Industry Canada Industrie Canada

Investment Canada Act

Annual Report 2009–2010

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Investment Canada Act

Annual Report
2009–2010

Message from the Director of Investments to the Minister of Industry

Dear Minister:

I am pleased to present the *Investment Canada Act* Annual Report for the 2009–10 fiscal year. This is the first annual report prepared on the administration of the Act since 1992–93. As responsibility for the review of foreign investment proposals in cultural businesses was transferred to the Minister of Canadian Heritage in 1999, this report relates only to investments in non-cultural Canadian businesses.

The 2009–10 fiscal year has been particularly noteworthy in the evolution of the Act, as we implemented some of the most significant amendments to the Act since its adoption in 1985. These amendments, which received Royal Assent on March 12, 2009, lower obstacles to foreign investment by focusing net benefit reviews on those transactions that have the greatest impact on the Canadian economy, improve transparency in the administration of the Act and authorize the government to review investments on national security grounds. In fact, this report is being published in response to an amendment introduced to increase transparency in the administration of the Act. These amendments were made following the 2008 report of the Competition Policy Review Panel.

As part of its efforts to implement these amendments to the Act, Industry Canada developed the new *National Security Review of Investments Regulations* in consultation with Public Safety Canada. These regulations took effect on September 17, 2009. Industry Canada also performed extensive work on other regulations needed to fully implement the changes to the Act and pre-published the proposed amendments to the *Regulations Respecting Investment in Canada* in the *Canada Gazette* in July 2009.

The 2009–10 year was notable for a fragile global economic recovery. Over the past several years, foreign investment in Canada has clearly been influenced by record high levels of world foreign direct investment, a commodity boom unparalleled in recent memory, the worst financial crisis since the Great Depression and a subsequent uneven global recovery. The administration of the Act over the 2009–10 fiscal year is therefore deserving of the attention this report affords.

I look forward to continuing to support you in administering the *Investment Canada Act*.

Yours sincerely,

Simon Kennedy
Director of Investments

Contents

Executive Summary

The *Investment Canada Act* (ICA or the Act) came into force in 1985, replacing the *Foreign Investment Review Act*. Its purpose is twofold: to provide for the review of significant foreign acquisitions of control of Canadian businesses for their likely net benefit to Canada and to provide for the review of foreign investments that could be injurious to national security.

This is the first annual report on the administration of the Act since 1992–93. It responds to a new legislative requirement adopted in March 2009 that requires the Director of Investments to provide a report to the Minister for each fiscal year on the administration of the Act. The Minister shall make this report available to the public. As responsibility for the review of acquisitions of cultural businesses was transferred to the Minister of Canadian Heritage in 1999, this report does not cover the cultural sector.

The report contains three core sections (sections 2 to 4):

Section 2 provides an overview of the Act and its administration. It is intended essentially as an introduction to the Act and touches on all its key aspects. These include how the Act applies to various transactions, the process followed by the Minister and departmental officials in the conduct of reviews, and the monitoring and enforcement of investments reviewed under the Act.

Section 3 discusses recent policy changes to the Act. Over the last few years, the Act went through its most important changes since 1985. These address contemporary challenges on the investment landscape, including the rise of sovereign investors, the need to safeguard national security and the growing global competition for foreign investment.

On December 7, 2007, the Minister of Industry issued guidelines for the review of investments by state-owned enterprises. These guidelines clarify the fact that governance and commercial orientation are taken into account by the Minister when reviewing investments by state-controlled entities. The guidelines do not set new policy but rather describe how the Minister carries out his or her work in reviewing such investments.

On February 6, 2009, a number of important amendments to the Act were introduced in Parliament, responding to the core recommendations and conclusions of the June 2008 report by the Competition Policy Review Panel, *Compete to Win*. This legislative package included the following:

- Amendments to enhance transparency in the administration of the Act: These provisions, which came into force on March 12, 2009, include the requirement to publish an annual report on the administration of the Act. The provisions now enable the Minister to give reasons for a decision to approve an investment under the Act and require the Minister to do so for a decision not to approve an investment.

- A new part to the Act, Part IV.1 Investments Injurious to National Security: This new part, which was deemed to have come into force retroactively on February 6, 2009, authorizes the federal government to review investments on national security grounds. Concomitant regulations, the *National Security Review of Investments Regulations*, came into force on September 17, 2009.

- Amendments to refocus net benefit reviews on the most significant transactions by making changes to the thresholds above which acquisitions are reviewable under the Act: The lower review thresholds of $5 million for direct acquisitions and $50 million for indirect acquisitions were eliminated for the transportation services, financial services and uranium production sectors. These sectors are now subject to the general review threshold. Since March 12, 2009, the lower thresholds apply only to cultural businesses. The general review threshold, which currently stands at $312 million (for calendar year 2011) for investors from World Trade Organization member countries, applies to all other sectors. The February 6, 2009, legislative package also included provisions to raise the general review threshold progressively to $1 billion over a four-year period and to change the basis for this threshold from the book value of the assets to the enterprise value of the Canadian business to be acquired. These provisions are to come into force on a date to be determined by the Governor in Council, shortly after regulations defining the concept of enterprise value are adopted.

Section 4 provides information on investment activity under the Act.

As indicated above, under the ICA, foreign acquisitions of control of Canadian businesses are reviewable if the value of their assets is equal to or exceeds specified thresholds. Where this is not the case, foreign investors must still notify the Minister of their acquisitions. Foreign investors must also notify the Minister when they are establishing a new Canadian business (a greenfield investment).

In the period from April 1, 2009, to March 31, 2010 (fiscal year 2009–10), the total number of filings received under the ICA (i.e., approved applications for review and certified notifications) was 437. The Minister approved 23 applications for review that had a total asset value of $30.8 billion. The average asset value for these applications was $1.34 billion, almost double the average for fiscal year 2008–09. The total number of notifications received during fiscal year 2009–10 stood at 414 (109 for the establishment of new Canadian businesses and 305 for the acquisition of control of existing Canadian businesses) with a total asset value of $30.1 billion. The average asset value for these notifications was $72.6 million, almost 150 percent greater than the average for fiscal year 2008–09.

In terms of enforcement, in July 2009, for the first time since the ICA came into force, the Attorney General of Canada, on behalf of the Minister of Industry, filed a Notice of Application with Canada's Federal Court seeking an order for the United States Steel Corporation (U.S. Steel) to take appropriate measures to remedy the default in the production- and employment-related undertakings that were provided when its investment was approved in 2007. This case is still ongoing.

