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WORKING PAPER NO. 6

THE CABINET AS A REGULATORY BODY: THE CASE OF THE FOREIGN INVESTMENT REVIEW ACT

by

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Preface

Much of the information upon which this study is based was provided in interviews by participants in, and observers of, the FIRA process. Although we agreed not to identify these individuals, we do wish to express our gratitude to them for their willingness to discuss frankly and freely their perceptions and assessments. We could not have completed this study without their assistance. We would also like to thank Gordon Dewhirst of the Foreign Investment Review Agency and Hudson Janisch, Dick Risk and Jim Robb for their advice and encouragement both during the design and the completion of this study. Ian Harvie and Richard Shaw are also to be thanked for providing very capable research support. Cathy Duggan of McGill, once again, was both proficient and patient in typing the manuscript.

Frank Swedlove was on secondment from the Foreign Investment Review Agency while working on this study. Naturally the views expressed herein are solely those of the authors and not of the institutions with which they are associated.

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Contents

Résumé

La présente étude porte sur le processus de réglementation qui est confié à des mécanismes publics de contrôle et de responsabilité. Il s'agit plus précisément de la filtration de l'investissement étranger au Canada, aux termes de la Loi sur l'examen de l'investissement étranger, adoptée en 1973. Nous cherchons d'abord à déterminer s'il est possible de tirer de l'exemple fourni par cette loi, des renseignements quant aux avantages et aux désavantages que présente l'utilisation du Cabinet comme mécanisme de réglementation. Nous étudions en particulier deux aspects de la responsabilité : le contrôle politique de l'autorité élue sur l'autorité non élue, et l'imputabilité de ceux qui prennent les décisions en matière de réglementation, c'est-à-dire en ce cas, le ministre désigné et le Cabinet, devant le Parlement et le public.

Nous examinons dans le premier chapitre la structure du processus actuel de réglementation. Le deuxième chapitre contient une description et une analyse des rôles et des responsabilités des principaux acteurs à ce processus. Le troisième chapitre comprend une évaluation du processus de la Loi sur l'examen de l'investissement étranger, du point de vue de la responsabilité politique. A partir de cette évaluation, nous pesons les avantages et les désavantages de l'utilisation du

Cabinet comme organisme de réglementation.

Soulignons qu'il ne s'agit pas ici d'une étude des coûts et des avantages de la réglementation de l'investissement étranger, ni de la valeur de la politique canadienne dans le domaine du contrôle de l'investissement étranger. Il ne s'agit pas non plus d'une étude sur l'efficacité de l'Agence d'examen de l'investissement étranger comme organisme de réglementation. Nous examinons simplement dans les pages qui suivent certains aspects de la Loi sur l'examen de l'investissement étranger comme modèle particulier de réglementation, soit la réglementation par le Cabinet.

SUMMARY

This is a study of a regulatory process which is predicated on political controls and accountability. The process is that involving the screening of foreign investment in Canada introduced under the Foreign Investment Review Act, enacted in 1973. The purpose of the study is to determine what the FIRA example can tell us about the advantages and disadvantages of using Cabinet as a regulatory authority. In particular, the study focusses on two aspects of accountability, one the political control of elected over non-elected authorities, the other the answerability of those who make regulatory decisions, in this case the designated Minister and Cabinet, to Parliament, and to the public.

The first chapter analyses the design of the present regulatory structure and process. The second chapter describes and analyses the roles and responsibilities of the principal participants in the process. Chapter Three consists of the evaluation of the FIRA process from the perspective of political accountability. On the basis of this evaluation, we offer an assessment of the advantages and disadvantages of the employment of Cabinet as a regulatory authority.

It must be emphasized that this study is not a study of the costs and benefits of the regulation of foreign investment or of the merits of Canada's policy on screening foreign investment. Nor is it a study of the effectiveness of FIRA as a regulatory body. It is solely an examination of specific issues related to the FIRA process as a particular regulatory model, namely regulation by Cabinet.

POSTSCRIPT

In the Speech from the Throne on April 14, 1980 the Government announced its intention to amend the Foreign Investment Review Act "to provide for performance reviews of how large foreign firms are meeting the test of bring substantial benefits to Canada...[and] to ensure that major acquisition proposals by foreign companies will be publicized prior to a government decision on their acceptability." No action had been taken, however, at the time this study was completed, to enact such amendments. To the extent that a notification process will provide some degree of public information and specifically will ameliorate some of the problems we discussed concerning third party representations, such an amendment is to be welcomed. The proposed amendments, however, do not address the major problems identified in this study associated with the general lack of meaningful public information which interested participants require to evaluate Cabinet's performance of its regulatory responsibilities.

INTRODUCTION

The political accountability of regulatory authorities is one of the central issues in the current debate on governmental regulatory activities and processes.[1] This concern arises from the fact that regulatory agencies are often delegated discretionary powers that permit them in effect to make public policies rather than "simply" to implement policies made by appropriate authorities. The centrality of the concern for "accountable" regulation provides the focus and justification for this analysis of a regulatory process and agency that are predicated on political controls and accountability. The process in question is that involving the screening of foreign investment in Canada introduced under the Foreign Investment Review Act which was enacted in 1973.

For our purposes, it is useful to suggest that the concept, political accountability, as it pertains to regulatory institutions and processes, has two primary aspects or faces. One, which concerns the relationship between elected and non-elected authorities, involves the political control of the former over the latter. The second, which is no less important, although it has received far less emphasis, concerns the

relationship between two sets of elected authorities, namely Cabinet and parliamentarians. This aspect of accountability involves what perhaps can be described as the answerability of the former to the latter. It is this aspect that the Lambert Royal Commission had in mind when it defined accountability as "the liability assumed by all those who exercise authority to account for the manner in which they have fulfilled responsibilities entrusted to them...."[2] According to this aspect of political accountability, Cabinet collectively and individual ministers are responsible to Parliament for the exercise of their responsibilities. Parliament, for its part, as representative of the people, has a responsibility to ensure that Cabinet is performing, or has performed, its functions effectively and legitimately, that is within the terms of the mandates conferred on Cabinet by laws enacted by Parliament. It is important, that in the quest for accountable regulation, emphasis should not be placed only on the political control by Cabinet or the answerability of Cabinet, but also on the responsibility of Parliament for, again as the Lambert Commission has stated, "Parliament's responsibility, which is of no less importance, is the continuous scrutiny that it is empowered to maintain over the Government's implementation of the measures to which Parliament has given assent."[3]

With respect to the first aspect of accountability, the foreign investment review process is one in which the

principles of political control are clearly dominant. The agency is not independent in any meaning of the concept as it relates to regulatory agencies such as the Canadian Transport Commission, the National Energy Board, or the Canadian Radio-television and Telecommunications Commission.[4] In the first place, the chief executive of the Agency, the Commissioner, is not appointed for a fixed term but holds office at the pleasure of the Governor in Council (in effect the Cabinet). In other words, he can be summarily removed for any reason and not solely "for cause". Secondly, and perhaps more importantly, the agency does not possess any independent decision-making capacity. It is a regulatory body whose function is, by statute, "to advise and assist the Minister in connection with the administration" of the Act.[5] This is not to suggest, however, that the Agency is not a significant participant in the regulatory process, but simply to emphasize its dependent, subordinate role in the process. It is the Minister responsible for the administration of the Act who can order, according to the requirements of the statute, investigations into possible foreign takeovers or investments, and subject "non-eligible persons" to screening. It is the Minister alone who decides whether to publish undertakings agreed to by applicants when decisions are announced.

