative Party came into power as a minority government in 1979, Robert René de Cotret was appointed as Industry, Trade and Commerce Minister. Although de Cotret had been defeated in the federal election, Clark appointed him to the Senate. Following this he maintained a potent power base in his position as both the Trade Minister and the Minister of State for Economic Development.[80] His background included work experience as former president of the Conference Board of Canada, as staff economist with the President's Council of Economic Advisers in Washington, D.C. and as a specialist in monetary affairs with the Finance Department in Ottawa. This extensive background lent much credibility to his post as Trade Minister despite his inability to get elected to the Commons. As president of the Conference Board in Canada he had established good links with business. This most likely stemmed from an approach he had adopted even prior to entering politics;

that a larger portion of the gross national product should be devoted to private capital needs.[81]

During de Cotret's tenure the government launched two investigations into the role and effectiveness of the Agency in protecting the economy against foreign economic domination. One of the evaluations was a wide ranging political investigation of the role that foreign investment had and should play in the country's development. The other, more noteworthy investigation was to be an evaluation of FIRA's efficiency and operating practices.[82] Its basic aim was to find ways of expediting foreign investment proposals without unnecessary bureaucratic delay and paperwork. Essentially, there were three possibilities proposed in the interests of streamlining the Agency's work. These included the exemption of all small-business applications from the review process, eliminating the requirement of Cabinet approval for all except the largest foreign investment undertakings; and the provision for a clearer and narrower definition of "significant benefit."[83] This was viewed as a major attempt at enhancing the role of FIRA within a framework of a co-ordinated industrial sector strategy. The policy direction of the government was further indicated in statements made by the two chief economic ministers of the government. While Finance Minister John Crosbie told foreign exporters that Canada wanted more, not less, foreign investment, de Cotret had promised some West German businessmen that any future decisions on foreign investment would be speeded up.[84] Although the thrust of these endeavours was more clearly outlined than any previous effort to expedite the Agency's administrative burden, the goal was essentially the same. Unfortunately, Parliament was dissolved after a vote of non-confidence was carried in the House of Commons and the efforts of the special committee never came to fruition.

With the successful return of the Liberals as the governing party in 1980, the prospects for a strengthened Foreign Investment Review Agency, first put forward in the winter election campaign, were set out in the government's Throne Speech. In the interests of extending and reinforcing the role of the Agency the Liberals submitted a series of measures meant to reinforce Canadian participation in the economy as well as improve the role of foreign companies. In brief, these measures as discussed in the House by Herb Gray, the new Trade Minister, included:

> "... first, that FIRA be required to publish, in advance of a decision to allow or disallow, notice of larger acquisition proposals subject to review under the act ... Secondly, the bill would provide that financial assistance be provided to Canadians seeking either to compete against bids by non-Canadians to acquire Canadian businesses or to repatriate foreign ownership of assets. Thirdly, it will provide that FIRA undertake a program of periodic reviews of individual performances of large foreign owned subsidiaries operating in Canada in key areas like research and development and export activity."[85]

In this reinforced vein of government policy or what some opposition critics refer to as "a more intrusive instrument in the marketplace", Herb Gray has assumed responsibility for FIRA operations. As a pro-nationalist who had been given the task to undertake a major foreign investment study in 1972, Gray has come full circle to heading the operation he once advocated.

Gray's operating style is reminiscent of his past days in Parliament as a supporter of economic nationalism. Not long after his appointment to Industry, Trade and Commerce, he gave some indication of a plan of action to enhance the national economic and social well-being of the country. In terms of this commitment he referred to five principles of industrial development policy that were to set the tone for government strategy in this regard:

> "... those principles are to capitalize on our energy base to build an industrial sector that is competitive world wide; to ensure that the federal government is an active player in industrial development; to strengthen our research and technology capacity; to encourage independent Canadian-owned enterprise and to expand Canadian control of our economy and at the same time increase the benefits to Canadians from the foreign investment that is already there."[86]

This statement of principles has yet to become a framework for a new industrial policy. However, they serve to indicate the nationalistic tone with which Gray continues to perceive the government's mandate.

The new Trade Minister has, during the years of FIRA's operations, maintained an avid interest in the work of the Agency. He has always advocated that "government policy on foreign investment must be concerned with devising means for ensuring that such investment, to the extent that it continues to be needed in Canada, contributes to, and does not detract from, the country's economic well-being."[87] The Minister has supported the work of the Agency in its efforts to negotiate the matter of benefits and is firm in his conviction that the controls imposed on foreign investment do not weaken. Although Gray recently told the 1980 annual meeting of the Canadian Bar Association that he is open to changes that would improve the effectiveness and efficiency of the administration of the Act, he made it clear that any streamlining would not be undertaken at the expense of weakening the government's ability to enforce the Act.[88] The effect of Gray's approach on the administration of the Agency has already been felt in terms of the controversial aspect of disclosure of information. The publication of quarterly instead of just annual figures of Agency operations has been a first step in this regard. It is still too early to assess the effect that Gray's attitude regarding foreign investment generally has had on the quantity and or quality of investment entering the country.

While it is possible that the Agency's performance is more a reflection of the views of the various Trade Ministers than of its own thinking, documented accounts of the Agency's work make this hard to assess. It is difficult to compare the performance of successive Trade Ministers, since the government has published little of the business that has been carried on during their respective terms. Furthermore, there is no consistency in the kind of information published that would make it possible to draw conclusions regarding patterns or trends during the various administrations. All that can be said is that on the basis of information that is available it is reasonable to assume that the Minister in office plays a vital role in providing the Agency with functional guidance in the implementation of the legislation.

FOOTNOTES

[1]Canada, Department of Industry, Trade and Commerce, News Release, January 24, 1973.

[2]Alberta, Legislative Assembly, Select Committee on Foreign Investment, Final Report on Foreign Investment, December, 1974, p. 53.

[3]Minister of Industry, Trade and Commerce in Committee of the House, July 5, 1973.

[4]Speech to the Canadian Foreign Investment Review Seminar, Toronto, April 30, 1974.

[5]Herbert C. Byleveld, "Foreign Investment Review Act: Now Fully Hatched", The Canadian Banker and ICB Review, vol. 82, no. 6, 1975, p. 27.

[6]Canada, Foreign Investment Review Agency, Annual Report 1977/78, p. 12.

[7]Canada, Foreign Investment Review Agency, Supplement to the 1978/79 Annual Report, p. 15.

[8]Canada, Foreign Investment Review Agency, Annual Report 1975/76, p. 14.

[9]L. A. Wright, "Foreign Investment Review Act - Significant Benefit to Canada", The Business Quarterly, Autumn, 1977, vol. 42, no. 3, p. 17.

[10]Canada, Foreign Investment Review Agency, Supplement to the 1978/79 Annual Report, p. 5.

[11]Ibid., p. 7

[12]Ibid.

[13]Ibid., p. 9.

[14]L. A. Wright, "Foreign Investment Review Act - Significant Benefit to Canada", op cit., p. 91.

[15]Ibid., p. 13.

[16]For other examples please refer to Ibid., pp. 14, 15.

[17]Ibid., p. 15.

[18]See Appendix I.

[19]Canada, FIRA, Annual Report 1975/76, p. 16.

[20]Canada, FIRA, Annual Report 1976/77, p. 58.

[21]L. A. Wright,"Foreign Investment Review Act - Significant Benefit to Canada", op cit., p. 17.

[22]Foreign Investment Review Agency, Foreign Investment Review, vol. 1, no. 1, Autumn, 1977, p. 10.

[23]This evaluation must depend on the numerical distribution of cases as the government fails to publish sufficient detail regarding the status of all applications on a regular basis.

[24]Canada, FIRA, Supplement to the 1978/79 Annual Report, p. 1.

[25]Ibid., p. 2.

[26]Approximate percentages were derived from the information provided in the Supplement to the Annual Report 1978/79.

[27]The figures for this Table were derived from similar tables found in successive yearly reviews of the Agency commonly known as Annual Reports. For the time period specified, 1974-1979 inclusive, please refer to this table.

[28]Other minor reasons accountable for the disposition of cases can be found in Canada, FIRA, Annual Report 1974/75, pp. 10, 11.

[29]Ibid., p. 11.

[30]Canada, FIRA, Annual Report 1975/76, p. 7.

[31]Ibid., p. 8.

[32]Ibid., p. 4.

[33]Ibid., pp. 5, 6.

[34]Ibid., p. 16.

[35]The Minister of Industry, Trade and Commerce has the authority to issue guidelines with respect to the application and administration of any provision of the Act. In the fiscal year 1975/76 three sets of guidelines were issued:
Guidelines Concerning Corporate Organizations (April, 1975);
Guidelines Concerning Related Business (July, 1975);
Guidelines Concerning Acquisition in Oil and Gas Rights (February, 1976).
A further qualification to guidelines is that they do not have the force of law nor are they conclusive or binding on the Minister and Cabinet.

[36]New and revised Foreign Investment Review Regulations that were tabled in the House on March 11, 1977, combined, simplified and reduced information requirements. They also provided for an abbreviated form of notice for small business proposals with assets of less than $2 million and with fewer than 100 employees.

[37]Canada, FIRA, Annual Report 1976/77, p. 3.

[38]Ibid., p. 4.

[39]Ibid., p. 10.

[40]Ibid., p. 8.

[41]Ibid., p. 13.

[42]Refer to Chart 1, Business Capital Spending in Canada in, Edward M. Cape, "Upturn in Capital Spending and FIRA Cases", Foreign Investment Review, vol. 1, no. 2, p. 11, (Winter, 1977/78).

[43]Ibid., p. 10. Historical evidence, at least since the Second World War has indicated that foreign acquisition activity in Canada has usually displayed a cyclical pattern similar to general business activity trends. This correlation aspect has been studied in more depth in, G. A. Edwards, "Historical Perspective and Acquisition Trends", Foreign Investment Review, Autumn, 1977, and, G. A. Edwards, Foreign Acquisition Activity in Canada: A Long-Term Perspective, FIRA Paper no. 1, February, 1977.

[44]For factors that contributed to the difference in the relationship between direct and portfolio investment in 1975 and 1976 see, Canada, FIRA Annual Report, 1976/77, p. 23.

[45]Ibid.

[46]This topic is analyzed in more detail in the Agency's Annual Report 1976/77, pp. 19-25.

[47]P. Cook, "Foreign Investment: Canada's options cut as capital flow slows", Financial Times of Canada, April 3, 1978, p. 9.

[48]Ibid.

[49]Other effects of the Quebec election, in terms of financial charges, are dealt with in more detail in, P. Hayden, J. Burns and I. Schwartz, Foreign Investment in Canada: A Guide to the Law, (Scarborough, Ontario: Prentice Hall of Canada), Report Bulletin, no. 27, vol. 1, January 31, 1977, paragraph 27-3.

[50]"Canada: Business Warns Quebec", Business Week, May 23, 1977, p. 44. See also, Herbert Meyer, "Business Has the Jitters in Quebec", Fortune, October, 1977, p. 238.

[51]Canadian News Facts, January 16-31, 1978.

[52]Canada, FIRA Annual Report 1977/78, p. 4.

[53]Refer to Table XIX, in the Agency's Annual Report 1977/78, p. 44.

[54]Ibid., p. 5.

[55]Ibid., p. 6.

[56]Canada, FIRA Annual Report 1978/79, p. 4.

[57]Canada, FIRA Annual Report 1978/79, Table II, p. 30.

[58]Ibid., p. 4.

[59]Ibid.

[60]G. Radwanski, "Spate of Takeovers in Political Vacuum", Financial Times of Canada, January 15, 1979, p. 9.