1 Introduction

The *Investment Canada Act* (ICA or the Act) is Canada's primary mechanism for reviewing foreign investments. It applies to every sector of the economy in which a foreign investor can acquire control of a Canadian business. The purpose of the Act, as stated in section 2, is twofold:

> Recognizing that increased capital and technology benefits Canada and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

The ICA came into force on June 30, 1985, replacing the *Foreign Investment Review Act*. From 1985 to 1995, the ICA was administered by the Investment Canada Agency. The Agency, in its role as administrator of the Act, was also mandated to promote foreign investment in Canada. In 1995, the Agency was dissolved and its responsibilities were transferred to Industry Canada. Responsibility for promoting foreign investment has since been transferred to Foreign Affairs and International Trade Canada. In 1999, authority for the administration of the Act as it relates to the acquisition of control of cultural businesses was transferred to the Minister of Canadian Heritage. In February 2009, the Act was amended to provide for the review of investments that could be injurious to Canada's national security.[1]

This report has been prepared in compliance with section 38.1 of the ICA, which requires the Director of Investments to submit a report on the administration of the Act, other than Part IV.1 Investments Injurious to National Security, to the Minister for each fiscal year and which requires the Minister to make the report available to the public.[2] The report provides information on the administration of the ICA (except for cultural businesses) for the period from April 1, 2009, to March 31, 2010 (the 2009–10 fiscal year). It includes information on the level and nature of foreign investments that were subject to the Act during the 2009–10 fiscal year. The report is structured as follows:

- Section 2 provides information on key features of the Act and its administration. This includes information on how the Act applies to foreign investments, the net benefit factors, national security reviews, timelines for reviews, the confidentiality provisions of the Act, the consultation process for net benefit reviews, and the Investment Review Division that assists the Minister in administering the Act.

[1] The transfer of responsibility to the Minister of Canadian Heritage was originally effected by an Order in Council dated June 10, 1999. In 2009, that Order was replaced by a new Order transferring responsibility for review of investments in cultural businesses to the Minister of Canadian Heritage, except for responsibilities related to national security reviews.

[2] References in this report to "the Minister" are to the Minister of Industry; references to "the Director of Investments" are to the Director appointed under the Act to assist the Minister of Industry. Statistics in this report reflect the administration of the Act at Industry Canada and do not include information from Canadian Heritage.

- Section 3 addresses recent policy developments relating to the Act. This section includes recent initiatives to address the issue of state-controlled investment, the government's response to the Competition Policy Review Panel, subsequent amendments to the Act and new national security regulations.

- Section 4 provides statistical information on recent investment activity, with a particular focus on investment activity under the Act, i.e., investments to acquire control of Canadian businesses and to establish new businesses, including applications and notifications, for the 2009–10 fiscal year. Also covered are the enforcement proceedings involving the United States Steel Corporation (U.S. Steel).

- Section 5, the Appendix, provides notes on data interpretation for the statistics related to the administration of the Act.

2 Overview of the *Investment Canada Act* and Its Administration

Background

As noted in the preceding section, the *Investment Canada Act* (ICA or the Act) provides for the review of significant foreign investments for their likely net benefit to Canada. It also provides authority to the government to review investments that could be injurious to Canada's national security. The Act applies to a broad range of investments; however, only significant acquisitions of control of Canadian businesses by foreign investors are reviewed for their likely net benefit.

Under the Act, when a non-Canadian acquires control of a Canadian business, the non-Canadian must file either an application for review or a notification. An investor must file a notification where there is an establishment of a new Canadian business or where there is an acquisition of control of a Canadian business with assets valued below the established threshold.

For an investment that is not subject to a net benefit review under the Act and where an investor has filed a notification containing the information required by the *Regulations Respecting Investment in Canada*, the investor has met its obligations under the Act. No further action is required on the part of the investor.[3]

Acquisitions of control by foreign investors are subject to review where the value of the assets of the Canadian business is equal to or above the established threshold. By filing an application for review, an investor initiates the review process. The information that must be submitted where an application is filed is also established by the *Regulations Respecting Investment in Canada*. The relevant threshold for review for direct acquisitions by

[3] Information required under the Regulations includes the names of the investor and the Canadian business, their respective addresses, a description of the business and its level of assets. Notification forms are available on the Industry Canada website (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home).

investors from World Trade Organization (WTO) member countries for the 2009–10 fiscal year was $312 million from April 1 to December 31, 2009, and $299 million from January 1 to March 31, 2010.[4] This threshold also applies if the seller is from a WTO country other than Canada. The threshold is based on the book value of the assets of the Canadian business. Indirect acquisitions by investors from WTO member countries are not reviewable.[5] In all other cases, the review threshold is $5 million for direct acquisitions and $50 million for indirect acquisitions. This lower threshold also applies where the Canadian business is a cultural business listed in Schedule IV of the *Regulations Respecting Investment in Canada*.

Where a proposed investment is subject to a net benefit review under the Act, the investor cannot implement the transaction without the approval of the Minister responsible for the Act.

The Minister has the authority to issue guidelines and interpretation notes (under section 38) with respect to the application and administration of any provision of the Act or its regulations. Over the years, the Minister has issued the following guidelines:

- Dual Filing Requirements—Guidelines (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00053.html)
- Related-Business Guidelines (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#related)
- Guidelines—Investment by State-Owned Enterprises—Net Benefit Assessment (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned)
- Guidelines—Administrative Procedures (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#admin)
- Guidelines—Acquisitions of Oil and Gas Interests (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#oil)

The Minister has also issued the following interpretation notes:

- Interpretation Note No. 1—Defunct Business (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00051.html#defunct)
- Interpretation Note No. 2—Part of a Business Capable of Being Carried on as a Separate Business (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00051.html#part)
- Interpretation Note No. 3—All or Substantially All of the Assets (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00051.html#all)
- Interpretation Note No. 4—Business (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00051.html#business)

The guidelines and interpretation notes are complementary to the provisions of the Act and do not modify the provisions of the Act.

[4] The WTO threshold is adjusted yearly by an amount equivalent to the growth in nominal gross domestic product. You can find a list of historical review thresholds online (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html). The threshold for review for investors from WTO member countries is adjusted at the beginning of each calendar year to reflect the change in the nominal gross domestic product of the previous year as per the formula set out in section 14.1 of the ICA. The threshold applies for the calendar year in which it is determined.

[5] An indirect acquisition is the acquisition of a foreign company with Canadian subsidiaries.

CASE REVIEW—NET BENEFIT TEST

The Minister of Industry approves an application for review only where he or she is satisfied, based on the information, written undertakings and other representations of the investor, that the investment is likely to be of net benefit to Canada. In making this determination, the Minister must consider the following factors listed in section 20 of the Act and only those factors:

(a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment; on resource processing; on the utilization of parts, components and services produced in Canada; and on exports from Canada;

(b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

(c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the investment on competition within any industry or industries in Canada;

(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

(f) the contribution of the investment to Canada's ability to compete in world markets.

In determining whether a transaction is likely to be of net benefit to Canada, the Minister proceeds as follows.

The first key step is to establish a baseline against which to review a proposed transaction. To do so, the Minister looks at the Canadian business that an investor proposes to acquire, taking into account the business' likely prospects on a stand-alone basis (i.e., in the absence of an acquisition). For example, the Minister assesses whether the Canadian business is a healthy company with good prospects or whether it is in financial distress. The Minister also takes into account the Canadian business' key strengths, areas requiring improvement and the key business challenges it is facing.

In reviewing a proposed transaction, the Minister takes into account what the foreign investor brings to the investment, for instance, whether the investor is bringing capital or expertise that is not accessible to the Canadian business, the investor's plans for the Canadian business and any legally enforceable undertakings that the investor may offer to provide further assurance that the transaction is likely to be of net benefit to Canada. The Act requires that the Director of Investments provide the Minister with specific information to assist in the net benefit determination. This includes the investor's plans, written undertakings and other information, and representations from affected provinces and territories as well as the results of the consultations held with other federal government departments.