It is the Minister who is authorized to issue guidelines related to the implementation and administration of the Act. It is the Cabinet which alone is empowered to make all regulations under the provisions of the Act. Finally, and most importantly, it is the Cabinet, on the recommendation of the Minister, which alone decides whether the proposed foreign investment meets the statutory test of "significant benefit to Canada" and is, or is not, permitted. In short, all the decisions, both on policy matters and on individual decisions are, by statute, to be made by elected officials. The FIRA process, thus, is the quintessential politically-controlled and directed regulatory process.

Insofar as the second face of political accountability of the FIRA process is concerned, namely the answerability of Cabinet to Parliament, the Foreign Investment Review Act contained no special statutory arrangements to provide for such accountability. In lieu of any such arrangements, Parliament must rely on the established traditions of ministerial responsibility, individual and collective, to ensure that Cabinet is accountable for the exercise of its powers under the stature.

Before turning to an outline of the scope and content of the study, it is imperative, given the controversy that continues to rage in Canada around the subject of foreign investment in general and FIRA in particular, that we emphasize

what this study does not attempt. It is not a study of the costs and benefits of the regulation of foreign investment, or of the merits of Canada's policy on screening foreign investment. Nor, it must be stated, is it a substantive review of the effectiveness of FIRA as a regulatory body. The study confines itself to an examination of specific issues related to the FIRA process as a particular regulatory model, namely regulation by Cabinet.

The purpose of the study will be to answer a fundamental question, namely: what can the FIRA example tell us about the advantages and disadvantages of using Cabinet as a regulatory authority? To answer this question in a comprehensive manner we canvass the perspectives of the principal participants in the process: Cabinet as a collectivity, individual ministers and departments, FIRA officers, companies being acquired, competitors, investors, Members of Parliament, provincial governments and citizens. On the basis of these perspectives and employing a number of basic criteria such as responsiveness, openness, fairness and flexibility, an evaluation of the FIRA process will be developed.[6] This evaluation will concentrate on an assessment of how the regime of political accountability, in both meanings of the concept as we have defined it, has been implemented.

The study consists of five chapters. The first analyses the design of the present regulatory structure and process. It explains why this particular model was accepted as the most appropriate method of regulating foreign investment. Chapter Two consists of a multi-faceted analysis of the current FIRA process. Among the topics examined are the development of regulatory procedures and substantive policy guidelines and regulations. The major part of this chapter is an analysis of the "adjudicative" process of FIRA, i.e. the disposition of individual applications. In this chapter we will describe and analyse the roles and responsibilities of the principal participants in the review process.

Chapter Three of the study consists of our evaluation of the FIRA process from the perspective of political accountability. In this chapter we will describe and attempt a weighing of, from a variety of perspectives, the advantages and disadvantages that arise in the FIRA process. In Chapter Four we set aside for the moment the specific matter of the FIRA process to survey other instances, both federal and provincial, where Cabinets play regulatory roles, that are comparable, in whole or in part, to those played in the FIRA process. In the fifth and final chapter, on the basis of

our analysis of the FIRA process, we offer an assessment of the advantages and disadvantages of the employment of Cabinet as a regulatory authority.

CHAPTER ONE

Background and Design of FIRA

In this part, our objective is to outline the background and development of the present foreign investment regulatory process. It is our contention that an appreciation of this background is necessary to any comprehensive assessment of the merits of the FIRA process as a model. In the first section, we describe, in an admittedly most summary fashion, some of the historical antecedents of the model. The next section turns to a discussion of the document that provided the original blueprint for FIRA, namely the Gray Report (officially titled Foreign Direct Investment in Canada).[1] We then analyse the legislative phase that produced FIRA with the emphasis placed on the factors that appear to have been influential in the decision to create this particular form of a regulatory model.

It should be emphasized that we are not attempting to provide a comprehensive history of Canadian governmental responses to the issue of foreign investment. Rather, we are simply trying to isolate and concentrate on those aspects of that history which throw light on why the particular model of regulation by Cabinet decision-making and agency advice was selected.

1. Historical Antecedents

The ancestral development of Canadian initiatives on foreign investment issues have been well-traced by a number of writers.[2] Among these initiatives have been the identification of various key sectors such as transportation, broadcasting and banking, in which the extent of foreign ownership has been restricted, and the employment of tax incentives and disincentives, particularly with respect to magazines. Another initiative, which was in large part the result of the Gordon Royal Commission on Canada's Economic Prospects,[3] was the enactment in 1962 of the Corporations and Labour Unions Returns Act (CALURA) which requires all Canadian corporations with assets and revenues above a minimum level to file detailed annual reports concerning the operations, assets and breakdown of Canadian and foreign ownership.[4] The objective of such reports was to aid the determination of the extent and nature of foreign investment in Canada. A fourth initiative was the issuance in 1966 by the Canadian Government of hortatory non-binding "Guidelines of Good Corporate Citizenship".[5] Yet another form of government initiative were the interventions to prevent the sale of Canadian businesses such as Traders Group, Denison Mines and Home Oil to foreign interests.[6]

Aside from these specific initiatives by Canadian governments, two other antecedents merit discussion. The first, and by far the more significant, is the 1968 Watkins Report officially entitled Foreign Ownership and The Structure of Canadian Industry.[7] Two aspects of this report are particularly important from our perspective. The first was the emphasis on the general problems of foreign investment as opposed to the specific issues arising out of particular investments. After detailing the extent of foreign ownership and control, the Report argued that the issue of surpassing importance was national independence - the capacity of the government of Canada to implement decisions in the national interest.[8] It noted that overall foreign investment had provided significant benefits to Canada by contributing to a high standard of living but argued that against this, the costs of such investment must be weighed in terms of inefficiencies introduced into Canadian industries and a hindering of the capacity of the Canadian economy to experience self-generated growth.[9] This emphasis on the costs and benefits of foreign investment was the second important aspect of this Report because it provided the rationale for one of its major recommendations.