[61]Ibid.

[62]Canada, House of Commons, Debates, 1st Session, 31st Parliament, October 16, 1979, p. 255.

[63]Canada, House of Commons, Debates, 1st Session, 31st Parliament, November 30, 1979, p. 1897.

[64]Canada, FIRA Annual Report 1975/76, p. 8.

[65]John Urquhart, "The Welcome Wagon", Macleans, November 1, 1976, p. 40n.

[66]Graeme C. Hughes, A Commentary on the Foreign Investment Review Act, (Toronto: The Carswell Co. Ltd.) 1975, p. 2.

[67]C. Baxter, "Friend or Foe", Financial Post (Supplement), August 17, 1977, p. 15.

[68]J. Schreiner, "U.S. Businessmen Fear FIRA But Understand Its Rationale", Financial Post, October 11, 1975, p. 9.

[69]Ibid.

[70]L. A. Wright, "Foreign Investment Review Act", The Business Quarterly, vol. 41, no. 3, Autumn, 1976, p. 20.

[71]John Urquhart, "The Welcome Wagon", op cit., p. 40p.

[72]P. Hayden, J. Burns, I. Schwartz, op cit., paragraph 25-4.

[73]P. Teasdale, "New Foreign Control Wave Washes over FIRA's Dike", Financial Post, February 23, 1978, p. 1.

[74]C. Baxter, "Chretien Promises Decisions", Financial Post, September 25, 1976, pp. 1-2.

[75]P. Hayden, J. Burns, I. Schwartz, paragraph 30-3.

[76]C. Baxter, "Quicker Review Action by FIRA Promised by Chretien", Financial Post, October 9, 1976, p. 36.

[77]Jon Urquhart, "The Welcome Wagon", p. 40o.

[78]This statement is quoted in P. Hayden, J. Burns, I. Schwartz, paragraph 30-3.

[79]Canada, FIRA News Release, Notes for an address by the Honorable Jack Horner to the Toronto Society of Investment Dealers Association of Canada, February 7, 1979, p. 18.

[80]Politically, de Cotret would have difficulty because of the resentment in the House of Commons of his non-election and subsequent back-door route to power. It was inevitable that he would have to seek re-election to the Commons. In a general election, however, he was defeated in a rural riding in Quebec in February, 1980.

[81]F. Harrison, "How de Cotret Plans to Involve the Private Sector", Financial Post, August 4, 1976, p. 6.

[82]"FIRA Placed Under Federal Microscope, Edmonton Journal, November 5, 1979, p. F5.

[83]P. Teasdale, "How Tories Might Ease FIRA's Rules", Financial Post, October 20, 1979, p. 1.

[84]Ibid.

[85]Canada, House of Commons, Debates, July 14, 1980, pp. 2872-73.

[86]Ibid., pp. 2871-72.

[87]H. Gray, "Gray Makes the Case for FIRA", Financial Post, September 20, 1980, p. 9.

[88]Ibid.

V ENVIRONMENT FOR DECISION-MAKING

The degree of success that the Agency has had in meeting its objectives must be weighed against a number of variables that have influenced its work. The day to day operations have unveiled a host of difficulties to which much of the negative opinion has been directed. The testing ground has been the administrative process itself which has been exposed to a plethora of stumbling blocks. The resolution of specific cases has pointed out the inadequacy of the legislation in its inability to respond effectively to various circumstances. The underlying problem in this regard has been the lack of clear cut guidelines in the determination of what constitutes "significant benefit" to Canada.

In a broad sense the objectives of the legislation were to ensure that foreign investment could contribute benefits that would serve national purposes in the economic development of Canada as well as the foreign investor. Its long term perspective was the improvement of the structure and efficiency of the Canadian economy through the screening of foreign investment. By investigating a small sample of investment applications and the manner in which they were resolved as well as Agency experience with both provincial governments and foreign investors, some light may be shed on whether or not these objectives have been met.

In attempting to determine whether the Agency has been able successfully to meet its original objectives it will be necessary to look at how effectively the Act has been administered and the criticisms that have been directed at the review process. The manner in which the legislation has been applied to ensure that commitments be extracted from foreign investors is perhaps one of the most frequently criticized aspects of the Agency's

work. The difficulties perceived by investors and media critics alike relate to the lack of a clear set of guidelines against which significant benefits are assessed coupled with a complex administrative structure. Another popularly held belief is that the Agency's administrative practices have created problems for the Agency in terms of its flexibility in adapting the legislation to changing economic conditions. Although some of these issues have been alluded to in previous sections a more in-depth discussion will lend some focus to this aspect of the Agency's work.

One shortcoming of the Act which was noted in the early stages of the Agency's operations was the nature of the negotiating process in determining "significant benefit." In speaking to the Law Society of Upper Canada in 1975, Richard Murray, the first Commissioner appointed to head the Agency, noted that an inherent problem with the process was that the real power to decide lay outside the bargaining procedure. Despite the fact that investors negotiate with Agency officials for certain arrangements and the Minister then advises a particular strategy based on the recommendations provided the responsibility for the final decision rests with the Cabinet. In this regard Murray was questioning the lack of equal bargaining power for the Agency as well as potential investors.[1] With respect to the latter it is even more difficult to determine whether a favourable negotiation with Agency officials will result in Cabinet approval. The absence of communicated reasons for Cabinet decisions provides little guidance for an investor in terms of Cabinet thinking.

Given the limited history of Agency experience up to that time Murray's concern must be weighed against the results of the Agency negotiations in the past few years. The first instance in the Agency's history which witnessed the reversal of an earlier Cabinet decision and permitted

a previously blocked foreign takeover of a Canadian company was the case involving a Quebec based assembler of school bus bodies, J. H. Corbeil Ltee. of St. Lin. The proposed takeover by the American affiliate, Canadian Blue Bird International Inc., which had not met the original test of significant benefit was later approved when the Quebec government abandoned its opposition as a result of its ability to gain equity participation in the transaction.[2] It should be noted that no explanation of the factors leading to the change in decision were provided. One can assume however, that the provincial government's interest in protecting an indigenous industry had substantial influence in the Cabinet's reassessment. This factor would have more likely led to the change in opinion rather than any disagreement with a previous recommendation provided by the Agency via the Minister.

Another instance that more directly reflects the extent of Cabinet prerogative in the final disposition of applications was a situation regarding the double application made by White Consolidated Industries (Canada) Ltd. to obtain approval to takeover Westinghouse Canada Ltd. A second application by White Consolidated Industries (Canada) Ltd. was apparently made on the assurances from D. M. Jamieson, who was then Minister of Industry, Trade and Commerce, that if certain undertakings were provided approval of the takeover would be guaranteed. Both the Agency and Mr. Jamieson recommended approval of this second application but the Cabinet, apparently under political pressure, did not accept the recommendations and rejected the proposal.[3]

The need for openness in administering the Act raises a fundamental issue of the wide discretion employed by the Cabinet in reaching a decision. The major drawback in the entire process of determining the status of a proposed investment is the feature of confidentiality versus disclosure of

information. When an investor files a notice of a proposal to the Agency such information is considered confidential. In the early years of the Agency's operations the only information published was in the form of news releases that announced whether a transaction had been approved or denied and when approved, a brief statement indicating the nature of the "significant benefit" was published in the Canadian Gazette.[4] It is now more common to review the conditions on which an investment is allowed as published in a departmental newsletter. In rare instances more specific undertakings provided by the investor may appear in print but only with the consent of the investor. However, the public is still unaware of the reasons for which Cabinet determines a final decision nor to what extent a foreign investor complies with certain undertakings when a proposal has been approved. There are two exceptions to this rule. The first concerns information requested by an individual to whom the information relates who, in turn, wishes to share this information at his or her own discretion. The second is information communicated to provincial ministers and crown employees for purposes relating to the administration of the Act.[5]

As a result of government policy to withhold information to the general public the overall effectiveness of the Agency in its implementation of the Act becomes more difficult to determine. Moreover, the withholding of certain information has created the impression that "the administration of the Act is being carried on behind a veil of secrecy."[6] One of the government's main reasons for not disclosing the details of an investment proposal is that an applicant would be at a competitive disadvantage if confidential information was readily available to potential competitors. The concept of disclosure was built in as a safeguard against damaging the viability of an investment if certain intentions became public. Legal critics have argued

however,[7] that this type of reasoning has little credibility as the Agency should be accountable for a general indication of the "significant benefit" proposed in each application and the Cabinet's reasons for either allowing or disallowing a proposal. In short, information disclosure of a general nature should not in any way preclude the Agency's administrative responsibility to the potentially successful candidate.

A related argument to this lack of information sharing is that potential applicants are deprived of a valuable source or check list of factors against which they can judge or compare the status of their own proposals. It would appear that expediency in drawing up an investment proposal is the main factor underlying this concern and more of an issue with new investors unfamiliar with the Agency's administrative machinery. However, experience in dealing with the Agency has shown that in the negotiating process to determine significant benefits, the Agency is flexible in providing a number of opportunities for an investor to supplement an original proposal with additional undertakings.

Gorse Howarth, the present Commissioner of the Agency, has referred to the dilemma surrounding the disclosure of information policy as "openness for the general good versus discretion in the use of confidential, private information...."[8] The issue has been a sensitive one, particularly in the early period of the review process. It would be reasonable to suspect that the Agency's uncertainty and unfamiliarity with the Act was also reflected in some uncertainty in decision-making in this regard. Thus, the disclosure of Cabinet's reasoning on certain proposed undertakings could have exposed an improper or inadequate determination of what constitutes "significant benefit" to Canada.[9] Taken a step further disclosure could also point out inept decision-making on the part of Cabinet or even expose political

favoritism in choosing certain economic benefits over others, although this aspect would be more difficult to verify. The one defence that the Agency has at its disposal, however, is that there is nothing to prevent the parties to a transaction from publishing the facts of a case if they so desire.

Another major concern which Richard Murray had once addressed was the length of time alloted for handling individual cases. He was concerned that the regulation period of sixty days in which to make an assessment was too short a time particularly in cases where decisions were not appealable.[10] Consequently it was discovered that subsection 11(1) of the Act, which advises investors of their rights to make further representation to the Agency, came into frequent use. In effect, this administrative loophole places the onus on the investor to secure additional information to prove "significant benefit" and the time frames involved to reach a decision can be indefinite. In practice an average of 100 days has been known to elapse between the filing of the bid and the Cabinet's decision and it is not uncommon to have four or five months elapse in the case of an unsuccessful application. Essentially Mr. Murray had suggested that certain time limitations should be subject to review.

In the course of the Agency's work time frames generally appear to be quite flexible. One instance, for example, that demonstrates the type of time restrictions with which the Agency deals is the case of Marks and Spencer Ltd., a British specialty food and clothing retailer which received Agency approval to take over Peoples Department Store of Montreal in 1975. The British firm agreed to open fourteen new stores, create 550 jobs by 1976 and convert sixteen Walker/Smith's Stores to Marks and Spencer outlets. It should be noted that what the Agency had not stated publicly was that the

new management at Peoples had up to two years' time to fulfil those commitments. Furthermore, it could lay off an unlimited number of workers in the interim as long as the firm could prove that it had created 550 jobs at the end of the two year period.[11] Finding itself trapped in an economic slowdown, Marks and Spencer only managed to create 370 new jobs, open ten new stores and close down four others previously run by Peoples. On the other hand, forty-three rather than sixteen Walker/Smith's Stores were remodelled and converted to Marks and Spencer outlets. The degree of Agency enforcement in securing the original undertakings in this case is a matter that will be dealt with later. Although there is no conclusive evidence that the Agency's administrative time frames are unrealistically short the Marks and Spencer incident may be a case in point. The company's failure to satisfy the conditions set out in its original agreement with the Agency was based not only on its unfamiliarity with Canadian market conditions but also on an insufficient amount of time in which to gain a proper knowledge of those conditions and thus be able to fulfill its commitments.