The types of undertakings that investors may offer relate directly to the factors listed in section 20 of the Act and vary based on the nature of the transaction. Not all transactions involve undertakings. Undertakings generally reflect the importance of a transaction to the Canadian economy as well as the health of the

Canadian business being acquired. Undertakings related to employment are common, as are those related to capital spending. Undertakings on the participation of Canadians in the Canadian business, including those to maintain head offices or head office functions, are also common. Finally, research and development undertakings are frequently offered, particularly in research- and technology-driven industries.

As indicated in the Guidelines—Administrative Procedures, the Minister, in reaching a decision on likely net benefit, considers both the positive and negative effects of a proposed investment in relation to each factor listed above. The results for all factors are then aggregated. Where their net effect is positive, the Minister can be satisfied that the investment is likely to be of net benefit to Canada. A proposed investment that is subject to review cannot be implemented by an investor unless the Minister has notified the investor that he or she is satisfied that it is likely to be of net benefit to Canada.

It is important to note that the Act does not assign set weights to the factors nor does it indicate whether any factor is more important than another in the net benefit determination. Furthermore, not all factors may be relevant to a specific investment and some factors may be more relevant to one investment than to another. As each transaction presents its unique features, the Minister examines proposed investments on a case-by-case basis and makes his or her decision based on the facts and merits of each proposed investment.

It is possible for competing investors to file applications for the same Canadian business. The Minister's role is to determine whether each individual investment is likely to be of net benefit to Canada, and he or she may approve more than one application, making the decision on a case-by-case basis on the merits of the individual case. The Minister does not compare one proposed investment with another to determine whether one proposal is more beneficial to Canada. Ultimately, it is the shareholders who decide whether to sell their business and to whom (assuming that all the investment proposals are determined to be of likely net benefit to Canada).

Finally, at any time after an application or a notification has been filed, the investor may withdraw the application or notification. Investors do this for a variety of reasons, such as the following: the investor has decided not to implement the investment; there were competing bids for the same Canadian business and the investor was not selected (only one can be successful); or there was an error in the interpretation of the application of the Act and the Act did not apply to the investment. From June 30, 1985, to March 31, 2010, 172 applications and 637 notifications were withdrawn. Two applications for review were withdrawn after the Minister issued a notice to the investor that he was not satisfied that the proposed investment was likely to be of net benefit to Canada. Twelve notices of this kind were sent out over this period. Only one application for review was officially disallowed by the Minister of Industry: Alliant Techsystems Inc.'s proposed acquisition of the Canadian business, the Information Systems Business of MacDonald, Dettwiler and Associates Ltd.

NET BENEFIT—TIMELINES

The Act provides an initial 45 days for the Minister to conduct the net benefit review and make a determination. The Minister may unilaterally extend this period for a further 30 days if required. Beyond this 75-day period, the time frame for the review may be extended with the agreement of both the Minister and the investor.

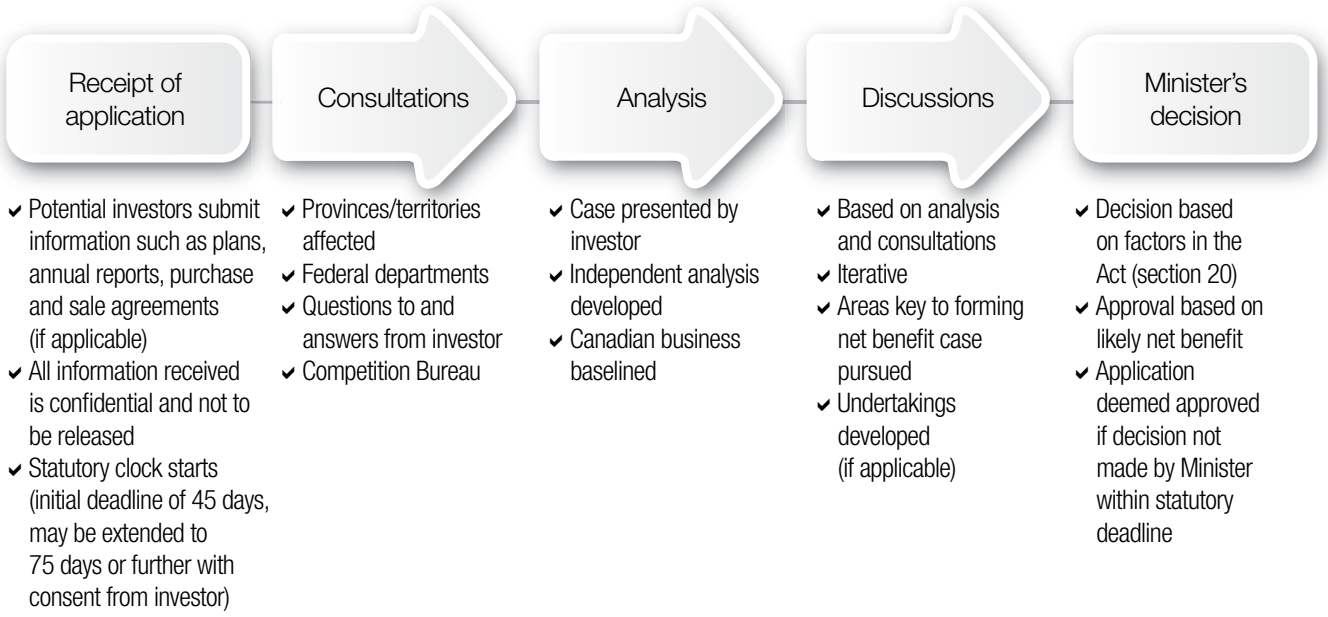
If the Minister does not make a decision within the timelines provided in the Act, the investment is automatically deemed to be approved.

In the 2009–10 fiscal year, the Minister of Industry approved 23 applications for review. The mean time required to complete the review process and for the Minister to make a determination of net benefit for these reviews was 69 days. In performing a review, officials are provided with the commercial deadline for the implementation of the proposed investment. Much of the time required to complete a review is consumed by obtaining information from investors, completing the analysis of the information obtained through the review and discussing undertakings with investors.

CONSULTATIONS

An exception to the strict confidentiality provisions of section 36 of the Act allows the Minister to share information with federal or provincial/territorial ministers or employees for the purpose of administering the Act. This allows the Minister to consult with the federal departments with policy responsibilities for the industry sector involved and the provinces and territories where the Canadian business has significant activity. All parties consulted are bound by the confidentiality provisions of the Act.

Figure 1. The Review Process



MONITORING AND ENFORCEMENT

Investors who have implemented investments subject to review under the Act are required to submit information requested by Investment Review Division officials to determine whether the investment is being carried out in accordance with the application. An evaluation of an investor's performance in implementing its plans and undertakings under the Act is ordinarily performed 18 months after the implementation of the investment, or earlier as required. Efforts are often made to align monitoring activities with the investor's annual reporting cycle to facilitate the reporting of timely and accurate information.

The Guidelines—Administrative Procedures[6] outline the policies that apply to the monitoring of investments that have been reviewed and implemented. As per the guidelines, investment performance is judged in the context of the overall results. If the Minister is not satisfied that an investor is meeting its obligations under the Act, the Minister may seek more information from the investor prior to determining what action to take.

The Act specifies enforcement procedures when the Minister believes that an investor has not complied with its obligations under the Act, for instance, where an investor has failed to comply with its undertakings. Sections 39 and 39.1 stipulate that the Minister may accept replacement undertakings or may send a demand letter to the investor requiring it to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or, in the case of undertakings, to justify non-compliance. If an investor fails to comply with a demand letter under section 39, an application may be made on the Minister's behalf to a superior court under section 40 of the Act. The court may order any measure as the circumstances require, including directing divestiture, compliance with undertakings, payment of a penalty of $10,000 for each day of contravention, revocation of voting rights and disposition of voting interests.