After emphasizing the general problems posed by foreign investment, the Watkins Task Force proposed that one way to

lessen the costs in general of such investment was to introduce means for altering the behaviour of individual foreign-controlled businesses. To this end, it recommended that an agency be established to exercise surveillance over the operations and investments of foreign corporations in Canada.[10] Although it did not propose that the agency be granted any specific powers to back up its surveillance function, the Watkins Report did suggest that the government should explore the option of requiring foreign investors to guarantee greater benefits.[11]

The other antecedent that should be mentioned is the Wahn Report named after the Chairman of the parliamentary Standing Committee on External Affairs and National Defence.[12] This Report was by far the most radical of the studies in its recommendations. It endorsed the conclusions and objectives for Canadian policy found in the Watkins Report but went further and concluded that:

> the time has come...to provide clearly that it is the general policy of the Canadian government that all companies operating in Canada shall, over a reasonable period of time and with due regard to varying circumstances including availability of Canadian capital, permit at least 51% of their voting shares to be owned by Canadian citizens.[13]

In addition the Wahn Report called for majority Canadian representation on all corporate boards of directors.[14]

In addition, the Report recommended a "Canadian Ownership Law" to establish a "Canadian Ownership and Control Bureau" under the direction of a minister. The function of the proposed bureau would be to perform many of the advisory and research functions referred to in the Watkins Report, but the Wahn Report also suggested that the bureau might have some screening and decision-making powers.[15] The significance of this Report is found not so much in its specific recommendations but in their tenor. It was by far the most radical set of proposals to date and symbolized not only the extent to which the issue of foreign investment had become politicized and highly controversial, but the fact that a number - how many was unknown - of the governing Liberal Party shared the nationalistic concerns about the problems of foreign investment. It is notable that after essentially ignoring the Watkins Report, while the Wahn Committee was conducting its hearings, the Government of Canada, as if in expectation, if not anticipation, of such a critical, radical set of demands, established the Gray Task Force, headed by a Cabinet member, albeit a minister without portfolio, to bring "forward proposals on foreign investment policy for the consideration of the government."[16]

2. The Gray Report

The Gray Report was the most comprehensive survey to date of the issues arising from foreign investment and the alternative responses available to the Canadian Government. It clearly provided the underlying rationale and basic framework for the Foreign Investment Review Act, introduced one year after the Report was published, and, accordingly, merits particularly detailed scrutiny. In terms of two of the major alternatives, majority Canadian ownership and key sectors, the Report was generally negative. With respect to the former, the Report concluded any benefits would be primarily "symbolic"[17] while the costs would be significant inasmuch as such requirements would cause both "substantially greater truncation of the operation of those companies in which foreigners retained an interest" and "a fragmentation of Canadian capital."[18] The Report was less critical of the key sector approach and recognized that the employment of such an approach had some value. The Report concluded, nevertheless, that it should not be the basis for a foreign ownership policy because it could be both economically costly and because it would not give the government sufficient "capacity to influence the domestic economic environment."[19]

After analysing the problems and the alternatives, the Gray Report recommended that there should be a screening

or review process of foreign investment in Canada. Such a process would have five central features:

1. it should entail a cost-benefit analysis;
2. it should be done on a case-by-case basis;
3. it should involve a bargaining or negotiating process with foreign investors;
4. it should be carried out within a framework of policy guidance; and
5. it should be selective and concentrate on major transactions.

We shall examine these five features in turn.

The Gray Report, like its predecessors, viewed the problem of continuing investment not solely in terms of costs for, if this was the case, "it would be a simple matter to deal with it: all foreign investment could simply be blocked."[20] Rather the problem was the complex mix of costs and benefits associated with foreign investment. The Report repeatedly stressed that "foreign direct investment has in the past played, and continues to play, an important role in Canada's economic development. Therefore, any sweeping arbitrary prohibitions would be bound to involve a substantial economic price."[21] Moreover, the focus could not be simply on the aggregate mix of costs and benefits but had to consider the individual investment as well:

> Each individual foreign direct investment, as well as foreign direct investment in the aggregate, involves a mix of benefits and costs. There may be scope for reducing the costs and benefits to Canada in particular cases where the foreign firm is prepared to settle for a lower return than that now available - albeit reluctantly - without being deterred from undertaking a new investment in this country or maintaining his present one.[22]

Although the Gray Report acknowledged that changing domestic policies and strengthening particular domestic capabilities could strengthen the benefit side of the foreign investment equation at the aggregate level, more would be required at the individual level and, accordingly, recommended a case-by-case approach. This was necessary because

> There is no way of determining without careful study, whether and to what extent any particular foreign direct investment may result in an increase in the level of Canadian economic activity and whether any increase is as great as it might be. Will it result in a sufficiently important contribution to the nation's growth and development, when considered against expectations and a reasonable assessment of potential? Will it create employment opportunities appropriate to the skills and aspirations of Canadians? Will it trigger events which either multiply or counteract its initially favourable impact? Only case-by-case analysis can provide an answer - in whole or in part - to those questions.[23]

The case-by-case approach to enhancing the benefits of individual investments should not be simply a passive exercise, a question of studying individual applications, however. The authorities involved should be empowered "to negotiate with the foreign firm, where this was practicable, to improve the

net benefits from proposed foreign direct investment; ... to seek through negotiations to secure for the economy, where feasible, the distinctive and valuable inputs from the foreigner by other means than direct investment - under licence, for example."[24] This was the third central characteristic of the recommended administrative intervention, its activist bargaining, negotiating role.

The fourth characteristic of the proposed intervention concerned a central constraint within which the case-by-case bargaining would take place, namely articulated policy guidance. The Gray Report stressed that administrative intervention should not be seen as "any kind of panacea" or "as a substitute for...more general policy instruments," such as fiscal, competition and commercial policies.[25] Elsewhere, the Report went further to emphasize the necessity of policy guidance for the bargaining. Such bargaining "would have to be guided by criteria or guidelines established by legislation",[26] and "should operate within the framework of the government's industrial strategy, to the extent that it is articulated...."[27] Moreover, it was important, the Report argued, that the bargaining "not operate on the basis of economically unsound incrementalism, but in accordance with the government's industrial strategy...."[28]

The final central characteristic was that intervention would not be comprehensive, but would be selective. This was repeatedly emphasized in the Gray Report. Intervention, to be manageable, should be restricted to the more important cases defined by "economic significance"[29] where "general and remedial policies would not work or were not sufficient."[30] This would require developing "a threshold of economic significance" on grounds of both economic policy and administrative feasibility.[31] Thus intervention should "concentrate on that relatively small proportion of foreign investments which are of greatest concern to Canada at any point in time,"[32] on "transactions of defined significance".[33] Investments which did not meet criteria of economic significance should not be reviewed or subject to bargaining.

These then were the central features of the Gray Report's recommendations for intervention by the Canadian government to screen and review new foreign investments in Canada. The process would seek to improve the benefit side of the cost-benefit ratio by bargaining, on a case-by-case basis with individual investors. Such bargaining, however, would take place within two major constraints. First, it would be guided by articulated policy guidance and secondly it would be highly selective, limited to only the economically significant cases.

There is one other aspect of the Gray Report from the perspective of its being a blueprint for the present process that merits comment. Attention needs to be paid to the arguments advanced for the particular institutional form of intervention, namely a government agency. Actually, this aspect breaks down into two issues. The first question is why an agency was favoured rather than employing a traditional departmental structure.[34] Secondly, we need to examine the reasons for making the proposed agency an advisory rather than a decision-making body. Both these issues are centrally relevant to the role of Cabinet as a regulatory authority.