In still other types of takeover cases the Agency has been criticized for utilizing time to unfair advantage by delaying action until a Canadian company is able to pick up a bargain by default. In March, 1976, the controlling interest in Zellers Ltd. of Montreal which was held by the bankrupt W. T. Grant Co. of New York, was put up for sale to meet creditors' demands.[12] This was met with a competitive wrangling between two companies to determine the most attractive purchase offer. Specifically, Gambles Canada Ltd. of Winnipeg (wholly owned by Gamble-Skogmo Inc. of Minneapolis), through its subsidiary Macleod Steadman Ltd., made a bid of $32 million. The foreign parent company was subject to review and presented its case before FIRA.

This initial bid was challenged by a second bid of just over $32 million by Fields Stores Ltd. of Vancouver. Gambles subsequently raised its bid to a final offer of $35 million. The Gambles offer was conditional on FIRA's approval and Fields, the Canadian bidder, placed a time limit on its bid which ended June 23, 1976. Due to the long period of time that the Agency delayed on its decision to approve the Gambles offer the New York City bankruptcy court approved the lower Fields bid.

In the final analysis the Agency appeared negligent in its duty to determine what was in the best interests of the Canadian economy. FIRA had been aware of the Zellers case since early April of that year as well as the deadline that Fields imposed. The Agency might have placed itself in an even more difficult situation if it had refused the Canadian offer because Fields would not extend its time limit. In this apparent erosion of Agency responsibility, FIRA could have been accused of encouraging Canadian companies to make low bids for takeovers knowing that if they waited long enough they would be able to buy at below market value. As one source has commented, FIRA's inaction might, in the long run, have created disadvantages for Canadian vendors, generated more uncertainty in a changing Canadian economy or even put the Agency's own reputation in jeopardy.[13]

In its attempts to derive benefits for both the investor and Canada the Agency's ability in ensuring that benefits are forthcoming is restricted somewhat by the "structural weakness" of the Act. Specifically, the lack of clear-cut guidelines for determining significant benefit and a questionable application of enforcement and control functions has led to some other difficulties in the administration of the legislation. Ideally the Agency was to be an instrument cognizant of the volatile nature of foreign investment. The workability of the legislation is contingent upon the discretionary power

vested in Agency officials to make somewhat arbitrary decisions. Not all of the "significant benefit" criteria set out in the Act are applicable to every case. Each application is examined on its own merits in the context of the benefits it is likely to obtain. The government claims that this type of review procedure is more flexible than a fixed rules approach in that it enables the Agency to take into account the unique characteristics of each investment proposal. However, it also exposes the Agency to factors such as corporate obstinacy, political opportunism and government indifference, all of which have created problems in certain individual cases. More importantly, the manner in which the government has neglected the enforcement of certain provisions has nurtured a feeling of general distrust with what appears to be erosion of government responsibility for an accountability to the legislation.

In one case in 1975, UPS Ltd., the Canadian subsidiary of United Parcel Services of America, Inc., was refused permission to take over Delivro Ltd., a Montreal parcel delivery service because of strong protests from groups such as the Post Office, and Canadian National and Canadian Pacific Express as well as from the Quebec government and labour organizations from Ontario.[14] Despite the refusal UPS went ahead and completed the takeover of Delivro conditional on the transfer of Delivro's licences to UPS. Within two years UPS lent funds to Delivro in return for shares as collateral. Delivro subsequently defaulted on the loan which placed UPS in a position of control of Delivro. In this instance the Agency agreed to the right of UPS to acquire the shares of Delivro under a loan agreement but only if there was a default. The Agency could consider such an undertaking reviewable only if UPS entered into the original loan agreement for the purpose of acquiring control of Delivro.[15] Since then the agreement between the two firms has

been cancelled as Delivro has ceased operations. If the takeover had gone ahead it would have been likely that Canadian vested interests, such as the Post Office and Canadian National and Canadian Pacific Express , would have been vehemently opposed to having to deal with such strong competition. The Commissioner in this case turned a blind eye to the entire affair saying only that the takeover was out of his hands because the purchase price of the company was less than $250,000, the threshold that determines whether a transaction should be screened by the Agency.[16]

Within the meaning of the Act the acquisition of control of a Canadian business enterprise had not been completed. However, the Minister admitted that "because of the nature of Delivro's business, the alleged acquisition would appear to be subject to approval by certain regulatory authorities of the provinces in which Delivro Inc. is or has been operating."[17] In this case, it appeared as though the Agency's hands were tied in what could have developed into a possible violation of the Act.

One of the basic problems of the legislation lies with the weakness of the original intent of the Act. In certain cases the legislation becomes unworkable because it does not anticipate certain problems. Furthermore, weak enforcement measures reveal the Agency's inability to win a dispute if taken to the courts. In 1975, for example, N.V. Indivers, a Dutch firm, took over the Vac-Hyde Processing Corporation, an American company. With this takeover, Indivers indirectly acquired a controlling interest in Vac-Hyde's Canadian subsidiary, a successful firm involved in treating metal for aerospace purposes. The Government disallowed this transaction due to protests by both the Quebec and Ontario governments to the effect that it would restrict competition. The decision meant that Indivers had to divest itself of the Canadian subsidiary. It took almost two years before the

Dutch company finally sold its indirect interest to Canadian management.[18] In the interim the Agency was virtually powerless to do anything short of taking the Dutch company to court to force divestment. Government officials made no attempt to force the company to comply with its decision. Whether the government might have acted sooner if it had had access to stronger enforcement measures than those found in the Act[19] is a moot point in this case. The government could have tested the legislation in the courts but chose to default instead.

In these particular cases there were certain reasons that may explain the government's reluctance to enforce the Act in the case of a possible violation. It has been noted that in both the UPS and Indivers cases the government, for reasons undisclosed, failed to prepare a summary of each case for review by the Cabinet. While this would appear to be a small technicality, FIRA was advised that such an oversight would be detrimental in court.[20] In the Indivers case moreover a further qualification made this case a potentially difficult one if taken to the courts. Acquisition of control also accounts for those cases in which control of a Canadian firm, already foreign owned, transfers to another foreign company by virtue of the sale of the foreign parent firm. Due to the ambiguous nature of the legislation, officials of the Department of Justice have questioned the applicability of the Act in such instances.[21]

Another case which poses some interesting questions concerning the issue of Agency enforcement in investor compliance to an undertaking is the Marks and Spencer takeover. Earlier in this chapter we also reviewed the consequences of limited time frames for this particular case. Despite the absence of publicly disclosed facts it would appear that the Agency did not take any measures to force the British chain to live up to its original

agreement. Instead, the government allowed the company to submit revised undertakings that were considered more reasonable. In an informal discussion concerning the matter of whether the government had been particularly lenient with Marks and Spencer one Agency official remarked that the company had every intention of meeting its commitments. Unfortunately it came up against unfamiliar Canadian marketing circumstances and thus stood the risk of going bankrupt.[22] The principal undertakings included in the revised agreement included commitments to open a total of fifteen new Marks and Spencer stores by the end of 1980; to recruit eighty-three new staff for the three stores that were to open in 1977; to obtain seventy per cent of its textile merchandising purchases from Canadian manufacturers and to spend $100,000 each year up to 1980 on Canadian research and development.[23] By 1978 the British company had already surpassed its commitments substantially.

The only wrinkle that could have been perceived in this otherwise smooth re-negotiation was that the new conditions set down for Marks and Spencer were approved by the Minister (Chretien) alone. Critics pointed out that there was nothing in the Act that stipulated Ministerial approval of a new agreement without reference to Cabinet.[24] Obviously the case proceeded on the basis that there was also nothing in the Act that required the Minister to take a new set of conditions to Cabinet for approval. At the very least this action by the Minister points out that there may be instances in which expedient measures may be taken at the expense of bureaucratic process.

This type of resolution also begs the question of how often investors are permitted to revise their agreements with the Agency because they cannot keep their original commitments. Because of the confidentiality provisions set down in the Act lack of information on such undertakings makes this

difficult to determine. It should be noted however that a move to police commitments made by foreign investors was initiatied during the Jamieson administration. At that time the Agency's compliance branch started sending out questionnaires to the companies one year following the date on which their takeovers were approved. Agency officials found that it was necessary to request additional information after receiving the initial responses. The extent of follow-up to be conducted was a matter that went to Jamieson for review.[25] The manner and frequency with which compliance measures were enforced is a matter of speculation since the Agency has not released any information, to this author's knowledge, concerning a follow-up process.[26]

Another incident in early 1977 raised some doubts about the government's own commitment to the review process. The case involved a merger of the appliance divisions of Canadian General Electric Company and General Steel Wares Ltd. In turn, the new company, Canadian Appliance Manufacturing Company (CAMCO) was to takeover the appliance division of Westinghouse Canada Ltd. This application followed the two attempts by White Consolidated Industries (Canada) Ltd. to take over Westinghouse Canada Ltd., a situation referred to earlier in this chapter. This type of transaction would have normally been subject to Agency scrutiny due to the level of foreign interest involved in the takeover but Chretien, apparently under pressure from the participants, took the initiative to rule that the merger did not have to be screened.[27]

Under the terms of the Act, the takeover of an enterprise that will result in control by foreign interests is subject to review. However, Chretien proceeded on the basis that CAMCO was not a "non-eligible person" even though Canadian General Electric Company would have sixty per cent of

the equity shares (but only fifty per cent of the voting shares) in the new company. The Minister argued that a fifty-fifty split in the allocation of voting shares did not constitute control by the American owned Canadian General Electric Company. Some observers noted however, that the United States firm would have veto power over proposals from its Canadian counterpart.[28]

In consenting to approve CAMCO's bid to provide 400 new jobs and investments totalling $50 million Chretien was in danger of violating normal administrative procedure particularly in the case of new companies formed for purposes of affecting acquisitions. Herb Gray, then a Liberal backbencher, criticised Chretien's decision in this case and stated that the Minister "provided an opportunity for business generally to do an end-run around FIRA."[29] It was also argued that in cases where there is a promise to perform, failure to follow normal procedures under the Act would usually result in a null and void decision. Normal Agency procedure in this type of case would constitute a formal request from an affected company followed by a written response from the Minister. Chretien's authority to waive the normal FIRA scrutiny for a merger was no more than an expedient measure to overcome corporate obstinacy. Concerning the legality of the entire transaction the Department of Justice claimed that the acquisition by CAMCO of Westinghouse Canada Appliance Division was subject to review.[30] Despite this legal opinion, CAMCO was given permission to complete the Westinghouse acquisition as well as investigate the possibility of potential export markets. One of its initial stumbling blocks came when the company submitted an application to the federal Registrar of Trademarks for use of the "Westinghouse" name. CAMCO's submission exposed FIRA's failure to be able to deal adequately with the question of foreign control of trademarks.[31]

In a long-standing dispute over the right to use the trade name "Westinghouse" in Canada the Agency became involved in a complex dispute between two American parent companies and their Canadian subsidiaries. Westinghouse Canada Ltd. and its United States parent (Westinghouse Electric Corporation) and White Consolidated Industries and its Canadian subsidiary (White Consolidated Industries (Canada) Ltd.) entered into a four way agreement whereby Westinghouse agreed to take action with the Registrar of Trademarks to enable White Consolidated to take over sole rights to the trademark. The crux of the matter lay with the potential confusion involved in having CAMCO marketing Westinghouse products. In other words, if White Consolidated Industries (Canada) Ltd. was allowed to use the Westinghouse tradename it would be marketing products under that name, while CAMCO would be marketing other products which it had acquired from Westinghouse Canada Ltd. under the same tradename. Furthermore, CAMCO was required to provide warranty service for Westinghouse appliances and was concerned that White Consolidated Industries' use of the name "Westinghouse" would create confusion in the marketplace.[32]

The battle over the use of trademarks ended with White Consolidated Industries owning the Westinghouse appliance trademark. It was agreed however that while appliances bearing the Westinghouse name would still be distributed by CAMCO until the factory inventories of Westinghouse products were depleted White Consolidated Industries would utilize a "White-Westinghouse" trade-name.[33] After CAMCO's supplies were sold CAMCO adopted the brand name "Hotpoint" for its product line.[34] In this particularly confusing episode two factors became evident; the Agency had not imposed any time frames to affect a resolution in the trademark situation nor did it consider the assignment of trademarks a reviewable transaction.