Over the 2009–10 fiscal year, 65 investments under the ICA were monitored. In one case, the Minister believed that the investor had failed to meet its obligations under the Act and a section 39 demand letter was sent. This case is now in the Federal Court. For more information, see "Enforcement Proceedings in the U.S. Steel Case up to March 31, 2010" on page 21.

NATIONAL SECURITY REVIEWS

In February 2009, the Act was amended to include a new part, Part IV.1 Investments Injurious to National Security. This amendment provides the Government of Canada with the authority to review a foreign investment that could be injurious to national security. Under this new part, an investment is reviewable if the Governor in Council (GiC) orders a review. For the GiC to order a review, the Minister of Industry must have reasonable grounds to believe, after consulting with the Minister of Public Safety, that a foreign investment could be injurious to national security. The Minister of Industry must make a recommendation to the GiC for a review. In addition to ordering a review, the GiC has the authority to take any measure with respect to an investment that it considers advisable to protect national security, including the following:

[6] Read Guidelines—Administrative Procedures online (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#admin).

- directing the investor not to implement the investment;
- authorizing the investment on condition that the investor (i) give written undertakings that the GiC considers necessary in the circumstances, or (ii) implement the investment on the terms and conditions ordered by the GiC; or
- requiring the investor to divest control of the Canadian business or of its investment in an entity.

The national security provisions apply to a broader set of investments by non-Canadians, including the establishment of a new Canadian business and the acquisition of an interest in a Canadian business that represents less than a controlling interest.

NATIONAL SECURITY—TIMELINES

Where the Minister has reasonable grounds to believe that an investment could be injurious to national security, he or she may proceed in one of two ways. The Minister may send a notice to the investor that an order for the review of the investment may be made. If he or she proceeds in this way, the Minister must still subsequently make a recommendation to the GiC for a review to be ordered. Alternatively, the Minister may refer an investment to the GiC, recommending that an order for review be made without first notifying the investor.

In both cases, the time period within which the Minister must give the investor the first notification of a review, or possible review, ends 45 days after a relevant starting point. For investments subject to review or notification under the Act, the 45-day period begins on the certified date of the application or notification. For all other investments, the 45-day period begins on the date of implementation of the investment. Where a notice is sent to an investor by the Minister that an order for the review of an investment may be made, the GiC has 25 days to order a review of the transaction.

Where a review has been ordered by the GiC, if the Minister is satisfied that the investment would be injurious to national security or is unable to determine whether it would be, the Minister must submit a report, with recommendations, to the GiC within 45 days from the date on which the order was issued, or any such further period agreed upon by both the investor and the Minister. Once the Minister has submitted a report and recommendations, the GiC may then order any measure it considers advisable to protect national security. The time period within which the GiC must make an order is 15 days from the date on which the Minister referred the investment to the GiC for consideration (i.e., submitted a report and recommendations). The Minister is then required to notify the investor, without delay, of the GiC order.

CONFIDENTIALITY

Since coming into effect in 1985, the Act has contained very strict confidentiality provisions. The substance of these provisions was in fact carried over from its predecessor legislation, the *Foreign Investment Review Act*.

Industry Canada and its officials often receive advance notice of takeovers, are given highly confidential information by an investor during the review process and receive information from third parties. All information obtained with respect to a Canadian, an investor or a business in the course of administering the Act is privileged. The disclosure of information outside of the narrow exceptions defined in the Act is a criminal offence.

Recent amendments to the Act have enhanced the transparency in its administration. The Minister may disclose the fact that an application has been filed under the Act and where the investment is in the review process, provided that doing so does not prejudice the investor or the Canadian business. In addition, where the Minister does not allow an application, he or she must give reasons to the investor and may make these reasons public, provided this does not prejudice the investor or the Canadian business. Where the Minister approves an application, he or she may give reasons to the investor and may make these reasons public, provided this does not prejudice the investor or the Canadian business. Finally, the Director of Investments must submit an annual report on the administration of this Act to the Minister, and the Minister must make the report available to the public.

Organization

In June 1999, authority for the administration of the Act as it relates to cultural businesses listed in Schedule IV of the *Regulations Respecting Investment in Canada* was transferred to the Minister of Canadian Heritage. The Minister of Industry remains responsible for all other aspects of the Act.

Under the Act, the Minister may appoint a Director of Investments to advise and assist in exercising the Minister's powers and performing the Minister's duties.

At Industry Canada, the Director of Investments is supported by a Deputy Director and the personnel of the Investment Review Division of the Small Business, Tourism and Marketplace Services Sector. The Division has a total of 10 employees. Its staffing and operations budget for 2009–10 was $1.08 million.

The Investment Review Division relies on the exemption to the confidentiality provisions contained in subsection 36(3) of the Act—allowing the communication of confidential information to government officials at the federal and provincial/territorial level—to regularly draw on the extensive expertise, experience and support from within Industry Canada, including Industry Canada Legal Services; from other federal departments with policy responsibility for investments under review; and from provincial/territorial governments where Canadian businesses being acquired have significant activities.

INVESTMENT REVIEW DIVISION PERSONNEL

The list of personnel in the Investment Review Division is available online (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00058.html) as well as further information on the Act and its administration (www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home).

3 Recent Policy Developments

In November 2006, the government released *Advantage Canada*, a long-term plan to improve Canada's economic prosperity. It stated Canada must "be open to trade and foreign investment so goods, services and technologies flow freely into Canada and Canadian firms have ready access to foreign markets to compete with the best in the world."

Advantage Canada also identified a concern that there may be rare occasions where foreign investments by state-owned enterprises (SOEs) with non-commercial objectives and unclear corporate governance and reporting may not benefit Canadians. *Advantage Canada* called for a principle-based approach to address these situations.

Guidelines—Investments by State-Owned Enterprises

On December 7, 2007, the Minister of Industry issued guidelines under the *Investment Canada Act* (ICA or the Act) to clarify the factors that are taken into consideration in assessing the net benefit of investments by foreign SOEs.

The guidelines emphasize that sound principles of corporate governance and commercial orientation are to be considered when reviewing investments by foreign SOEs. During such reviews, the Minister will apply existing principles under the Act and will examine:

- the nature and extent of control by a foreign government;
- the corporate governance, operating and reporting practices of the SOE, including whether the investor adheres to Canadian standards of corporate governance and to Canadian laws and practices; and
- whether the acquired Canadian business retains the ability to operate on a commercial basis regarding the following: where to export; where to process; the participation of Canadians in its operations in Canada and elsewhere; support of ongoing innovation, research and development; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

The guidelines also provide a list of undertakings that SOEs may offer to demonstrate net benefit, such as appointing Canadians to boards of directors, employing Canadians in senior management positions, incorporating a company in Canada, or listing the shares of the acquiring company or the Canadian business on a Canadian stock exchange.

Competition Policy Review Panel

In July 2007, the Government of Canada established the Competition Policy Review Panel to review Canada's competition and foreign investment policies and to recommend ways of improving Canada's productivity and competitiveness. One of the key elements of the panel's core mandate was to review the Act. The panel consulted widely, receiving 155 written submissions, commissioning over 20 research projects and speaking to over 150 participants at 13 regional and thematic consultations. It provided its report, *Compete to Win*, to the Government of Canada in June 2008. *Compete to Win* is available online (www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html).