The question of why the foreign investment screening agency should be created outside a department of government is not directly addressed by the Gray Report. There is, in fact, very little discussion of this aspect of the creation of what is now the Foreign Investment Review Agency in the Report, the principal references being to "an administrative agency responsible to a minister".[35] The report leaves unanswered the question of whether such an agency "should be assigned to a minister in the course of his departmental responsibilities or a minister of state."[36] However, interviews with key participants in the process have established that from the outset, the preference was for an

agency located outside of departmental structures and a number of arguments were advanced in support of such a preference. One of the most important, according to participants was that two obvious departmental candidates for administering the screening process were rejected as being too biased in favour of foreign investment. It was claimed that one, the Department of Finance, was only interested in foreign investment as a balance of payments problem, and for the department, it was not a problem. The other possible candidate, the Department of Industry, Trade and Commerce, was perceived as believing that the "only problem with foreign investment is there isn't enough of it." In addition, this department was rejected because of the well-advertised opposition of the incumbent Deputy Minister to any restrictions on foreign investment.

A more positive reason advanced for creating a non-departmental review agency was that many cases would not be directly relevant to a particular department such as the Department of Industry, Trade and Commerce. The issue of foreign investment transcends particular departments of government and, according to one figure, the present agency deals with at least seventeen departments.

There is a further reason advanced to explain, if not justify, the non-departmental status of the agency. This

reason relates to the expansion of the roles and responsibilities of agencies around the Prime Minister, namely the Privy Council Office and Prime Minister's Office, that was in process during the conception of the review agency.[37] According to this argument, a non-departmental status for the agency, especially given its limited size and its concomitant inability to call on the resources of a "parent" department would be a means whereby central agencies could attempt to ensure that they would maintain control of the process. Given the Gray Report's original recommendation that the Minister responsible for the review agency should make the decisions permitting individual investments with other Cabinet members assigned solely an advisory role and the final decision to make Cabinet the decision-maker and the responsible Minister the advisor, this argument has considerable explanatory power. This argument is further strengthened when it is appreciated that the precursor of the Foreign Investment Review Act, the Foreign Takeovers Review Bill (introduced in 1972) provided for a departmental official, not a separate agency, to process the assessment of applications.[38] When the Government was compelled to extend the scope for review to cover new investments as well as takeovers, it can be argued that this made it all the more imperative that the review process be less closely tied to departmental resources

and thus more amenable to central agency direction and influence.[39]

There is, finally, a fourth possible factor of relevance to the decision to create a non-departmental agency. Creating a separate agency, rather than a bureau or division within a large department, constituted a much more visible political act on the part of the Government. Such an action provided for a much higher profile for the review process and could be perceived as an important symbol of the Government's commitment to act in this highly controversial area. Moreover, a not insignificant aspect of the symbolic role for a non-departmental agency was that it could, and consequently would, act as a "lightning rod" drawing criticism away from the real decision-makers, the Government, by becoming itself the central reference point in debates on the policies and process for reviewing foreign investment. In conjunction with the second characteristic to be discussed below, namely the dependent, non-decision-making status, of the review agency, the Government thus could benefit from being seen to act as well as by creating an agency which could attract any potential criticism notwithstanding its lack of independence.[40]

The Gray Report did address the second question raised above with respect to the advisory as opposed to a decision-making role for the review agency. The Report

considered the idea that the review agency should have an independent decision-making capacity.[41] According to one of the authors of the Gray Report, although such an alternative "was politically attractive, because it would have taken individual decisions out of the Cabinet's hands", it was unacceptable for a number of reasons. As the Report argued, a decision-making agency "would require the government to delegate a substantial measure of responsibility for decisions which would have great importance to its overall industrial and commercial policies to an independent body."[42] The crux of this argument was that the factors involved in making decisions to allow or block individual foreign investments were

> ...basically policy oriented. It would have been unfair to ask a quasi-judicial tribunal to determine, for example, the significance of Canadian participation or the contribution of a particular investment to federal and provincial economic objectives. These are policy determinations which can only be made by a politically-oriented body.[43]

In contrast to this argument, however, it should be noted much of the work of other regulatory agencies involves many of the same types of policy determinations associated with reviewing foreign investment. Agencies in the fields of energy, transportation and communications are centrally involved in making political decisions, that is "choices between competing social and economic values and competing

alternatives for government action - decisions delegated to them by politically accountable officials."[44] While this fact does not invalidate this rationale for not delegating such decisions to the screening agency, it does suggest that additional factors may have played a role, especially since the Canadian system of independent regulatory agencies normally allows for some form of appeal to the Governor-in-Council (the Cabinet) against the decisions of such agencies. Such a provision permits, when employed, remedial action by elected authorities.[45] The fact that the National Energy Board model, which limits the agency to making recommendations to Cabinet rather than making decisions itself in several important regulatory areas, was also rejected, reinforces the assumption that other factors were more important.[46]

It can be argued that it was not so much the "policy-oriented" nature of the decisions but the controversial characteristic of those decisions which prohibited their delegation to an independent agency. Screening foreign investment involved decisions which for a variety of reasons could not be "taken out of politics". One was that the governing party continued to be sharply divided over the issue and, consequently, not prepared to surrender any significant degree of discretionary power to an independent agency. In addition, there were two basic opponents of such

delegation. The first were provincial governments. Several of them were opposed in principle to restrictions on foreign investment and all of them insisted that any decisions take into consideration provincial government as well as federal assessments and considerations.[47] Delegating such decisions to an independent agency would have been totally unacceptable to provincial governments. Provincial governments were increasingly being caught up in acrimonious disputes with other federal regulatory agencies such as the CTC and CRTC and it would have been totally unacceptable to them to have another set of decisions delegated to an independent body.[48]

The second basic source of opposition to delegating decision-making to an independent regulatory body was the business community. For several years prior to, and during the period of, the creation of FIRA, the business community was engaged in battle with the federal government over revisions to the anti-combines legislation. Although there were a host of reasons for this battle, a particularly crucial one was the proposal to create a Competitive Practices Tribunal with an independent decision-making capacity to regulate particular aspects of corporate behaviour.[49]

In short, while there is validity in the rationale that an advisory agency was necessary because of the policy considerations involved in screening decisions, it is clear

that the opposition of provincial governments and members of the business community, plus the divisions within the Liberal Government itself ruled the option of delegating decision-making to a tribunal. These considerations, plus the claimed desire of central agencies to control the process cited earlier, a desire not unrelated to a concern to avoid or control controversy, were central to the decision to create an advisory as opposed to a decision-making regulatory agency.

3. The Foreign Investment Review Act

In 1973, Parliament enacted the Foreign Investment Review Act which established the Foreign Investment Review Agency.[50] This was the second attempt to create a screening agency. The year previous, legislation had been introduced which provided, most notably, only for the review of foreign takeovers of existing businesses.[51] For our purposes much of the significance of this legislation rests in the extremely hostile reception it received from NDP members of Parliament.[52] The Bill, however, died on the order paper when Parliament was dissolved in September, 1972. After the general election held in October the Liberal Government was reduced to a minority position with the NDP holding the balance of power. The new legislation, introduced on January 24, 1973, clearly

reflected the new political situation.