In general the assessment of cases determined by the Agency is most often dependent on the merits of individual circumstances. There may be instances, for example, where factors such as competition, increase in employment, product variety and usually anything that falls within the scope of significant benefit criteria play a more direct role in the disposition of a case. Based on the little information published by the Agency it is difficult to determine what, if any, pattern emerges in the types of cases which are resolved. It is reasonable to assume that much of the indecision that plagued Agency officials in the early years of operation was based on inexperience in interpreting the Act. The Agency has since become well aware that until a body of case law is developed for interpreting the Act, its staff has the responsibility to provide answers about the possible application of the Act to a particular transaction. It is not simply a matter of identifying the significant benefits of an investment proposal but rather how the benefit test is applied. Thus, in cases such as UPS and Indivers peculiar facts specific to each transaction together with the concerns expressed by provincial governments and interest groups were the most probable determining factor in the Agency's decision. One source has been quoted as labelling this process a game of "calculated ambiguity."[35] Although the bargaining process conducted by Agency officials suffered at the outset it is inevitable that experience gained in dealing with different transactions has helped the Agency develop a more concise method for negotiating prospective investments.

Throughout FIRA's early "growing pains" a number of investors who did not receive approval for their initial requests gained useful learning experience for future takeover attempts. One situation, for example, which had implications for provincial concerns regarding the review process served

to challenge the conventional wisdom that the provinces are more permissive toward foreign capital than is Ottawa.[36] Bestpipe Ltd. of Kitchener, Ontario, an Australian-owned pipe manufacturer, did not receive approval in its first bid to take over Vibrapipe Concrete Products Ltd. of Ste. Therese de Blainville in Quebec. For reasons undisclosed, although it was quite possible that Quebec feared jobs would be shifted from Ste. Therese to Kitchener, the Quebec government dissuaded Ottawa from consenting to the original takeover attempt. In its second takeover bid Bestpipe Ltd. was reportedly eager to satisfy the Quebec government in order to gain approval. In such cases the Agency is responsible for consulting with any province on investments with which it may have particular concerns.[37]

A review of some of the cases with which the Agency has had to deal does not provide conclusive evidence that could indicate direct violation of the review process. Although the Agency may have fallen victim to a certain degree of inept decision-making it is more important to consider that particular events re-order certain priorities. Each case may bring with it a set of unique circumstances that will ultimately determine the course of the investment application. It would be unrealistic to expect that the Act would always be interpreted within the exact guidelines originally established. As Herb Gray has stated, "the act was meant to be an evolving thing from the start ... it should be adapted periodically to changing conditions and requirements."[38] This type of observation points to the need for the development of decision-making continually rather than the application of expedient measures that gloss over administrative difficulties. A far more flexible and simplified set of arrangements is a solution advocated by most critics. Edward Safarian, a noted economist, believes that the tendency to view FIRA as weak and ineffective has been

based on misinterpretation. In his words, "... FIRA was set up in an unnecessarily complicated way to deal with something that's very difficult to deal with under the best of circumstances."[39]

Another aspect of the administrative process that may reflect the character and integrity of Agency decision-making is the role of the Commissioner of the Agency who is appointed by Cabinet. Although the Minister is responsible for ensuring that the legislation is being properly implemented, the Agency's day to day performance is influenced in part by the leadership qualities brought to it by the Commissioner. Generally speaking the Commissioner's role involves promotion of efficient operating procedures as well as marketing available services.[40] The Commissioner has become involved with different responsibilities in different times of the Agency's existence and this usually involves having to deal with other government departments that are affected by the Agency's decisions. Much of this type of activity has been a reflection of the administrative acumen of individual members holding this office.

In the early stages of its operation the Agency was vested with the responsibility of not only having to promote the new legislation but having to justify its own existence as well. Richard Murray, the first Commissioner, described as a "flamboyant businessman and nationalist"[41] seemed to realize the priorities of his fledgling organization. As a nationalist he appreciated the concerns associated with foreign domination of a country's economy and as a businessman he could lend a certain amount of initiative to an organization that needed to establish quickly a positive reputation. His concern with establishing credibility for the Agency was evident in a speech he made to the Law Society of Upper Canada in 1975.[42] In that speech he stated a personal reservation about the nature of the negotiating process in

determining "significant benefit," and the length of time that was required for dealing with individual cases. He also admitted that the guidelines issued for real-estate transactions were "unclear, difficult and not helpful." Furthermore, while insisting that the government should maintain a strong position on ensuring that commitments were fulfilled, such as pension plans for Canadian employees, he also acknowledged that some flexibility would be required in cases where undertakings were conditional on pricing and market conditions. In addition to his other concerns about the Agency becoming a large and unwieldly bureaucracy, the former Hudson's Bay executive was determined to eliminate much of the red tape in Agency dealings. For example, one of his reforms was the issue of less detailed guidelines for corporate re-organization which accounted for up to twenty-five per cent of applications made during the Agency's first year of operation.[43]

Bertram Barrow, the Commissioner appointed to succeed Mr. Murray, did not hold office long enough (August 15, 1975 - December, 1975) to be able to impose his own brand of administrative expertise.[44] Mr. Barrow had previously held the office of Senior Assistant Deputy Minister of the Department of Industry, Trade and Commerce. His objectives in running the administration were not significantly different from that of his predecessor. Barrow supported the idea of allowing the Agency more room for negotiations in dealing with foreign companies. He also seemed to favour joint ventures between foreign and Canadian companies as opposed to outright foreign ownership. His own sense of nationalism was revealed in his statement that "decisions on foreign investments should be directed towards strengthening the Canadian industrial base and aiding industry to compete in domestic and export markets."[45]

Gorse Howarth, the present Commissioner, served on an acting basis

from December, 1975 up to the date he was appointed on August 10, 1976. While his leadership qualities may not compare with the apparent dynamism possessed by Mr. Murray, his lengthy tenure has provided some continuity to the work of the Agency. Like his predecessors he has been anxious to eliminate much of the bureaucratic process involved in processing applications. This has been achieved to a great extent by a promotional campaign directed at foreign investors. The move to have the Agency appear readily available and willing to negotiate with most investors was, in large part, a consequence of Jean Chretien's desire to attract more foreign investment. The Agency's role during Howarth's tenure can be summed up by his statement,

> "We believe that it is not all inconsistent with the Agency's proper role to assist investors who are involved in reviewable transactions to make the best possible case for allowance."[46]

This would seem to imply that the Agency's mandate is to ensure, where possible, that significant benefits are achieved in any investment transaction. This is usually achieved by rewriting drafts of proposals, inserting qualifying clauses while removing others and developing a process that tries to ensure that proposals have a good chance of passing final Cabinet scrutiny. In support of this practice, there has been an increasing tendency in cases of reviewable transactions for investors to contact the Agency at an earlier stage to "check out reviewability or to discuss ... the manner in which their plans can be most advantageously explained and described in a formal notice."[47] It has become evident that in the more recent years of the Agency's existence the investment community is no longer as hesitant about approaching the Agency with its investment dollars. Figures cited later will attempt to provide additional evidence.

Federal/Provincial Association

The relationship between FIRA's policy of screening foreign investment for specific benefits and the objectives of the provinces in developing their own economies and looking to foreign investment as one of the means by which this can be achieved poses another question for the effectiveness of the Agency's work. In some of the literature regarding foreign control in Canada it has been suggested that the provinces would not hesitate in opposing the federal government efforts to restrict the entry of foreign investment into the country. Taken a step further it is also assumed that provincial governments tend to favour unrestricted flows of foreign investment.[48] In the face of federal initiative to regulate these flows the implication for possible federal-provincial conflict becomes apparent. Although it is not the intention here to present the opposite argument, that certain provincial governments have supported the restriction of foreign ownership for various reasons in the recent past, such as Ontario, Quebec and Saskatchewan, it should be noted that some evidence to this effect does exist.[49]

One of the significant benefit criteria on which the Act is based takes into account the impact that a proposed investment has on provincial economic and industrial objectives. The success of the Agency in recognizing these regional differences in its review process depends utltimately on how well the consultation process with the provinces proceeds. By briefly reviewing the chain of events that led up to this consultation process and the actual results achieved in the disposition of cases in terms of provincial recommendations an assessment of the federal government's success in reaching one of its objectives will be provided.

The matter of provincial input into a federal review process received

no study in the Foreign Takeovers Review Bill (C-201) which was placed before the House of Commons in May, 1972. It should be noted, however, that New Democratic Party concerns about the lack of consideration for the economic conditions of provinces and strong criticism from the Conservative ranks regarding the absence of an established process for consultation with provincial governments resulted in a proposed amendment to the original significant benefit criterion. Jean-Luc Pepin, then Minister of Industry, Trade and Commerce, stated his intent to consider the industrial and economic policies of any province which could be affected by an acquisition. Provincial views regarding this proposed legislation were solicited in a country wide tour by Herb Gray, then Minister of National Revenue. It was discovered that Manitoba, Ontario[50] and Saskatchewan supported the proposed legislation and in fact that Saskatchewan urged more restrictive legislation. Although New Brunswick strongly opposed Bill (C-201), the other Atlantic provinces were not as hostile.[51] Quebec viewed a screening process as a flexible instrument of government policy but did not provide its full support,[52] probably because of its historical need for large infusions of capital investment.

The industrial and economic policies of any province likely to be affected by an investment transaction became more firmly entrenched with the Foreign Investment Review Bill (C-132) which was introduced January 24, 1973. Although provincial reaction to the Bill was limited as discussed in Chapter Two, essentially the same views that had been provided in response to Bill (C-201) were re-iterated on this occasion.[53] The formulization of a formal consultation procedure between the federal and provincial governments on the issue of provincial representation did not occur until after Bill (C-132) became law later in the same year and various attempts in

establishing a procedure for consulting with the provinces were tested with the application of Phase I of the Act (acquisitions).[54] In a meeting of provincial Ministers of Industry in Newfoundland in December 1974, ministers discussed the issues of which provinces would be notified about certain transactions and the amount of information that would be provided by the federal government in this regard. That meeting was instrumental in finally providing a modus operandi for consultation which involved direct contact in cases where a foreign investment proposal involved assets or employees located in a particular province.[55] It is interesting to note that federal reaction to these developments was not particularly supportive. Alastair Gillespie, who was Industry, Trade and Commerce Minister during this time was quoted as saying,

> "... what they're really after is a veto power. There is no way, really, of defining consultation, what the provinces mean is that they want the right to override decisions taken here ... but that's not negotiable."[56]

The strong negative tone of Gillespie's statement was most likely a reaction to provincial opposition in the decision to proclaim Phase II of the Act at a time when the Minister was anxious to install the remaining portion of the legislation.