The report contained specific policy recommendations including amending the Act to reduce barriers to foreign investment by increasing the review threshold and applying it to all non-cultural sectors, by adopting enterprise value as the basis for setting the ICA threshold for all but cultural businesses, and by increasing transparency and predictability.

Government's Response to the Panel's Recommendations

LEGISLATIVE AMENDMENTS

On February 6, 2009, the Government of Canada responded to the core recommendations of the Competition Policy Review Panel by introducing legislation to amend the Act as part of the *Budget Implementation Act*, *2009* (Bill C-10). The Bill received Royal Assent on March 12, 2009.

The amendments reformed the net benefit review process by:

- changing the basis for the general review threshold from the book value of assets to enterprise value (this amendment requires regulations for its implementation; see "Pending Regulations" subsection);
- raising the general review threshold to $1 billion over a four-year period (in 2010, it stood at $299 million in asset value) (this amendment requires regulations for its implementation; see "Pending Regulations" subsection);
- eliminating the application of the lower review threshold ($5 million for direct acquisitions and $50 million for indirect acquisitions) in identified sectors (i.e., transportation services, financial services and uranium production sectors);
- requiring the Minister to justify any decisions to disallow an investment and allowing the Minister to disclose administrative information on the review process where this does not prejudice investors; and
- requiring the publication of an annual report on the administration of the Act.

The legislation also amended the Act by adding Part IV.1, Investments Injurious to National Security, as discussed in Section 2 of this report.

NEW NATIONAL SECURITY REGULATIONS

In addition to the legislative amendments, the *National Security Review of Investments Regulations* under the Act were registered and came into force on September 17, 2009.

These regulations prescribe the various time periods within which the Minister and/or the Governor in Council must take action to trigger a national security review, to conduct the review and, after the review, to order measures with respect to the reviewed investment to protect national security. The regulations also provide a list of investigative bodies with which confidential information can be shared.

PENDING REGULATIONS

The *Regulations Amending the Investment Canada Regulations* were published for comment in the *Canada Gazette* Part I, Vol. 143, No. 28 on July 11, 2009 (gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html). These regulations, however, have not yet been registered.

In general, the proposed regulations would amend the existing *Regulations Respecting Investment in Canada* to define the methodology for calculating the enterprise value of a Canadian business for the purposes of determining whether an application for review or notification is required to be filed; to remove references to the uranium, financial services and transportation sectors; to modify the information requirements for non-Canadian investors; and to provide that the signing authority in respect of applications for review and notifications must be the investor or an officer or director of a company or equivalent for another entity.

4 Summary of Activities Under the *Investment Canada Act*

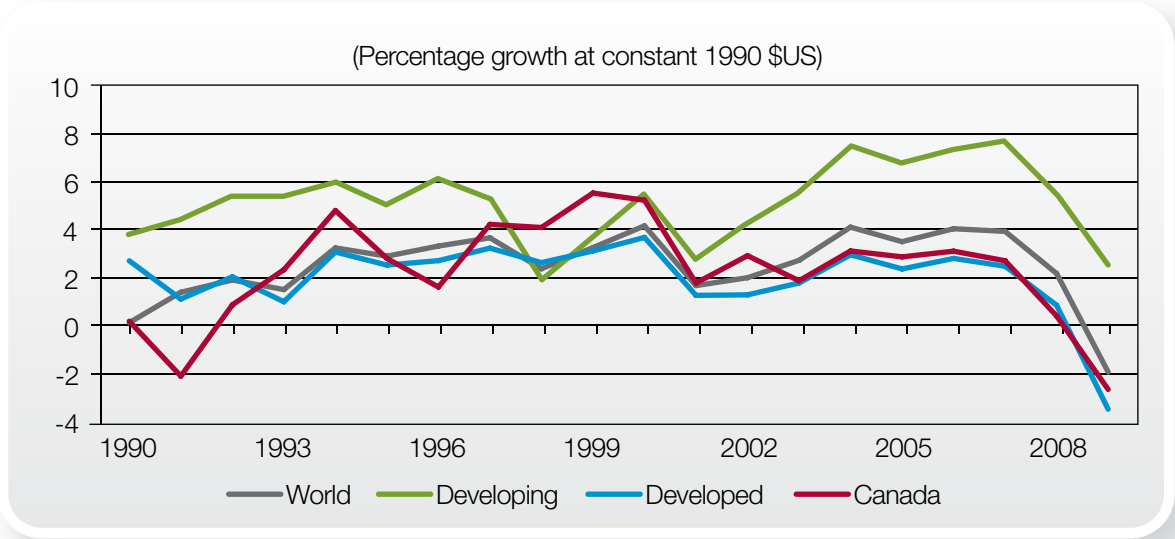
This section provides information on investment activity under the *Investment Canada Act* (ICA or the Act). While it focuses on activity over the 2009–10 fiscal year, it provides a brief overview of investment activity in Canada and globally over the past decade. Also, given the need to protect confidential information about specific investments, it is not possible to report on certain data for the year 2009–10 alone. Where this is the case, aggregate information over a five-year period is provided.

Decade Overview

The global economy witnessed generally strong, albeit uneven, growth over the last decade. The year 2000 started the decade on a very strong note, with growth in real global gross domestic product (GDP) exceeding 4 percent. However, the implosion of the dot-com bubble led to a sharp slowing in global growth in 2001.

This was followed by three years of gradual recovery with growth progressively inching upward, approaching the strong pace of 2000. The global economy grew at a brisk pace from 2004 to 2007, but the decade ended with the 2008–09 global recession, triggered by the global financial crisis that pushed the global economy into negative territory in 2009 (see Figure 2).

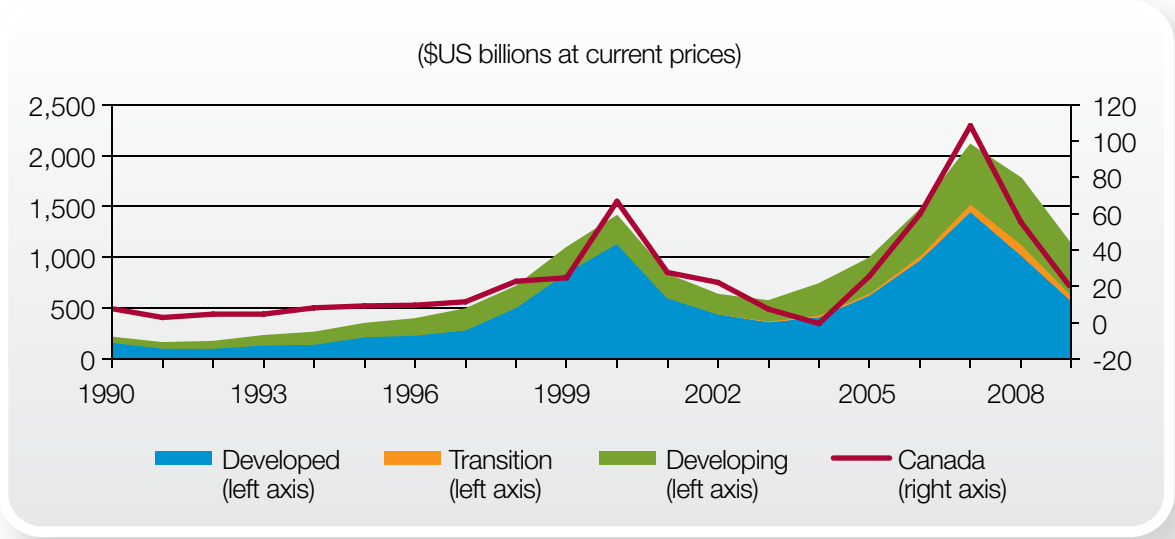
Figure 2. Real GDP Growth



Data were extracted from United Nations Conference on Trade and Development statistics (UNCTADstat).