There are four key aspects of the revised and enacted legislation that merit our attention, particularly with reference to our preceding analysis of the Gray Report.

The first has already been mentioned which is that the roles of the Minister responsible for FIRA and the Cabinet recommended in the Gray Report were reversed in the legislation. Under the Act, the Minister, while he would have some decision-making power, would advise Cabinet which would make the decisions on the key issue, namely to approve or block individual investments.[53] This change would significantly increase the workload of Cabinet.

The second major aspect of the legislation pertains to the statutory criteria to guide the review process. The Gray Report, it will be recalled, had, repeatedly, emphasized the importance of statutory guidelines for the review mechanism and had outlined some of the factors to be included.[54] The Foreign Investment Review Bill, as did its predecessor the Foreign Takeovers Review Bill, did not contain specific criteria but rather general statements of "the factors to be taken into account". The factors contained in the statute are not significantly different from the statutory guidance given most regulatory authorities.[55] The factors are five-fold:

> (a) the effect of the acquisition or establishment 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 business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;
>
> (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
>
> (d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
>
> (e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.[56]

During the parliamentary debate, a great deal of attention and criticism was directed at the generality of the criteria to be considered. Opposition members claimed that "the determination of significant benefit will be largely subjective",[57] that the criteria were "hazy and ill-defined",[58] that there were "no real criteria",[59] that those who make the decisions "will have a difficult time in deciding, with the myriad of guidelines to follow, what to do in any particular application."[60] Notwithstanding these criticisms, there was

no attempt made by Members of Parliament to make the criteria more specific by way of amendments.[61]

The Minister of Industry, Trade and Commerce acknowledged that the assessment criteria were general, but argued that "at this stage, precise standards for measuring acceptability cannot be spelled out." He went on to suggest that spelling out more precise standards will depend on experience with specific cases and that "particular decisions will lead to a body of guidelines." Most significantly, the Minister concluded by indicating that he hoped - "eventually" to be able to publish such guidelines.[62]

By far the most significant departure from the Gray Report found in the statute was that the process was to be comprehensive. Rather than being confined to "transactions of defined significance", the process would entail screening of all takeovers, all new investments and additionally all expansion by foreign companies into "unrelated" businesses. The Act does specify a threshold level - assets under $250,000 and annual revenues under $3,000,000 - which are so low as to not limit reviewable cases to those of "economic significance".[63]

The absence of a significant threshold is partly explainable by the opposition of the NDP to anything less than total review of foreign investments and partly, according to some participants, to the statutory drafting philosophy

then in vogue in the Department of Justice which placed great emphasis on the avoidance, at all cost and in great detail, of loopholes in statutes. Whatever the explanation, the review process would be required to handle a much greater caseload than was envisaged in the Gray Report.

The scope of the review workload was further complicated by the nature of the test to be employed in the determination of acceptability. In the Gray Report the emphasis was on improving the benefit side of the cost-benefit ratio of foreign investment and it was recognized even attempting to do so could be difficult. The statute imposed a very different and much more demanding test: the reviewable investment must be or likely be "of significant benefit to Canada". This test is the sole test of whether a reviewable investment should be allowed or rejected and by law must be applied to every case. Although this went beyond anything envisaged in the Gray Report, and was opposed by a number of groups during parliamentary committee hearings who advocated less demanding tests, the Government refused to change it, maintaining that the Act must be strict in order to ensure that foreign investments made genuinely significant contributions to the country.[64] Whether or not this has resulted, one direct consequence was to make an already expanded review process much more rigorous, at least in terms of the statutory requirements.

CHAPTER TWO

The Foreign Investment Review Process

1. Introduction

The purpose of this chapter is twofold. First, we describe the basic elements of the review process, emphasizing in this description the roles and responsibilities of the Minister responsible for the process and of the Governor in Council (henceforth Cabinet) as a whole. The second purpose is to identify the central problems that are raised by the nature of the process as it relates to the roles of the Minister and Cabinet. In doing so, we will not attempt a full analysis of the issues involved in each instance but will leave this to the next chapter where we will analyse and evaluate the FIRA process from the perspectives of both the individual sets of participants and criteria appropriate to the evaluation of regulatory processes.

For our purposes, it is useful to organize our discussion of the review process around two phases common to regulatory processes. The first is the "legislative" phase while the second is the "adjudicative." The former is the development and enunciation of general standards or regulations while the latter refers to the disposition of individual

applications, ideally guided by such standards and regulations. The "legislative" phase can itself be subdivided into procedural and substantive sections while the "adjudicative" phase, in the case of the review process can be subdivided into four phases. They are, first, the rulings process in which it is determined whether an investment transaction is reviewable, secondly, the assessment process, in which an application is assessed for significant benefit, thirdly, the decision-making process, in which the Minister and Cabinet decide to allow or disallow a transaction, and finally, the enforcement process, in which allowed investments are monitored to ensure that the investor's plans and undertakings are followed and in which disallowed investment proposals are watched to make certain that the investment does not take place. Although these phases are analyzed separately below, it must be recognized that substantial interrelationships exist among all four phases in the process. Accordingly, decisions within one of the phases can have ramifications in other phases. Where possible, examples of such interrelationships are provided below.

2. The "Legislative" Phase of the Review Process

"Legislative" powers are those which confer authority on officials to enact general rules or regulations which are

applicable to classes of applicants. As mentioned, it is useful within the legislative category to distinguish between regulations of a procedural nature and those of a policy nature, that is those which define, clarify or, indeed, develop the objectives of the statute. These are admittedly broad categories but their utility, allowing for some gray areas, has been generally conceded.

Under the Foreign Investment Review Act there are three sections which fall under the "legislative" rubric. The first is S.3(3)(a)(iii) which confers on the Minister authority to prescribe terms and conditions governing acquisitions of shares in Canadian companies by venture capitalists. More generally, S.4(2) empowers the Minister "to issue and publish, in such manner as he deems appropriate, guidelines with respect to the application and administration of any provision of this Act or regulation made pursuant to this Act." Finally, there is an omnibus section (S.28) which allows the Cabinet to "make regulations prescribing anything that, pursuant to any provision of this Act, is to be prescribed by the regulations."

Under these provisions, the Cabinet has issued a set of regulations "respecting the acquisition of Canadian business enterprises and establishment of new businesses in Canada." These regulations specify the information to be filed in a

notice under the Act.[1] The Minister has similarly issued guidelines concerning "real estate businesses",[2] "acquisitions of interest in oil and gas rights",[3] "related business",[4] and "corporate reorganizations"[5] as well as, under Sec. 3, "terms and conditions for the venture capital exemption."[6]

The most important aspect of these regulations and guidelines is that they fall primarily in what we define as the procedural category. They are mainly definitional in nature prescribing who must comply with the requirements of the statute and what they must accordingly do in the review process. Such regulations have had minimal policy content although it has been argued by some observers that some of the guidelines are more than simply procedural. One writer, for example, has noted that it is possible to read the guidelines concerning corporate reorganizations "as extending the statute in a case where in the absence of the guideline there would be no need to submit the matter to the review process."[7] Similarly Herb Gray, then a backbencher, was reported as stating that the definition of "related" business was "so loose that virtually every project could be classified as such."[8] In the absence of judicial pronouncements on these questions, however, it is virtually impossible to answer conclusively if these are "administrative amendments" to the Act and, thus policy or substantive regulations.