A complete discussion regarding the success of individual provinces in the matter of influencing recommendations on Agency decisions will not be provided here. There is little documented evidence available regarding the range of provincial experience in the consultation process.[57] Furthermore any study would be incomplete without an assessment of particular cases and the general attitudes of provinces towards FIRA in the course of changing provincial governments. In the absence of knowledge of what Agency decisions would be without provincial recommendations the degree of

provincial influence in the established process is a difficult element to measure. Notwithstanding these limitations however, some general observations might be made. Provincial economic development ambitions have not reflected an unconditional "open-door" policy to foreign investment as some might speculate. Although the Atlantic provinces have traditionally regarded foreign capital flows as necessary in promoting economic growth and continue to do so, Quebec and Saskatchewan on the other hand appear to maintain stricter controls over the entry of foreign investment. Other provinces do not appear to have had any strong reactions to the effect of the screening process, probably because the regulations have not precluded the realization of their individual economic objectives.

In the little information that the Agency provides in its annual reports it would appear that procedures for consultation with provincial governments, and for that matter other federal government departments and agencies, are well established and effective. Since the Agency had chosen not to block the entry of foreign investment but rather improve its terms, this information suggests that the application of the foreign investment review legislation is not a source of federal-provincial conflict but rather governments at both levels have been able to co-ordinate their interests and come to an agreeable solution on reviewable cases. In a three year review published by the Globe and Mail it was noted that in ninety-six per cent of all cases received there had been no disagreement between the two levels of government on the resolution of reviewable cases.[58] It would also appear that the lack of debate in the House of Commons concerning provincial interests in specific cases would reflect a certain degree of satisfaction with or at least non-opposition to the screening of foreign investment for "significant benefit." Due to the confidential nature of provincial

recommendations the substance of consultations with the federal government are unknown. However, the results of recommendations in terms of the distribution of outcomes for a certain number of cases involved have been offered by Mitchell.[59] It is interesting to note that annual or other reports issued by the Agency have not provided this type of detail. In a time period covering roughly two years it was determined that a majority (81 per cent) of cases had been allowed; that more than half of the cases reviewed involved businesses in Ontario and finally that the disposition of cases resolved did not indicate any particular orientation toward either provinces which had favoured unrestricted foreign investment or those that had preferred some degree of regulation.[60] In the final analysis the significant benefit criterion which looks to provincial consultation in its review of foreign investment seems to have overcome any strong competition among provinces for foreign investment by being able to bargain on behalf of the various political and economic objectives of Liberal, Conservative and New Democratic Party provincial governments as well as on behalf of the country as a whole.

Generally the federal-provincial association has worked out positively in terms of FIRA regulations and provincial interests in the consequences of screening foreign investment. The concern over proper consultation with provincial governments was more prevalent in the development of the legislation than in subsequent Agency dealings. Anticipated problems such as the degree of stringency employed in the review process did not seem to materialize. Perhaps this was due to, on the one hand, Progressive Conservative Party objectives in having to be sensitive to the demands of its provincial wings and the tendency for the party to submerge its internal conflicts by emphasizing the federal-provincial issue. During debate in the

House on the proposed review legislation there was disagreement within Party ranks about the substance of the Act.[61] An issue on which the rank and file could agree however, was criticism of the lack of consultation with individual provinces. On the other hand, the actual implementation of a screening process has not posed any great difficulties in terms of provincial input to final federal decisions. It should also be noted that at the time the legislation was in committee stage the Atlantic region was most concerned about the application of a screening tool in foreign investment transactions. In reality, however, most cases have concerned investments in the central region of the country where provincial governments conceded the need for a certain level of government regulation. In view the actual distribution of cases then, the potential for federal provincial conflict has not been realized. Furthermore, the track record of the federal screening initiative has dissipated any earlier concerns about co-operation between both levels of government. Provincial interests have been served for example, in the success of Quebec's recommendations to the Agency as in the Blue Bird case discussed in an earlier section of this chapter. This type of situation reflects the spirit of federal support for strongly held interests within a province. Unfortunately there has not been enough published concerning the disposition of cases within each of the provinces that would serve to indicate any appreciable differences in the federal-provincial association to date. As the Agency becomes more sophisticated in its review process perhaps this will be an area of interest that will be addressed by other researchers.

Foreign Reaction

The effectiveness of FIRA's mandate will ultimately depend on the co-operation it receives from the parties with which it deals to extract

economic benefits for Canada; namely, foreign investors. While this may be overstating the obvious it is still an important measure of the Agency's success in meeting its goals. The significance in considering the reaction of the foreign investment community at large to the work of the Agency lies in the effect this has on both Agency and government behavior. For the Agency in particular it may offer some indication of the manner in which government officials have responded directly to industry pressure. Furthermore, any reaction from the Agency poses some interesting speculations as to whether this organization has maintained the same political posture in all of its dealings or whether it has adopted a more flexible approach in the disposition of reviewable applications.

Prior to an investigation of foreign reaction to the regulatory provisions it should be noted that business and interest groups in Canada were given an opportunity to voice their concerns respecting the proposed legislation when it was being reviewed in committee stage in the House. Although some of these reactions have already been noted in this research,[62] it might be helpful to re-iterate the main concerns. It was generally perceived that the legislation would create a detrimental effect on the economy due to its negative influence in attracting potential sources of development capital required by many industries. Business in general was under the impression that government intervention in this form would be seen as discouraging investment flows entering the country. The most predominantly held view was that the mere existence of a screening agency would act as a disincentive to potentially interested investors who would be more apt to look at opportunities available elsewhere.

Both foreign firms in Canada and those outside have, at one time or another, viewed the Agency as a tool of government intervention and generally an unfair intrusion into the economic marketplace. The rumblings

of discontent were more harsh in the early months of the Agency's operations as FIRA set out to make its presence known. The Agency was relatively firm in the early stages partly because of the more nationalist mood and also because it only dealt with the question of takeovers of existing companies for the first eighteen months. During that time business concerns felt threatened by the screening powers imposed by the government. The Agency's most ardent critics helped to perpetuate a myth, difficult to dispel, that the Agency was in the process of blocking foreign investment outright. There seemed to be little regard for the fact that the concept of selectively screening foreign investment, although relatively new in the international community, was not totally unfamiliar.[63] Despite any knowledge or concern for similar government regulations elsewhere the view strongly held was "the very existence of a screening mechanism creates the impression abroad that Canada doesn't welcome foreign investment."[64]

The views expressed by various businessmen reflected a growing unease about the political climate surrounding the activities of the Agency. Speaking to an international meeting of marketers in 1976, Leonard Matthews, then United States Assistant Secretary of Commerce in the Carter Administration, made reference to how "nationalism had reared its ugly head" in many countries around the world to the detriment of multinational corporations. Although Mr. Matthews described FIRA as a worthwhile objective for Canada, he qualified his statement by saying, "but in practise, it tends to take less than a balanced view of the picture especially where United States multinationals are concerned."[65] In another observation, Mr. Ward Pitfield, president of the brokerage firm, Pitfield, MacKay, Ross, noted

> "FIRA is endeavouring to do far more than this country can afford to do. It(')s far too large and all-encompassing. We're hard up for foreign investment and we're pushing it away."[66]

In this comment Pitfield may have been influenced in his critique of FIRA by the fact that he was financial advisor to White Consolidated Industries whose takeover application of Westinghouse Canada had been a major investment proposal rejected by the Agency. Despite his personal experience with the review process Pitfield's observation likely reflected the fears of other businessmen who held a vested interest in foreign capital flows. Although the business community's initial reaction to the screening mechanism was, in some cases, extremely negative, as in the case of an American businessman who labelled FIRA "a bureaucratic iron curtain," such harsh criticism disappeared within time by virtue of the relatively few cases the Agency actually screened out.

Foreign investors abroad also expressed their reservations about the country's investment restrictions. Canadian trade officials in Europe confirmed that potential investment flows could be deterred by what the European investors in France and Britain viewed as confusing and overly restrictive Canadian foreign investment laws. Furthermore, the lack of clarity in the "significant benefit" guidelines posed some concerns about the direction in which Canada was heading in its investment policies.[67]

The prime European concern was the speed with which the review process was applied. During an official visit to West Germany in 1975, Prime Minister Trudeau was informed by business and government officials that German investment policy favoured freely moving investment and expanding free trade on a global scale and that industry hesitated to invest in any country that imposed foreign investment restrictions. It had also been suggested that the restriction of the flow of German capital into Canada affected by the Foreign Investment Review Act could in turn affect Canada's attempt at that time to negotiate a form of economic relationship with the

European Economic Community.[68] Mr. Hans-Gunther Sohl, President of the Federation of German Industries, also expressed concern about the amount of discretion the Canadian government had in deciding whether foreign investment would be accepted or refused.[69]

When a Japanese economic mission visited Ontario late in 1976, Japanese officials were frank about their concerns with the current trade and economic activity in Canada. In considering the stumbling blocks to investment in Canada the foreign officials pointed out the limited size of the Canadian market, and the effects on operations' profitability of taxation, labour relations and the environmental legislation.[70] Although no specific mention about FIRA policies was made during the visit, the Japanese qualified their concerns about Canada's economic policies with their perception of a lack of co-ordination between federal and provincial policies. In view of Ontario's eagerness to attract Japanese investment dollars at the time, the foreign officials may have been speculating about the apparent restrictiveness of federal legislation with FIRA having proclaimed the new business regulations in the government's final implementation phase in the same year.

This sample of foreign reaction to the review initiative, albeit small, provides some indication of the overall concerns expressed by current and potential investors in Canada's economy. What is perhaps more significant however, is that these and similar complaints were more prevalent in the early years of Agency operations than in the recent past if public reports serve as a measure of this sentiment. The most recent data available in terms of investment initiatives is likely to be a more accurate reflection of investor confidence in Canada and this will be examined later.

Another relevant factor in an assessment of business reaction to the screening process is the determination of the extent to which external influences, such as business reaction, have affected the administration in the disposition of cases. The general malaise associated with bureaucratic process in the marketplace has some bearing on FIRA's psychological effect in the business community. In commenting on the public versus private orientation in conducting business one senior executive of a foreign-controlled Canadian company has noted that government intervention, frequently changing regulations and the increasing cost of responding to government demands in terms of time and money spent are significant concerns of business in general.[71] Mr. Guy French, President of American Can of Canada Ltd. made this observation in relation to the negative reaction FIRA has received in investment communities as well as the industrial strategy vacuum within which FIRA attempts to operate.

Government spokesmen and foreign investors alike have emphasized the need for clear-cut policies in the application of significant benefit criteria. Gorse Howarth, Commissioner of the Agency, believes that a more effective job in bargaining with foreign investors could become possible if a definite strategy was articulated. He has noted that "applicants are more inclined to agree to undertakings which have their basis in enunciated industrial policies."[72] In the life of the Agency policy goals of respective government administrations have only served to provide a vague idea of an industrial strategy focus. It has been difficult for foreign investors to react to economic policies that appear market oriented in one sense, as in the service sector, and interventionist in another such as the resource industry. Federal government attempts in developing some framework for an industrial strategy, which would provide the Agency with more politi-

cal clout in its dealings, have been scattered. An editorial comment on the screening process in this regard supports this claim.