Given its pro-cyclical nature, foreign direct investment (FDI) generally followed economic growth during this period (see Figure 3).

Figure 3. FDI Inflows by Types of Economy



Data were extracted from UNCTADstat.

Following sustained strong increases throughout most of the 1990s and at the turn of the millennium, global FDI inflows fell sharply by 51 percent in 2001[7] and continued to fall at more modest rates in 2002 and 2003. Thereafter, FDI grew very strongly between 2004 and 2007. This period was marked by two major trends on the investment front: consolidation in the extractive sector (particularly mining), supported by sustained strong growth in commodity prices; and the continued rise of emerging economies as major players on the investment landscape. Outward investment flows from Brazil, Russia, India and China (the so-called BRIC countries) reached a peak of $147 billion in 2008, compared with $6 billion in 2000.[8]

The financial crisis and subsequent global recession led to sharp declines in global FDI, with inflows falling 16 and 37 percent in 2008 and 2009 respectively. In 2009, merger and acquisitions activity contracted by 66 percent.[9] Overall, however, the impact of the global recession on FDI inflows was less severe for developing and transition economies than for developed economies.

Global FDI posted a modest, yet uneven, recovery in the first half of 2010, which was consistent with global growth patterns.

INVESTMENT ACTIVITY UNDER THE ICA OVER THE LAST DECADE

As explained in Section 2 of this report, the Act requires that foreign investors file either an application for review or a notification when they acquire control of a Canadian business. A notification is required where there is an establishment of a new Canadian business or an acquisition of control of a Canadian business with an asset value below the established threshold. These investments are not subject to a net benefit review under the Act. An application for review is required when a foreign investor acquires control of a Canadian business with an asset value that is equal to or greater than the established threshold. These investments are subject to a net benefit review.

As figures 4 and 5 show, the trend in investment activities that were subject to the ICA largely mirrors the movements in global FDI over the decade. Figure 4 illustrates the evolution in the number of approved applications for review and certified notifications since 2000. Figure 5 provides the total asset value of both applications for review and notifications by fiscal year.[10]

[7] UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (UNCTAD: Geneva, 2002), p. 3.
[8] UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (UNCTAD: Geneva, 2010), p. 7; UNCTAD FDI database.
[9] UNCTAD, "Global and Regional FDI Trends in 2009," *Global Investment Trends Monitor*, No. 2 (UNCTAD: Geneva, January 19, 2010), p. 1.
[10] The threshold for review for investors from World Trade Organization (WTO) member countries is adjusted in January of each calendar year to reflect the change in the nominal gross domestic product of the previous year. The threshold applies for the calendar year in which it is determined. However, the statistics in this report reflect investment activity for each Government of Canada fiscal year in the period. The government fiscal year is April 1 to March 31. The reader is reminded that two different review thresholds for investors from WTO member countries apply in each fiscal year. For example, in the 2009–10 fiscal year, the threshold for review was $312 million from April 1 to December 31, 2009, and $299 million from January 1 to March 31, 2010, for direct acquisitions by investors from WTO member countries.

Figure 4. Number of Applications and Notifications

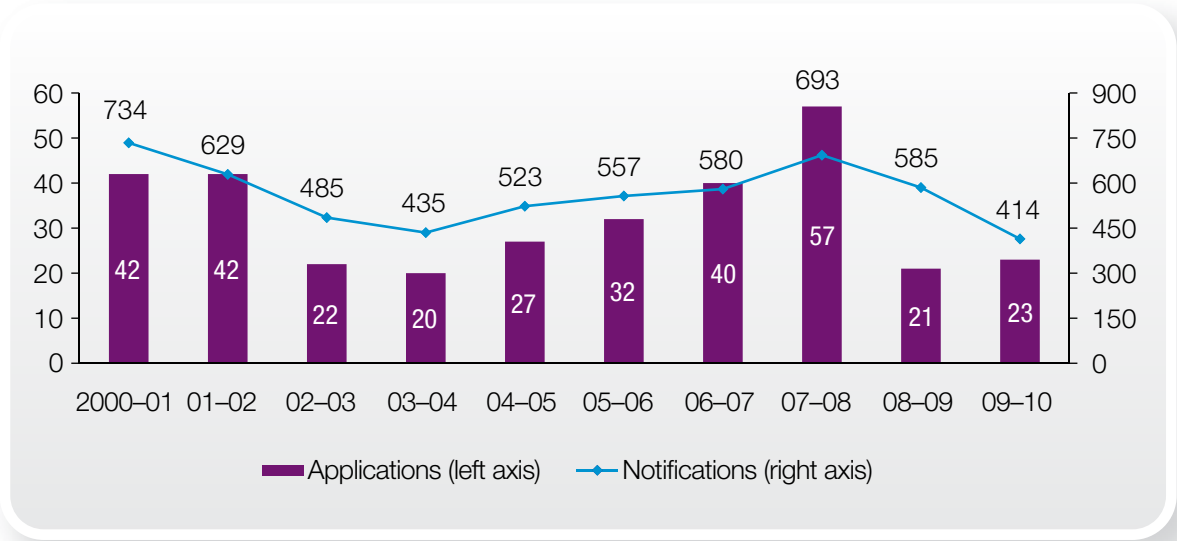
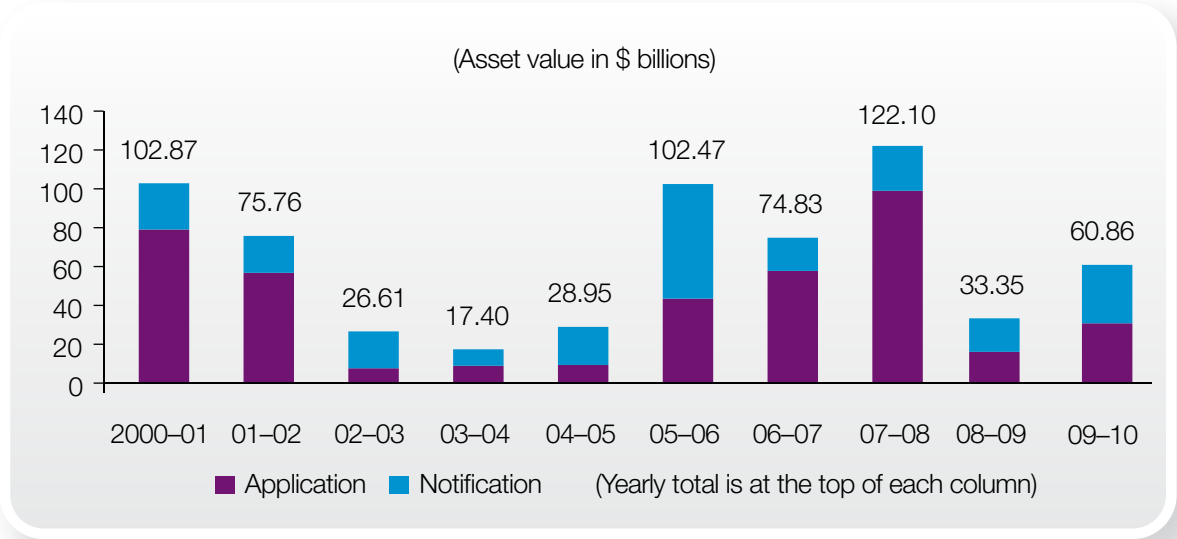


Figure 5. Asset Value of Applications and Notifications



Transaction volumes and asset values tended to follow similar patterns. A notable exception was fiscal year 2005–06 in which the total asset value for notifiable investments was affected by large investments in foreign companies outside of Canada with Canadian subsidiaries (indirect acquisitions).