The concern with policy guidelines and regulations is an important one. It will be recalled that, when the legislation was before Parliament, opposition Members expressed considerable concern about the vagueness and subjectivity of the criteria that were to be employed in the determination of significant benefit of investments. The Minister acknowledged the validity of such concerns and promised that, with experience in the application of the Act, it might be possible to "flesh out" the criteria with more detailed statements of policy guidelines for the interpretation of "significant benefit". Such statements have not, after six years, emerged.

A number of reasons have been advanced to account for this. One is that invoked when the legislation was before Parliament, namely the inherent complexity of the scope of the act which even six years of experience cannot overcome. More significantly, the Gray Report in its argument for policy guidance for intervention placed great emphasis on the development of an industrial strategy by the government. Such a policy has not emerged and critics suggest its development is improbable, if not impossible.[9]

Aside from these reasons, some suggest that the process of policy articulation has been abysmal and that to expect such articulation is a "pious hope."[10] According to this

perspective, there are no incentives and several disincentives for either the Minister or Cabinet to articulate policy openly. The disincentives are the targets such statements offer for criticism - "they are something for the critics to shoot at." Cabinet does not provide policy statements because they do not want to face issues nor constrain their freedom of movement. Cabinet members, according to this argument, perceive the option of issuing policy statements in terms of a zero-sum game in which they can only lose.

This is not to argue, however, that policy guidance has been completely absent. There are, in fact, three ways in which guidance and direction have been given to, or at least taken by, FIRA to aid the agency and its officers in the reviewing and advising process. The first method is by Ministerial statement through speeches in the House or press releases. In October 1974, for example, the Minister responsible for FIRA reminded the House of Commons of the Prime Minister's election promise that "the Liberal Party of Canada sets as its objective that new, major projects in the natural resources field should have at least 50 per cent, and preferably 60 per cent, Canadian equity ownership."[11] He went on to suggest this policy should apply to fishing, forestry, petroleum (oil and gas), mining and pipelines. Although this statement came during a debate in the House and

was not followed by the issuance of guidelines by the Minister or regulations by Cabinet, it was taken as authoritative and employed by FIRA in negotiating with affected applicants.

To cite another example, although the statement was made before the Act was passed by Parliament, in negotiations on proposals to acquire the company which owns the Canadian assets of the Ambassador Bridge between Windsor and Detroit, FIRA uses a policy statement issued by the Secretary of State for External Affairs in reviewing proposals to acquire the Canadian company.[12] A third example of policy guidance for FIRA is provided by a February 1977 press release by the Minister of Fisheries which stated "for 1977 the federal government will approve no joint ventures between Canadian and foreign fishing interests in the new 200-mile zone that involve foreign capital investment."[13] A final example is provided by a reply to a question in a Commons Standing Committee about possible changes governing real estate transactions. The Minister replied by stating that "the criteria in the act do not readily lend themselves to rental real estate transactions, except for one particular criterion...which concerns itself with the compatibility of a transaction with national economic objectives and provincial industrial and economic policies. Recognizing the importance of rental accommodation

at a reasonable cost today, we have decided that the main thrust of those criteria will bear on that last item that I have just mentioned."[14] In subsequent applications involving real estate transactions, FIRA followed the thrust of this statement although, as we shall see below, in a somewhat revised form.

FIRA also obtains guidance from Cabinet and from the Minister by way of comment on individual applications. During Cabinet consideration of applications, policy matters may arise that hitherto have not been addressed, with the result that FIRA will draw inferences about particular objectives or considerations to bear in mind when screening similar applications. Given the nature of the confidentiality of Cabinet discussions, we are unable, however, to provide concrete examples of this practice.

The third way in which the agency obtains policy direction is through interdepartmental consultation within Ottawa. The Act specifies that, in the determination of significant benefit, one factor is the compatibility of the investment "with national industrial and economic policies." One interpretation of this factor given by the Agency is that this necessitates consultation with relevant departments within Ottawa. There have been occasions when, in the

absence of articulated policies, and confronted with contradictory advice from individual departments, the agency has had to convene an interdepartmental meeting of policy-makers, or more accurately, their advisers, to hammer out appropriate understandings on approaches to take in future negotiations. As in the case of Cabinet direction, given the confidential nature of such activities, these "undertakings" remain internal to the Government and we cannot cite specific examples.

There are obvious, readily apparent problems with the preceding methods of providing policy direction to the Agency, some of which are specific to individual methods while others are more general. One problem is that policy guidance by press release or ministerial speech can often amount to no more than policy signals or cues and can possibly result in conflicting statements.[15] Although we cannot cite instances of this occurring, it will be recalled that in the four examples cited above, there were three ministers individually involved. It is difficult to determine, especially when the designated Minister is not the source, why a statement by other ministers is authoritative. A second problem when policy is not authoritatively established by way of guidelines or regulations is that the message can be garbled in transmission. This appears to have been the case with respect to the example cited above concerning real estate transactions. In contrast to his reply in committee, the Annual Report of

FIRA issued by the Minister states that "transactions involving rental real estate were being assessed in the context of the government's objective of encouraging the availability of rental accommodation at reasonable cost and that, since most acquisitions of rental real estate were likely to be compatible with that objective, they would generally be regarded as offering significant benefit to Canada and thus allowed."[16]

The problems with existing methods of providing policy direction go beyond those of mechanics. The most serious issue arising from Cabinet and departmental guidance methods are their informal, unofficial nature. There is no public notification to interested parties unless they have privileged access to policy-makers. These methods, thus, raise issues not only of the efficiency but of the legitimacy of the present system. We shall return to this question in the next chapter.

3. The "Adjudicative" Process

In this section we describe the four phases of the "adjudicative" stage of the review process with the emphasis on the roles and responsibilities of the Minister and Cabinet in the individual phases. To reiterate our earlier point, we will not analyze extensively these roles but will identify the major issues which will be central to our evaluation in the next chapter.

TABLE 1

RESOLVED CASES, 1974-1979

	1974 April 9 to Dec. 31	1975	1976	1977	1978	1979	Total
Acquisitions							
Allowed	33	116	124	231	282	320	1,106
Disallowed	8	21	19	12	28	24	112
Withdrawn	9	27	17	10	17	28	108
Total	50	164	160	253	327	372	1,326
New Businesses*							
Allowed	-	-	115	297	273	322	1,007
Disallowed	-	-	9	12	21	22	64
Withdrawn	-	-	20	25	25	28	98
Total	-	-	144	334	319	372	1,169
All Cases							
Allowed	33	116	239	528	555	642	2,113
Disallowed	8	21	28	24	49	46	176
Withdrawn	9	27	37	35	42	56	206
Total	50	164	304	587	646	744	2,495

* New Business provisions of the Act did not come into force until October, 1975. While some cases were submitted in the calendar year 1975, none of these cases were resolved in that year.