> "It has been an ad hoc thing, with rules made up for each occasion and no certainty about how they would be applied to similar cases in the future.... Canadians thought they could twist the arms of foreign investors to make them cough up extra benefits for Canada. But foreign investment does not work that way. If we are going to have guidelines, they should be set out clearly so people will know where they stand when they come to Canada with money to invest."[73]

The latter part of this statement is reminiscent of the concerns expressed early in the debate over the foreign investment review bill in the Standing Committee of the House. Guidelines as well as certain key terms of the Act were never explicit enough to satisfy opposition members.

While the Agency's work is tempered by the success of other government policies in sectors such as banking, publishing, and in resources such as uranium and oil and gas, there are no real objective standards for determining when an investment is likely to be of significant benefit. In more recent years however, political guidelines have been proposed, such as the initiatives undertaken by Herb Gray, who has attempted to design a strategy that would strengthen Canadian participation in the economy and improve the performance of foreign controlled firms. A range of options have been proferred including tax measures to encourage Canadian ownership, guidelines to encourage foreign companies to Canadianize and special funding to assist Canadian companies to acquire foreign controlled ones.[74] These Canadianization goals have become particularly fervent in the resource sector which would require that foreign companies maximize their use of Canadian supplies, services, research and development. The significant implications for FIRA with respect to these stated goals is that the Agency's jurisdiction, which has only been over new unrelated investment, would be

broadened. Whether this increased government intervention would be justified will depend ultimately on the industrial strategy that the federal government establishes.

In spite of the loose industrial strategy framework within which the Agency has had to operate FIRA officials have been sensitive to some of the concerns expressed by foreign investors about the screening process. In each of their respective administrations, both Ministers and Commissioners have attempted to cope with investor uncertainty with the screening mechanism. Investors have been generally alienated by the length of time that the administrative process takes, the inordinate amount of paperwork involved in submitting an application and the lack of clarity in certain guidelines concerning proposals in specific areas such as real estate. The Agency has responded to these concerns in its frequent attempts at streamlining the process by shortening the review time and reducing the amount of form filling by applicants. Jean Chretien was instrumental, for example, in introducing an abbreviated form of notice for smaller investors and promoting a shorter time frame in the actual assessment phase of an application. Thus, by the time that Jack Horner stepped in as Minister in 1979 following Chretien's administration about seventy-five per cent of all cases were decided within fifteen days from the date an application was filed.[75] Other large complex cases still take the usual sixty day period if not longer.

Robert de Cotret who was the Minister responsible for FIRA in Joe Clark's Progressive Conservative government also aimed to find ways of speeding proposals through the network. An internal government committee had considered the possibilities for exempting all small business applications from the review process as well as eliminating the requirement of Cabinet approval for all except the largest and most controversial cases.

Included in this push for greater government efficiency was a clearer and more narrow definition of "significant benefit."[76] The continuing efforts on the part of the Agency in proposing and implementing revised administrative procedures has indicated to some degree the level of influence that investor concerns have had on the review mechanism.

Not all businessmen, however, view the experience of dealing with the Agency in a negative light. In an informal survey conducted by the Globe and Mail in 1977, a generally positive view of FIRE emerged from the interviews. Although some admitted that the cost and time of providing the necessary information was one stumbling block to greater efficiency others felt that the screening process worked well for Canadian firms that sought a partnership arrangement with large foreign firms.[77] In yet other instances businessmen have supported the mandate of the Agency believing that Canada should have some means by which to evaluate potential benefits coming into the country by way of specific investment proposals.[78] In the process of conducting such an evaluation the Agency has also been seen to operate in a fair and reasonable manner.

An important environmental aspect that must be considered in any assessment of bureaucratic controls on foreign investment flows is the global economic climate and some of the factors that affect it. Government decision-making has been cognizant of these changes if only by virtue of the fact that FIRA has not bargained as hard as it once did to ensure that reviewable foreign investments are of significant benefit to Canada. Yet the record of allowances versus disallowances, which has stood at an average of eighty to ninety per cent in any one year, has led to criticism that the Agency is a rubber stamp type of operation and has not been administered in the spirit originally intended. On the other hand, media critics have also

claimed, particularly in recent years, that economic conditions generally coupled with the manner in which government has perceived those conditions havehelped to create a situation of incompatible doctrines; namely, making foreign investment selective at a time when it cannot afford to be. The case for FIRA however, may not be one of politics or bureaucratic control but rather the more recent poor investment climate which has been somewhat of a deterrent to foreign businessmen.

At the risk of oversimplifying the economic situation let it suffice here to note that a worldwide recession during 1974-1975 created more selective investment decisions, particularly in the United States. A United States Commerce survey taken in December of 1977 noted that investment by multinational firms had been limited to a six per cent growth in 1975 and only three per cent in 1976 compared to previous levels of twenty-two and twenty-three per cent in 1973 and 1974, respectively.[79] Although slightly higher levels of investment projected at ten per cent were estimated for the 1977 and 1978 period, fluctuation in foreign currency values and the imposition of controls and incomes policies abroad created further uncertainties in investment abroad. The implication for Canada was that planned United States investments in Canada were expected to rise by only one per cent for 1978 and multinationals cut $830 million off the budgets of Canadian subsidiaries in the period from June 1977 to April 1978.[80] Furthermore, American capital was being earmarked for resource development in Britain and Third World countries and being less directed into the manufacturing sector. This economic environment coupled with the federal government's screening policy was apparently not conducive to making Canada particularly selective about incoming foreign capital. Furthermore, Canada was also experiencing the advent of Quebec's political aspirations and the

prospect of domestic firms diversifying their investment to the United States.

In spite of these economic forbodings for the investment climate generally, 1978 and 1979 witnessed another investment phenomenon in the form of increased corporate mergers. A spate of activity included the take-over of Simpson's Ltd. by the Hudson's Bay Company; of Zeller's, also by Hudson's Bay; of Husky Oil Ltd. by Alberta Gas Trunk Line Ltd. and Laurentide Financial Corporation by Provincial Bank among others. Although the economic climate precluded large scale expansion within companies generally, the weak Canadian dollar made it more attractive to buy companies in related fields.[81] This, in addition to the rise in corporate merger activity in the United States which had some influence on the Canadian experience, resulted in a large number of takeover and investment applications accepted by FIRA.[82] The Agency also claimed that businessmen had become more familiar in dealing with the screening mechanism and displayed less hesitancy in submitting applications. Other factors that may have had some effect on this increased momentum of activity relate to the political environment within Canada at that time. The Liberal government was looking to develop a broad industrial strategy that pointed to the need for improved competitiveness abroad. Also, the Bryce Royal Commission on Corporate Concentration which had been appointed by the federal government in 1977 had not directed any strong views against the implications of corporate concentration. Within this broad scheme of events it is also quite likely that Agency officials were more apt to soften their negotiating tactics in deriving significant benefits from investment proposals.

The Agency's role can be looked upon as either "humble servant to much needed foreign investment or Big Brother protecting fragile industries."[83]

Although officials claim that the application of significant benefit criteria is equal in every case, that is, all cases are treated alike, the level of discretion used in making an assessment, together with factors such as changing government policy and economic climates, make it difficult to predict outcomes. Liberal election promises in early 1980 such as publicizing foreign takeover bids and offering financial assistance to help keep companies in Canadian hands may, if implemented, strengthen the Agency's mandate. Corporate repatriation may also however be helped along by certain economic conditions which are out of the scope of government influence. There has been some speculation that Canadians have been able to buy out foreign subsidiaries in Canada because foreign corporations no longer view the subsidiary as fitting into the corporate scheme of things.[84] This development could also be enchanced by attitudes of business that reject Canadian objectives in this regard. Imasco chairman Mr. Paul Paré has noted, for example,

> "No serious foreign investor will accept the prospect of all the cost ... and an agency review with the foreknowledge that the agency will act as a brokerage house for Canadian companies that can count on financial backing from the government."[85]

Another interesting scenario on the global front that could affect the scope of Agency dealings is that industrial innovation is shifting from the United States to Europe and Japan. It is likely that in view of American opinion which supports an American-first approach in competition, the United States will move to protect its technological lead and consequently, in the words of Ontario's Industry and Tourism Minister, Larry Grossman, "the ease with which Canada has access to American developments may be diminished."[86]

Given all these considerations it is still interesting to note that

the level of activity with which the Agency deals is substantially high. From its inception in 1974 up to the fiscal year 1979-80, FIRA has allowed 2,300 proposals and only turned down 194. Another 213 applications were withdrawn. In terms of specific investment activity by various countries the Agency does not appear, in itself, to be a deterrent to incoming flows of investment. The following observations will serve to substantiate this trend.

Americans have been responsible for sixty-one per cent of all reviewable applications up to the end of December, 1979. Although the growth of American investment has been relatively high in Canada in the past Agency economists qualify the future rate of growth with the outlook that changes in the world investment picture such as tariff reductions do not provide a great advantage for branch plant operations. Furthermore, the rate has also declined in the recent past with developments such as repatriation of American-controlled investments in sectors such as manufacturing, mining and oil and gas.[87] A significant development for the American situation is the more rapid growth in investment from other countries.

European corporations have not only gained significant ground on their American counterparts but they have also taken the lead in some sectors such as the chemical industry. Companies controlled in Europe have accounted for just under thirty per cent of the takeover proposals and over thirty-five per cent of new business establishment proposals. Manufacturing, construction and the building materials sectors have been expanding most rapidly.[88] An interesting feature of recent European investment in Canada has been a growing frequency of joint venture undertakings with Canadian companies. This was confirmed in an Agency survey of main European invest-

ments in Canada in 1978.[89] With specific regard to the role of British investment interests it should be noted that investments made in the oil, forest products, textile, chemical and transportation equipment industries have, during the 1970's, allowed British firms in Canada to strengthen their position in the North American market through expansion and diversification.[90] This expansion however, has still attracted considerably less attention than United States investments.

West German investment in Canada, primarily in the resource and manufacturing sectors has in the period between 1952 and 1979 amounted to well over four billion dollars in foreign capital. The proximity to the large United States market and an abundance of relatively inexpensive energy have served as the primary attractions. Since the Act came into effect, ninety per cent of all West German proposals have been allowed, of the 168 proposals resolved between April 1974 and June 20, 1980, only four have been disallowed. The total value of investments in this period was approximately $875 million making West Germany the third largest investor after the United States and Britain.[91]

The Japanese investment experience in Canada has not accounted for a very significant proportion of the total coming into this country and this has been attributed to several years of slower growth rate of Japanese investment in the resource sector. Of the twenty-three Japanese investment proposals allowed between 1974 and 1978, nineteen were attributed to service industries.[92] The increased contact between Japan and Canada through trade and investment missions may indicate a growing interest in Canada's investment potential. However, some Japanese businessmen still view the Act as a policy designed to block United States investment and consequently to reduce Canada's dependence on United States capital. At the third joint

Japan-Canada Businessmen's Conference in Japan in 1980, the head of the Japanese delegation complained that Japanese investments were "subject to strictly uniform screening on the same basis as United States investments" in spite of the relatively small influence of Japanese business on Canada's economy.[93] These sentiments may indicate that Canadian regulations to foreign investment still pose a psychological stumbling block to Japanese interests and that it may take some time before Canada will be seen as a more likely alternative for Japanese investors.

While admitting that certain statistics serve as a basis for subjective interpretation the level of foreign investment coming into Canada as determined by the above figures reflects, at the very least, that the Agency does not exist to block investment. Respective of the initial concerns of foreign businessmen concerning FIRA's mandate, it is most likely that the level of proposals actually approved, together with the flexibility of the Agency to meet certain demands placed on its administrative operations, has served to allay most fears of foreign companies with the exception, perhaps, of Japan.

FOOTNOTES

[1]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, (Osgoode Hall: Toronto), p. 41.