During the global recession, there was a considerable decrease in the number and total asset value of both applications for review and notifications in the fiscal year 2008–09, followed by a weak recovery in 2009–10 (see figures 4 and 5). More specifically, from the peak of investment activity in 2007–08, total asset value of investments in 2009–10 was down by half.

The Year in Review (2009–10)

In fiscal year 2009–10, Canada and the world began to recover from the global recession. Statistics on investment activity under the Act reflect this recovery.

It is important to note at the outset that the need to protect investor confidentiality severely restricts the ability to publish information that applies to just one year. As all information provided by investors is strictly confidential and can be released only under very narrow circumstances, the practice in this report is not to report on individual transactions. Furthermore, to protect the identity of investors, the general practice is not to report on data involving fewer than four observations if doing so could jeopardize the protection of confidential investor information. Where confidentiality restrictions do not allow us to report for 2009–10 individually, information over a five-year period is provided to give a more complete account of the various characteristics of investment activity under the Act.

INVESTMENT ACTIVITY BY ASSET VALUE

As Table 1 shows, investment activity rose sharply in 2009–10, with the total asset value of transactions subject to the Act (both applications for review and notifications) nearly doubling to $61 billion from a relatively low figure of $33 billion in 2008–09. This increase was due to significantly larger average asset values. The average asset value of reviewable investments rose from $766 million in 2008–09 to $1.34 billion in 2009–10, that of notifiable investments grew from $30 million to $73 million.

Table 1 also illustrates that, while 2009–10 was a year of recovery, investment activity was clearly not as robust as it was in the years immediately preceding the recession. In 2007–08, the total asset value of transactions subject to the Act peaked at $122 billion, twice the 2009–10 level. In 2009–10, there were six multi-billion dollar transactions (i.e., with asset values exceeding $1 billion). In 2007–08, there were 21. Overall, the average asset value of reviewable transactions stood at $1.74 billion for 2007–08, $398 million higher than in 2009–10.

Table 1. Investment Summary by Asset Range

Asset range ($ millions)	2005–06		2006–07		2007–08		2008–09		2009–10		Total Number	Total $ millions
Applications												
< 50	6		6		5		4		2		23	379.4
50 to 99.9	3		3		3		1		-		10	630.0
100 to 299.9	3		6		5		1		1		16	3,198.8
300 to 499.9	6		8		11		4		11		40	15,238.5
500 to 699.9	3		5		6		2		4		20	11,740.9
700 to 999.9	2		3		6		4		2		17	14,186.5
1,000 to 2,999.9	3		5		14		4		0		26	44,250.4
3,000 and up	6		4		7		1		3		21	157,477.6
Total count	32		40		57		21		23		173	
Total asset value	43,484.5		57,757.6		98,983.9		16,083.3		30,792.9			247,102.1
Notifications	**Acquisition**	**New business**	**Acquisition**	**New business**	**Acquisition**	**New business**	**Acquisition**	**New business**	**Acquisition**	**New business**		
< 1	101	59	90	54	88	87	107	100	79	74	839	276.2
1 to 4.9	129	19	138	29	142	32	124	31	69	27	740	1,777.2
5 to 9.9	59	2	62	-	62	7	57	-	34	2	285	2,039.8
10 to 19.9	42	-	71	2	73	5	50	-	37	3	283	4,028.5
20 to 39.9	55	5	56	1	73	2	35	1	31	2	261	7,351.0
40 to 59.9	21	1	22	2	28	1	28	-	13	-	116	5,616.4
60 to 99.9	26	1	24	1	23	2	23	-	17	-	117	9,160.1
100 to 199.9	19	-	16	-	37	-	17	-	13	-	102	14,761.5
200 to 999.9	14	1	11	-	26	5	8	1	9	1	76	24,907.2
1,000 and up	3	-	1	-	-	-	3	-	3	-	10	76,579.3
Total count	469	88	491	89	552	141	452	133	305	109	2,829	
Total asset value	58,123.4	858.7	16,789.9	285.6	21,277.0	1,834.8	16,817.3	445.5	29,541.7	523.3		146,497.2

ICA-IDENTIFIED SECTORS

A notable development in 2009–10 was the elimination of the lower review thresholds that previously applied to the transportation services, financial services and uranium production sectors. This amendment, part of the *Budget Implementation Act, 2009*, took effect on March 12, 2009. Prior to these amendments, the threshold for review in these sectors stood at $5 million for direct acquisitions and $50 million for indirect acquisitions. Currently, these sectors are subject to the general review threshold of $312 million (for calendar year 2011) for investors from World Trade Organization (WTO) member countries.

Table 2 shows the number of applications reviewed in the above three sectors over the fiscal years from 2005–06 to 2008–09. Of the 56 transactions reviewed over this period, 89 percent were in the transportation sector and the remainder were in financial services. Transactions in these identified sectors that were below the WTO threshold applicable to other sectors represented approximately 27 percent (40 out of a total of 150) of all transactions reviewed by the Minister of Industry.

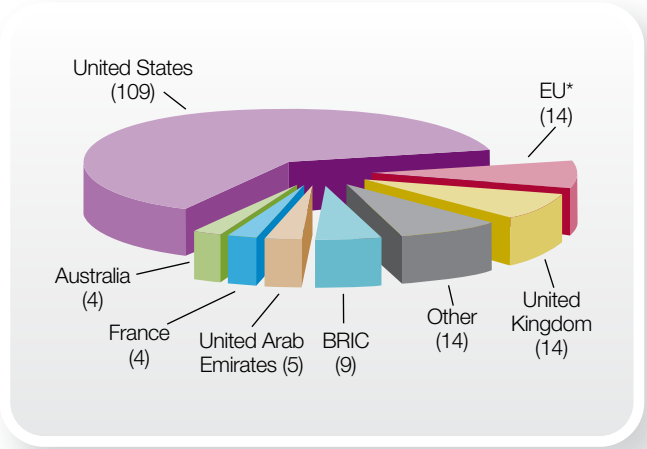
Table 2. Investments in Identified Sectors

Year	Greater than $5 million and less than WTO threshold	Greater than WTO threshold	Total
2005–06	10	4	14
2006–07	13	3	16
2007–08	11	6	17
2008–09	6	3	9
Total	40	16	56
Total asset value ($ millions)	2,570	21,818	24,388