Source: Foreign Investment Review Agency

Before turning to our description of the process, it might be useful to provide information on the workload of the adjudicative process. Implementation of the Act took place in two stages. The first commenced in April of 1974 and covered only foreign acquisitions of Canadian businesses. This stage was governed by the threshold described in the preceding chapter. The second stage, which extended the scope of the review process to cover new businesses, commenced in August of 1975. At this time the previously mentioned threshold applied only to those transactions involving the acquisition of a related business by an existing foreign-controlled company in Canada. This meant that, henceforth, except for this rather minor exception, all foreign investments regardless of size had to be reviewed. Between the proclamation of the Act on April 9, 1974 and December 31, 1979 (the latest date for which figures are available) 1,326 acquisition applications were received by FIRA. The reviewing of new businesses between October 1975 and December 1979 has led to an additional 1,169 cases. In total, therefore, the process has had to process 2,495 separate applications by foreign investors in Canada between the date of its proclamation and December 1979. Table 1 provides a breakdown on an annual basis of investment for this five year period.

The process is made more complex by several factors. First, the applicants are from different countries, as detailed in Table 2, each having its own way of carrying out business and each accustomed to certain types of relationships with governments. Therefore, the country of the applicant has a significant impact on the way negotiations are carried out. The applicants of some countries will be straightforward in their relations with the Agency, presenting close to all their full plans and undertakings early in the process. Applicants from other countries, meanwhile, approach negotiations as a chess game, with each move of the Government side being responded to be a single well-thought-out move by the applicant.[17]

A second factor is the type of investment which the applicant intends to carry out. An acquisition proposal will generally have more ramifications than a new business proposal, as there may be a loss of Canadian ownership and "significant benefit" may be more difficult to prove. The way an acquisition application is treated will also depend on the status of the vendor. Identical applications, one for the acquisition of a strong company and the other for the acquisition of a financially-troubled company, may end with two very different results, especially if the weak company is on the verge of failing. Therefore, not only the applicant's future plans are of importance to the final

decision but so the existing situation of the company being acquired.

The third and probably most significant factor which contributes to the complexity of the process is the diversity of industries which are involved. Tables 3 and 4 provide information on this diversity of reviewable cases for acquisitions and new businesses respectively. Unlike other federal regulatory authorities who develop or administer policy for one industry, the Act applies to almost all sectors of the Canadian economy, some of which Governments have articulated policies and some of which there is none. For each industry, and indeed often for each subindustry, it is necessary to place different weights on the separate criteria of the Act. This industry weighting superimposed on the individual circumstances of the case creates a decision making situation likely more complex than any faced by our other regulatory authorities.

What must be recalled is that unless an application is withdrawn, the Minister must, by law, review and recommend disposition of the application and the Cabinet must make a decision on each individual case. By law, neither of these responsibilities can be delegated although, as we shall see, Cabinet decision-making can assume various forms. These may approximate in some cases delegation, depending upon the

TABLE 2

SUMMARY OF RESOLVED CASES BY COUNTRY

April 9/74-Dec. 31/79

Country	Acquisitions	New Businesses	Total	% of All Cases
United States	874	643	1,517	60.8%
United Kingdom	182	112	294	11.8
West Germany	63	83	146	5.9
France	35	53	88	3.5
Switzerland	33	40	73	2.9
Other Western Europe	84	120	204	8.2
All Other	55	118	173	6.9
TOTAL	1,326	1,169	2,495	100.0%

Source: Foreign Investment Review Agency

TABLE 3

ACQUISITIONS

REVIEWABLE CASES

Distribution of Targets by Principal Economic Activity (1)
From April 9, 1974 to December 31, 1979

INDUSTRY	Number of Targets	% of Total
Agriculture	16	
Forestry	6	
Fishing and Trapping	2	
Mines, Quarries, Oil Wells	103	
TOTAL RESOURCES	127	8.8%
MANUFACTURING		
Food and Beverage	68	
Tobacco Products	2	
Rubber and Plastic Products	28	
Leather	5	
Textiles	18	
Knitting Mills	5	
Clothing	9	
Wood	30	
Furniture and Fixture	16	
Paper and Allied	13	
Printing, Publishing and Allied	15	
Primary Metal	21	
Metal Fabrication	75	
Machinery	78	
Transportation Equipment	44	
Electrical Products	69	
Non-Metallic Min. Prod.	37	
Petroleum and Coal Prod.	5	
Chemical	78	
Miscellaneous	54	
TOTAL MANUFACTURING	670	46.5%
Construction	16	
Trans. Communication and Utilities	50	
Trade	359	
Finance, Insurance and Real Estate	78	
Community, Business and Personal Services	140	
Unspecified	-	
TOTAL CONSTRUCTION & SERVICES	643	44.7%
TOTAL ALL INDUSTRIES	1,440	100.0%

(1) Where there are two or more targets involved in a single transaction, the industry activity of the target with the largest asset size is used to determine the principal economic activity of that transaction.

Where a target is fully integrated, the primary activity of the target is used to determine the principal activity of the target.

Source: Foreign Investment Review Agency

TABLE 4

NEW BUSINESS

REVIEWABLE CASES

Distribution of New Business Cases
by Principal Economic Activity
From October 15, 1975 to December 31, 1979

INDUSTRY	Number of New Businesses	% of Total
Agriculture	9	
Forestry	5	
Fishing and Trapping	1	
Mines, Quarries, Oil Wells	62	
TOTAL RESOURCES	77	6.2%
MANUFACTURING		
Food and Beverage	27	
Tobacco Products	--	
Rubber and Plastic Products	21	
Leather	2	
Textiles	13	
Knitting Mills	2	
Clothing	11	
Wood	13	
Furniture and Fixture	10	
Paper and Allied	3	
Printing, Publishing and Allied	9	
Primary Metal	16	
Metal Fabrication	44	
Machinery	47	
Transportation Equipment	17	
Electrical Products	27	
Non-Metallic Min. Prod.	15	
Petroleum and Coal Prod.	--	
Chemical	22	
Miscellaneous	63	
TOTAL MANUFACTURING	362	29.2%
Construction	34	
Trans. Communication and Utilities	38	
Trade	461	
Finance, Insurance and Real Estate	52	
Community, Business and Personal Services	216	
Unspecified		
TOTAL SERVICE AND CONSTRUCTION	801	64.6%
TOTAL ALL INDUSTRIES	1,240	100.0%

Source: Foreign Investment Review Agency

application. Whatever the nature of the individual process, the preceding figures provide a rough index of the onerous workload that the review process places on FIRA, the Minister and the Cabinet. Some of the problems related to the process, as we shall see, can be directly traced to the scope and complexity of the process.

a) The Rulings Process

Central to the foreign investment review process is a simple distinction between those investors who can, and those who cannot acquire a company in Canada or establish a new business unrelated to an existing Canadian business without scrutiny. Those who fall into the latter category are by statute designated as "non-eligible persons" (NEPs). What must be emphasized is that such persons are not ineligible to invest but that they are ineligible to invest without scrutiny and allowance from Cabinet. Although there are many complexities involved in the determination of whether or not one is a "non-eligible person", for purposes of this paper, we need only focus on the process by which such decisions are made.