[2]"Foreign Control Board Overruled by Cabinet; takeover is approved", The Globe and Mail, January 3, 1975.

[3]Lawrence A. Wright, "Foreign Investment Review Act", The Business Quarterly, Autumn, vol. 41, no. 3, 1976, p. 19.

[4]Due to public interest in the reasons for Cabinet decisions concerning takeovers, the Agency commenced the disclosure of general information in March, 1975. The information indicates, on an aggragate scale, the significant benefits approved.

[5]Graeme C. Hughes, A Commentary on the Foreign Investment Review Act, (Toronto: The Carswell Company Ltd.), 1975, p. 71.

[6]Canada, Foreign Investment Review Agency, Foreign Investment Review, Autumn, vol. 1, no. 1, 1977, p. 11.

[7]P. Hayden, J. Burns, and I. Schwartz, Foreign Investment in Canada: A Guide to the Law, (Scarborough, Ontario: Prentice Hall of Canada), vol. II, 1974, paragraph 130,003.

[8]Foreign Investment Review, vol. 1, no. 1, p. 11.

[9]Hayden, Burns and Schwartz, paragraph 2,003-4.

[10]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, p. 42.

[11]"Compliance necessary but not necessarily now", The Financial Post, February 14, 1976, p. 2.

[12]For a more complete overview of this case please refer to Hayden, Burns and Schwartz, paragraph 2007.

[13]Ibid.

[14]Hayden, Burns and Schwartz, paragraph 36-3. See also, Ian Urquhart, "Sellout Inc.", Macleans, July 11, 1977, pp. 19, 20.

[15]Hayden, Burns and Schwartz, paragraph 36-3.

[16]Ian Urquhart, "Sellout Inc.", p. 18.

[17]Hayden, Burns and Schwartz, paragraph 35-3.

[18]Ibid., paragraph 42-7.

[19]See Sections 22, 24(2), 26, 27 of the Act.

[20]Ian Urquhart, "Sellout Inc.", p. 19.

[21]Ibid.

[22]Personal interview with Frank Swedlowe, Foreign Investment Review Agency economist in Ottawa, Ontario, February 9, 1979.

[23]Hayden, Burns and Schwartz, paragraph 1021.

[24]Ian Urquhart, p. 20.

[25]"Compliance is necessary, but not necessarily now", The Financial Post, February 14, 1976, p. 1.

[26]During a debate in the House in 1979 Liberal Member of Parliament Hal Herbert (Vandreuil) quoted an article in the Montreal Gazette to the effect that the Agency had estimated twenty per cent of cases had failed to meet the original undertakings. Refer to Canada, House of Commons, Debates, November 22, 1979, p. 1606.

[27]At least two sources confirmed that a certain amount of pressure was directed at the Trade Minister to let this proposal stand. See Ian Urquhart, "Sellout Inc.", p. 19, and Philip Teasdale, "New Foreign Control Wave Washes over FIRA's Dike", The Financial Post, February 25, 1978, p. 4.

[28]Philip Teasdale, "New Foreign Control Wave Washes Over FIRA's Dike", p. 4.

[29]Ian Urquhart, "Sellout Inc.", p. 20.

[30]"Government appears to be split on review of CAMCO by FIRA", The Globe and Mail, January 18, 1977.

[31]Hayden, Burns and Schwartz, paragraph 30-12.

[32]Ibid.

[33]Ibid., paragraph 32-2.

[34]"The Merger Pays Off", Financial Times of Canada, September 18, 1978, p. 18.

[35]This statement was quoted by The Financial Post of an official with Canadian Gypsum Co. of Toronto which did not receive approval for its bid for the adhesives division of Mexcell of Canada Ltd. See "FIRA's hottest moment over takeovers yet to come", The Financial Post, May 24, 1975, p. 4.

[36]"FIRA's hottest moment in takeovers yet to come", The Financial Post, p. 4.

[37]Bestpipe received subsequent approval as documented in the Agency's Annual Report 1975/76.

[38]Philip Teasdale, "New Foreign Control Wave Washes over FIRA's Dike," p. 4.

[39]Ibid., p. 8.

[40]Interview with Frank Swedlowe, Agency economist, February 9, 1979.

[41]Ian Urquhart, "The Welcome Wagon", Macleans, November 1, 1976, p. 40o.

[42]The Foreign Investment Review Act, Edited Proceedings of the programme held in May, 1975, p. 41.

[43]"FIRA's hottest moment on takeovers yet to come", p. 4.

[44]After his stay in office as Commissioner Murray was named President and a director of the new Federal Business Development Bank. Mr. Barrow resigned only four months after Murray had departed.

[45]Hayden, Burns and Schwartz, paragraph 10-1.

[46]Foreign Investment Review, vol. 1, no. 1, 1977, p. 11.

[47]Ibid.

[48]Some of the sources that discuss this potential area of conflict include: John Fayerweather, Foreign Investment in Canada: Prospects for National Policy, (New York: International Arts and Science Press, Inc.), 1973, p. 38; Garth Stevenson, "Continental Integration and Canadian Unity", in Continental Community? Independence and Integration in North America, Edited by A. Axline, J. Hyndman, P. Lyon and M. Molot, (Toronto: McClelland and Stewart Ltd.), 1974, pp. 202-203.

[49]Garth Stevenson, "Foreign Direct Investment and the Provinces: A Study of Elite Attitudes", Canadian Journal of Political Science, vol. 7, no. 4, December, 1974, pp. 630-647.

[50]"Let Canadians run foreign-owned firms", The Toronto Star, March 28, 1972, p. 1.

[51]"Davis says Canadians must work for economic independence", The Toronto Star, January 22, 1972, pp. 1-2.

[52]"Quebec prefers 'open-door' for investors, says Minister", The Toronto Star, March 28, 1972, p. 28; also see, "Robarts assets Quebec troubles emphasize need for U.S. Capital", The Globe and Mail, November 20, 1970, p. B2.

[53]Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, 1st Session, 29th Parliament, 1973, Appendices 2F, H, S, T.

[54]Marnie Mitchell, Foreign Investment Policy in the Context of Canadian Federalism, Paper presented to the Canadian Political Science Association Annual Meeting, London, Ontario, May, 1978, pp. 12-13. Also, Hayden, Burns and Schwarts, paragraphs 4-1, 4-4.

[55]Marnie Mitchell, op cit., p. 13.

[56]"Takeover law's next step already causing worries", The Financial Post, March 8, 1975, p. 11.

[57]Mitchell, op cit., In a paper on the federal-provincial aspects of the investment process Mitchell has provided an overview of the experience of individual provinces up to 1977.

[58]"88% of Applications for takeovers approved by FIRA", The Globe and Mail, October 4, 1977.

[59]Mitchell, pp. 16-17.

[60]Ibid., p. 15.

[61]Canada, House of Commons, Debates, November 5, 1973.

[62]Refer to Chapter II, supra, pp. 21-22.

[63]Similar arrangements exist in Western European countries although they are considered far more flexible and simplified. Also, Australia utilized a key sector screening approach until that government adopted a more consultative approach and established a Foreign Investment Review Board similar to FIRA. For more information regarding the Australian experience see Canada, Foreign Investment Review Agency, A Comparison of Foreign Investment Controls in Canada and Australia, no. 5, April, 1979.

[64]"Ottawa: Tougher Look at Costs", Financial Times of Canada, November 21-27, 1977, p. 23.

[65]"A case study in how Canada gets bad press on FIRA policy", The Financial Post, November 20, 1976, pp. 20-21.

[66]Ian Urquhart, "The Welcome Wagon", p. 40n.

[67]Hayden, Burns and Schwartz, paragraph 7-2.

[68]"Germans Cool to Canadian Investment Controls", The Globe and Mail, March 5, 1975, p. 3.

[69]Hayden, Burns and Schwartz, paragraph 5-3.

[70]"Japanese mission frank about investment barriers", The Globe and Mail, November 2, 1976.

[71]Guy P. French, "A Businessman's Comments on FIRA", Foreign Investment Review, Summer, vol. 1, no. 4, 1978, p. 21.

[72]"Secrecy Cloaks FIRA's easing of takeover rules", The Globe and Mail, October 4, 1977, p. 2.

[73]"FIRA: Time for Change", Financial Times of Canada, November 21-27, 1977,

[74]"Canadianization kick could backfire if 'rigs go south'", The Financial Post, August 23, 1980, p. 8.

[75]The Foreign Investment Review Act, Address by the Honourable Jack Horner to the Toronto Society of the Investment Dealers Association of Canada, February 7, 1979.

[76]"How Tories might lose FIRA's rules", The Financial Post, October 20, 1979, p. 1.

[77]"Doubts linger but investment watchdog wins praise", The Globe and Mail, October 3, 1977, p. 1, 10.

[78]Guy P. French, op cit., p. 21.

[79]"Foreign Investment: Canada's options cut as capital flow slows", Financial Times of Canada, April 3, 1978, p. 9.

[80]Ibid.

[81]"Foreign investors still flocking into Canada", Edmonton Journal, November 3, 1978.

[82]"Spate of takeovers in political vacuum", Financial Times of Canada, January 15, 1979, p. 9.

[83]"Inside Ottawa's Foreign Investment Review Agency", Quill and Quire, vol. 46, no. 11, November, 1980, p. 32.

[84]"Canadians waking up to reality over foreign control", The Financial Post, March 8, 1980; "Local entrepreneurs 'repatriating' the branch-plant city", The Financial Post, August 18, 1979.

[85]"The fuss abroad dealing with FIRA", Edmonton Journal, September 16, 1980.

[86]"Industrial gaps left as U.S. withdraws", The Financial Post, April 25, 1981.

[87]"U.S. Investment in Canada", Foreign Investment Review, Spring, vol. 3, no. 2, 1980, p. 14.

[88]The most current figures for all foreign investment coming into Canada may be obtained from the statistical tables found in Foreign Investment Review, Autumn, vol. 4, no. 1, 1980, pp. 26-27.

[89]West European Investment in Canada", Foreign Investment Review, Spring, vol. 2, no. 2, 1979, pp. 11-13.

[90]Ibid., p. 9.

[91]"German Investment in Canada", Foreign Investment Review, Autumn, vol. 4, no. 1, 1980, pp. 7-8.

[92]"Japanese Investment in Canada", Foreign Investment Review, Autumn, vol. 3, no. 1, 1979, p. 7.

[93]Foreign Investment Review, Autumn, vol. 4, no. 1, 1980; p. 2.

Conclusion

In attempting to determine whether the Agency has been successful in meeting the objectives set out in the Foreign Investment Review Act it has been necessary to initially consider the political and economic determinants of a screening system which restricts the entry of foreign direct investment. The political and economic climate which occasioned the need for such a system has been examined on the basis of historical events that led up to the enactment of the legislation. This has involved consideration of parliamentary reports which were commissioned to look into the issue of foreign ownership, the actual introduction of the legislation and the economic environment which was conducive to introducing greater regulation of foreign investment inflows. Without going into greater detail about the rationale employed by the federal government in arriving at a set of goals in this regard it might suffice to say that the legislation was created as a political response to a growing nationalist sentiment that saw a need to reduce Canada's vulnerability to foreign direct investment, particularly American foreign investment. A qualification of the objectives adopted for the application of a screening process should be able to put this legislative response in a more clear perspective.