INVESTMENTS BY COUNTRY OR REGION OF ORIGIN

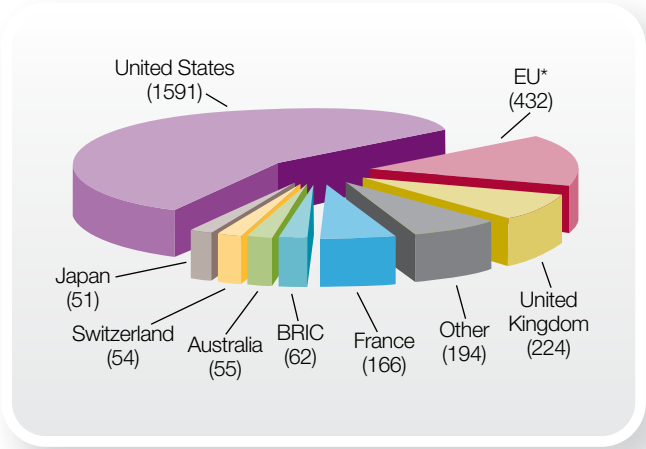
Canada's main trading partner, the United States, has been the number one investor over the past five years, accounting for more than half of the total number of investments and the total asset value. The region with the next highest number of filings was the European Union (EU) with approximately one quarter the number of U.S. filings (see figures 6 and 7); however, with respect to total asset value, the United Kingdom came second behind the United States.

Figure 6.
Application Distribution (2005–09)



*The rest of the EU member countries not including the United Kingdom and France.

Figure 7.
Notification Distribution (2005–09)



*The rest of the EU member countries not including the United Kingdom and France.

Consistent with previous years, investments from the United States continued to make up more than half of the total number of investments at 244 and accounted for more than half the total asset value at $31.3 billion in fiscal year 2009–10.

ENFORCEMENT PROCEEDINGS IN THE U.S. STEEL CASE UP TO MARCH 31, 2010

This section has so far reported on applications for review and notifications under the Act. As discussed in Section 2, another important dimension of the work of the Minister of Industry is monitoring investment performance and, where applicable, enforcement activities in cases where investors are found by the Minister not to be in compliance with their obligations under the Act.

Section 2 has outlined the monitoring of investment process followed by the Investment Review Division. The first stage in the enforcement process, as mentioned in Section 2, occurs where the Minister believes that an investor has failed to implement a written undertaking. The Minister may send a demand letter under section 39 of the Act requiring the investor to cease the contravention, remedy the default, show cause why there is no contravention or, in the case of undertakings, justify any non-compliance with the undertakings. The next stage commences if the investor fails to comply with the demand. A court application may be brought by the Attorney General of Canada on the Minister's behalf seeking remedies. These remedies include directing the investor to divest control of the Canadian business, forbidding the investor from taking any action in relation to the investment that might prejudice the ability of a superior court to effectively order a divestiture, directing the investor to comply with a written undertaking and imposing a penalty not exceeding $10,000 for each day the investor is in contravention of the Act.

Over the 2009–10 fiscal year, the Minister believed that one investor had failed to meet its obligations under the Act and took action under the enforcement provisions of the ICA.

On May 5, 2009, after reviewing the undertakings of United States Steel Corporation (U.S. Steel) and the information that the company provided related to their implementation, the Minister sent a demand letter to U.S. Steel under section 39 of the Act. The letter required U.S. Steel, among other things, to do the following: remedy forthwith the default of the production and employment undertakings, show cause why there was no contravention or justify any non-compliance with those undertakings. U.S. Steel had undertaken that, over three years, it would increase the annual level of production at the former Stelco facilities by at least 10 percent and that it would maintain an average aggregate employment level of not fewer than 3,105 employees on a full-time equivalent basis.

On May 20, 2009, U.S. Steel responded to the demand letter.

By letter dated July 15, 2009, the Minister advised U.S. Steel that, based on U.S. Steel's representations to the Minister, U.S. Steel had failed to remedy the defaults identified in the demand letter, had failed to show cause why there was no contravention and had failed to justify any non-compliance with the undertakings.

On July 17, 2009, the Attorney General of Canada, on behalf of the Minister of Industry, filed a Notice of Application with the Federal Court seeking an order for appropriate measures to remedy the situation. The Crown's affidavit in support of this application was served on U.S. Steel on August 13, 2009.

In September 2009, the Federal Court granted intervenor status with limited participatory rights to Lakeside Steel Inc. and the United Steelworkers Union. U.S. Steel appealed these orders. On October 8, 2009, U.S. Steel filed a motion challenging the constitutional validity of the enforcement provisions of the ICA (sections 39 and 40). The hearing on this motion was held on January 12–14, 2010. On June 14, 2010, the Court concluded that section 40 of the ICA does not violate section 11(d) of the *Canadian Charter of Rights and Freedoms* or section 2(e) of the *Canadian Bill of Rights*. The Court ordered that U.S. Steel's motion be dismissed.

Information on developments after March 31, 2010, can be obtained through the Federal Court.

5 Appendix

Data Interpretation

The following factors should be taken into consideration when interpreting the data in this report:

- The Government of Canada reports under the fiscal year of April 1 to March 31. Note that all references in tables, charts and explanations related to ICA investments to a given year mean the fiscal year of that year; for example, 2009 means April 1, 2009, to March 31, 2010.

- Acquisitions are recorded by the asset value of the Canadian business to be acquired, based on the corporation's most recent audited financial statements, not on the purchase price.

- New business proposals are recorded on the basis of the planned amount of investment over the first two years.

- The actual number and value of notifiable acquisitions and new business starts by international investors may not be wholly reflected for the following reasons:

  - From time to time, two or more investors may submit notifications to acquire the same Canadian business. In such cases, each proposal is recorded as a separate transaction.

  - Since June 1999, responsibility under the *Investment Canada Act* with respect to investments related to activities listed in Schedule IV of the *Regulations Respecting Investment in Canada* (http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00049.html#culture) was transferred to Canadian Heritage. Accordingly, our statistics since that time do not include investments by non-Canadians in businesses engaged strictly in activities listed in Schedule IV.

  - Most applications and notifications are submitted to the Investment Review Division at the proposal stage and processed promptly under the terms of the *Investment Canada Act*. Subsequently, however, the investor for commercial or other reasons may choose not to implement the investment or implement it at a different time.

  - There is a procedure in place with respect to applications whereby the investor is contacted, within a specified period after the approval of its investment, in order to ascertain the status of its investment. It is at this time that information is obtained as to whether or not the transaction was in fact implemented.

  - The statistics provided in this report reflect those cases that, to the best of our knowledge, have been implemented and do not include the non-implemented cases.

Data Comparison with Other Statistical Sources

The principal purpose of the *Investment Canada Act* is the regulation of investment activity by non-residents. This differs from programs of other agencies, such as Statistics Canada, whose primary purpose is the development of information. As a consequence, Investment Review Division data on the value of foreign investments in a given period reflect operations under the *Investment Canada Act*. Investment Review Division officials tabulate the value of "planned investment" from new business notifications and the book value of "assets acquired" from acquisitions requiring notification or review. Aggregated figures are published on a quarterly basis, two or three weeks after the end of March, June, September and December. These figures cannot be compared with either the foreign direct investment flows or stock figures published by Statistics Canada.

The Investment Review Division collects data only on new business proposals and acquisitions of control by non-Canadians, and this represents just a portion of the value of foreign investment in Canada. For example, Investment Review Division data do not include the myriad of important plant expansions by established foreign investors in Canada.