The prevailing attitude towards foreign ownership in the time leading up to the implementation of the Act called for the reduction of the level of foreign investment already in the country. Within this broad context of the problems associated with high level foreign investment the Government chose to assume a more limited response by establishing a screening mechanism which would focus solely upon future investment flows. The legislation was not meant to block the entry of foreign investment outright

but rather, to obtain this investment on better terms; namely, to negotiate for economic benefits deemed beneficial to both Canada and the foreign investor. This was to be achieved by screening foreign takeovers as well as the establishment of new and unrelated foreign businesses. The strategy then was to further the development of a stronger Canadian identity as part of a national economic policy and concurrently, to ensure that foreign capital flows would still be forthcoming. In its attempts to obtain the best of both worlds the legislation has only marginally satisfied economic nationalist desires to recover control of the foreign-owned sector of the economy. The limitations of the Act in this regard would perhaps suggest that the legislation was created as an expedient tactic in the face of growing nationalist sentiment rather than from a genuine desire to achieve nationalist goals.

Although the Act had been the strongest measure undertaken by the government to deal with foreign investment, critics have pointed out that a screening mechanism is an inadequate substitute for a comprehensive strategy which will deal with the basic problems of foreign ownership. Investment for the expansion, replacement or modernization of existing foreign controlled Canadian businesses accounts for the greater part of new foreign direct investment. The two areas with which the Act is chiefly concerned, takeovers and the establishment of new businesses, account for relatively little of the total flow of investment activity in Canada. The Gray Report had recognized this limitation however, and admitted that a screening mechanism would not significantly increase Canadian ownership. Such a goal would have had to be accomplished through the adoption of other policies. Moreover, given the generally negative reaction to the screening agency, particularly at the outset, it would probably have been unwise for

the Government to proceed with a more restrictive measure. In applying more flexible conditions to inflows of foreign investment a screening mechanism could take into account not only the economic aspirations of various provincial governments but also be seen attempting to defuse the nationalist issue if only to a limited degree.

On the opposite side of the coin, FIRA has also been charged with having a deterrent effect on the inflow of foreign investment. This argument is based on the assumption that investment dollars are necessary to the Canadian economy regardless of their purpose or effects on the economy. Given the small amount of investment inflows that are actually used to finance annual capital formation in the country together with the high percentage of applications that are allowed in the screening process, any deterrent effect that the Agency may have would probably be small. It would be difficult to prove otherwise since there is no accurate method of measuring what the level of foreign investment would be in the absence of FIRA.

An evaluation of the Agency's success must also take into consideration the nature of the regulatory mechanism itself. Looking at the realities of the process the results suggest that the Agency's modus operandi is to pursue a case by case approach and is tempered by the flexibility of discretionary bargaining. No hard and fast rules are applied. Agency officials deal with investment applications on the basis of administrative fiat in conjunction with the "significant benefit" criteria. Thus, it is limited in its application to foreign direct investment in general but viewed on that basis the Agency can be credited with tangible though limited achievements. While the screening process has not changed the predominantly foreign ownership of sectors in the Canadian economy, it has extracted a

"better price" for Canada in negotiating for improved quality of investment inflows. One might assume then, that the Agency has improved on the benefits of foreign investment some of which would not have been forthcoming if a screening procedure had not existed. In the absence of a "no-agency" situation it would be difficult to determine otherwise..

It must also be kept in mind that the effectiveness of the Agency is closely related to overall government policy toward foreign investors. The decision-making structure of FIRA is not highly integrated with other governmental institutions and policies but the government has made no move to change this. Ineffective attempts to introduce a clear-cut industrial strategy for the Canadian economy has created the impression for foreign investors that the Agency functions within a political vacuum with little space for developing a set of meaningful guidelines for potential investors. In this regard a few comments should be made in relation to current government proposals aimed at increasing Canadian ownership and control within the oil and gas sector. The Government's national energy program, which seeks to reduce the foreign control of the petroleum industry from seventy to fifty per cent by the end of the decade, has been implemented in conjunction with FIRA's attempts of preventing further erosion of Canadian ownership in the resource sector. In bolstering its efforts to reverse heavy foreign domination in this sector the government, through FIRA, hopes to encourage the transfer of petroleum industry assets into Canadian hands. The adoption of a perceived tougher stance by government has resulted in a letter of complaint from United States government officials claiming that the Agency is being used unfairly to block imports of American goods and services as well as investment.[1] Charges of economic discrimination by American investors have caused Canadian government officials to take a

step back and reassess whether FIRA ought to be strengthened in its endeavour to regain control of this key sector. The sensitivity, as far as the United States is concerned, associated with investments in the oil and gas industry may indicate that the Government cannot afford to take as strict a stand as it might in other sectors such as manufacturing. It would also seem unlikely that in its efforts to develop a viable petroleum sector the Government would want to risk the loss of potential sources of capital which would bring their objective close to reality. Perhaps this type of situation also indicates that further regulation of foreign investment may be inhibited by this country's continuing need for foreign capital flows. This could become particularly evident in the rapid development of the resource sector which will also call for the financing of large natural resource or "mega" projects. Needless to say provincial government ambitions in this regard may also cause the federal government to reassess its priorities in the light of a coherent industrial strategy.

Has the legislation as implemented by the Agency achieved a high degree of efficiency in the economy while attempting both to serve Canadian interests and maintain foreign investment inflows? Due to the lack of a comprehensive industrial strategy it has been difficult to determine whether the Agency has been able to achieve any degree of effectiveness respecting stated goals. In various isolated sectors however, it has been able to negotiate for better benefits in transactions affecting those sectors. In its limited capacity it has probably achieved a "better deal" for Canada in terms of inflows of foreign investment alone. The broad scope given to the "significant benefit" criteria would seem to indicate that any foreign investment would be likely to provide some benefits, the difference, as a result of the Agency being in degree rather than kind. The lack of

information as to whether arrangements are actually complied with does not allow a more in-depth analysis of the validity of imposed conditions.

From the point of view of provincial participation in Agency decision-making it would appear that there has been little difficulty in meeting objectives at the regional level. Isolated cases in federal-provincial consultation concerning reviewable transactions have proven that the Agency has not, as yet, been a source of federal-provincial conflict. The interests of other federal government departments and agencies concerned with foreign investment seem to have been met if only as a result of mutual agreement about the need for capital in the long-term development of markets and technology. The lack of integration between various levels of decision-making within this bureaucratic organization may point to a need for closer consultation in the fu[redacted]

Despite the initial negative reactions of various foreign governments and investors to the legislation, subsequent inflows of investment activity would indicate that the flexibility of Agency review and a high allowance ratio have allayed earlier criticisms of the restrictive nature of the Act. It should be mentioned however, that not all foreign companies are able fully to understand Canada's objectives for an industrial strategy nor are they totally confident that they can meet Canada's expectations. Part of this difficulty stems from the fact that FIRA, influenced by other Government policies, has had to accommodate various political and economic changes both on the domestic and international level. As a result, it has been seen to adopt a policy that is more restrictive in some sectors than in others.

In conclusion the Agency's success ultimately will depend on the flexibility of its screening mechanism with possible modifications and the co-ordination of this system with a better defined industrial strategy. If

it maintains a sensitivity to the structural changes occurring in the world economy as well as a respect for the current domestic environment it may continue to exist as a unique and largely autonomous decision-making body. The economic and political objectives of this country in relation to global investment flows will determine the future status of this organizaton.

FOOTNOTE

[1]See Canada, Foreign Investment Review Agency, News Release, Ottawa, August 4, 1981. Also, "Alarm Sounded in U.S. Against Canadianization", Edmonton Journal, July 1, 1981, p. E11.

TABLE I

All Applications/Outcome or Status

ACQUISITIONS	74/75	75/76	76/77	77/78	78/79
Applications received of which:	230	189	189	342	416
Withdrawn prior to certification:	7	10	12	16	24
Returned as non-reviewable:	56	27	7	3	6
Pending small business cases on which more information requested:				8	18
Pending certification:	17	25	9	25	29
Uncertified applications carried forward from previous year:		17	25	9	33
Applications certified as reviewable:	150	144	186	299	373
Unresolved applications carried forward:		58	49	44	78
Applications resolved in fiscal year of which:	92	153	191	265	337
Allowed:	63	110	153	241	296
Disallowed:	12	22	19	11	26
Withdrawn after certification but before brought for final decision:	17	21	19	13	15
Applications under Assessment at year-end:	58	49	44	78	114

Source: Foreign Investment Review Agency, Annual Reports, 1974-1978/79.

TABLE II

All Applications/Outcome or Status

NEW BUSINESSES	74/75	75/76	76/77	77/78	78/79
Applications received of which:		66	265	424	402
Withdrawn prior to certification:		3	19	26	53
Returned as non-reviewable:		4	14	3	3
Pending small business cases on which more information requested:			2	37	44
Pending certification:		33	25	52	57
Uncertified applications carried forward from previous year:			33	27	89
Applications certified as reviewable:		26	238	333	340
Unresolved applications carried forward:			20	51	47
Applications resolved in fiscal year of which:		6	207	337	322
Allowed:		4	166	300	280
Disallowed:			14	14	18
Withdrawn after certification but before brought for final decision:		2	27	23	24
Applications under assessment at year-end:		20	51	47	65

Source: Foreign Investment Review Agency, Annual Reports, 1975-1978/79.

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G. APPENDIX

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APPENDIX I

NEW PRINCIPLES OF

INTERNATIONAL BUSINESS CONDUCT

(July, 1975)

Foreign-controlled businesses in Canada are expected to operate in ways that will bring significant benefit to Canada. To this end they should pursue policies that will foster their independence in decision-making, their innovative and other entrepreneurial capabilities, their efficiency, and their identification with Canada and the aspirations of the Canadian people.

Within these general objectives, the following principles of good corporate behavior are recommended by the Canadian government. Foreign-controlled firms in Canada should:

1. Pursue a high degree of autonomy in the exercise of decision-making and risk-taking functions, including innovative activity and the marketing of any resulting new products.

2. Develop as an integral part of the Canadian operation autonomous capability for technological innovation, including research, development, engineering, industrial design and preproduction activities; and for production, marketing, purchasing and accounting.

3. Retain in Canada a sufficient share of earnings to give strong financial support to the growth and entrepreneurial potential of the Canadian operation, having in mind a fair return to shareholders on capital invested.

4. Strive for a full international mandate for innovation and market development, when it will enable the Canadian company to improve its efficiency by specialization of productive operations.

5. Aggressively pursue and develop market opportunities throughout international markets as well as in Canada.

6. Extend the processing in Canada of natural resource products to the maximum extent feasible on an economic basis.

7. Search out and develop economic sources of supply in Canada for domestically produced goods and for professional and other services.

8. Foster a Canadian outlook within management, as well as enlarged career opportunities within Canada, by promoting Canadians to senior and middle management positions, by assisting this process with an effective management training program, and by including a majority of Canadians on boards of directors of all Canadian companies, in accordance with the spirit of federal legislative initiatives.

9. Create a financial structure that provides opportunity for substantial equity participation in the Canadian enterprise by the Canadian public.

10. Pursue a pricing policy designed to assure a fair and reasonable return to the company and to Canada for all goods and services sold abroad, including sales to parent companies and other affiliates. In respect of purchases from parent companies and affiliates abroad, pursue a pricing policy designed to assure that the terms are at least as favourable as those offered by other suppliers.

11. Regularly publish information on the operations and financial position of the firm.

12. Give appropriate support to recognized national objectives and established government programs, while resisting any direct or indirect pressure from foreign governments or associated companies to act in a contrary manner.

13. Participate in Canadian social and cultural life and support those institutions that are concerned with the intellectual, social, and cultural advancement of the Canadian community.

14. Endeavour to ensure that access to foreign resources, including technology and know-how, is not associated with terms and conditions that restrain the firm from observing these principles.