There are five basic types of rulings decisions related to reviewability which involve the interpretation of the most essential parts of the Act. They are:

(i) whether a company or an individual is a "non-eligible person";

(ii) whether there is an "acquisition of control";

(iii) whether the business being acquired is a "Canadian business enterprise";

(iv) whether there has been "the establishment of a new business"; and

(v) whether a new business is "related" to an existing business in Canada.

The procedural guidelines discussed in the preceding section have been issued to assist investors and their legal counsel in interpreting these definitions.[18]

Notwithstanding the detail provided in the Act and the existence of these definitional guidelines, in many instances it may not be immediately clear that a particular investment is reviewable. Consequently, FIRA is often approached by potential investors to determine if their planned investment is subject to review under the Act. There is, however, no statutory authority for the offering by the Agency of opinions on reviewability. Although the Agency does provide them, in fact it provides over 400 a year, such opinions are offered solely as a guide to the investor and are in no way binding on the Minister. In other words, even after an Agency opinion that a transaction is not reviewable, the Minister still has the option to require an investor to file an application if

he concludes that the proposed investment is reviewable. Similarly, even if the Agency gives an opinion that a planned investment is reviewable the Minister is not bound by such an opinion. Although it is impossible to confirm, because of the confidentiality governing communications between the Agency and the Minister, it was reported that the Agency considered the acquisition by General Steel Wares and Canadian General Electric of Westinghouse Canada Ltd. to be reviewable but the Minister rejected such an opinion.[19]

It is only the Minister, under S.4(1), who can give binding opinions on whether a potential investor is a "non-eligible person" or whether a transaction is reviewable. In fact, the Minister is required by this section to give such opinions upon request. Such opinions are binding on the Minister for a period of two years provided that all material facts have been disclosed and the facts remain substantially unchanged for that period of time. On average, there have been 28 applications per year for ministerial opinions. The vast majority of these have been for a ruling on whether an investor is a "non-eligible person". It should be emphasized that the Minister alone makes the decision.

There is another responsibility that the Minister must perform under the Act, although to date it has not been onerous. Under S.8(3), where a "non-eligible person" is

involved in what is deemed to be a reviewable transaction but does not comply with the Act, the Minister is empowered to insist that the Agency be notified and the transaction be reviewed. To date, there have been only four occasions in which the Minister has found it necessary to issue such demands, although the threat to do so has frequently resulted in compliance.

b) The Assessment Process

When it is clear that a case is reviewable, the investor is required to submit an application which describes his existing business and the new business or, in the case of an acquisition, the business being acquired. The application is sent to the Assessment Branch of the Agency and the process of assessing significant benefit begins. Before we turn to a description of the nature of this process, several points should be made. The first is that FIRA plays its most important roles during the assessment process. Secondly, it is important to emphasize that the assessment process per se should not be narrowly construed for it involves a number of fundamentally important functions. One is aiding the applicant in the preparation of the best possible offering of significant benefits and a second is advising the Minister and through him the Cabinet as to whether or not the Agency believes that the significant benefit goal has been or will be satisfied by the applicant. The third function of this

process is consulting with relevant federal departments and provincial governments. (Another feature of the consultation process involves "third-party" representations that we shall discuss in a subsequent section of this chapter.)

Finally, the fourth function of the assessment process is bargaining or negotiating with the applicant to obtain as many benefits as possible for Canada from the investment. It should be noted that while the Act does not specify a bargaining role for the Agency as part of the assessment process, its statutory purpose being merely "to advise and assist the Minister in connection with the administration" of the Act, the Gray Report and, more importantly, the Government during parliamentary debate clearly envisaged that such a role would be central to the review or screening process.[20]

There are, at present, two basic procedures employed in the assessment process, around which we can organize our discussion. One is the "standard procedure", which is the more involved and complicated, while the other is the "small business" procedure, which is a significant modification of the first, developed to aid the Agency and Cabinet to cope with the workload of the screening process.

1. The Standard Procedure

The assessment process under this procedure commences when the applicant has satisfactorily filed the appropriate

documentation with the Agency. Under this procedure, the information requirements are quite extensive, involving information related to the applicant, the "target", (i.e., the company to be acquired or proposed investment) and most importantly, the plans the applicant has for the "target" once acquired or established. The demands with respect to this last point are extremely extensive, for the Agency recommends that the applicant "provide a complete and detailed account of all plans relating to the Canadian business enterprise including any changes planned in the conduct of or for the Canadian business enterprise and the time of execution of such plans or changes."[21] The Agency has indicated that it is particularly interested in information concerning the following:

- plans for expansion, modernization, relocation, or closing down of any existing facilities;
- employment, marketing of principal products or services;
- new products;
- sourcing of products, materials, parts, components, and services; and
- plans for Canadian participation in the management, control and ownership of the Canadian business enterprise.[22]

In its Guide, the Agency advises applicants that "such plans or changes will be taken into account in assessing significant benefit."[23] (emphasis in original)

For those applicants which follow this procedure, there are three phases which are consultation, negotiation and evaluation/recommendation. All three are principally, but not exclusively, assigned to officers in the Assessment Branch. Although we shall describe them separately, it should be appreciated that the individual phases overlap considerably, particularly the consultation and negotiation phases.

The consultation phase involves consultation on each application with provincial governments and federal departments. It will be recalled that the FIR Act stipulates that among the factors to be considered in the determination of significant benefit is "the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment." In addition, the Act requires that the Minister and Cabinet must consider in their review of individual applications "any representations submitted... by a province that is likely to be significantly affected by the proposed or actual investment...."[24] Although the first requirement refers to "enunciated provincial policies", the Agency has interpreted both these sections as imposing upon the Agency, not simply taking into consideration relevant

policies but consulting with relevant provincial authorities on each application. This has been made necessary because of the absence in many, if not most, instances of enunciated provincial policies. With respect to the provision requiring that applications be assessed with regard to their "compatibility...with national industrial and economic policies," a similar articulated policy vacuum has forced the Agency to seek the advice of relevant departments on each application. As we shall point out below, this "mandated" consultation process gives both provinces and federal departments considerable influence in the review process.

To satisfy the consultation requirement, the entire application containing the information described above is sent to contacts in affected provincial governments, while a summary sheet is sent to federal departments with the appropriate policy responsibility. Provincial contacts are usually in the departments such as Industry or Economic Development. It is the responsibility of these contacts to inform any departments within their provincial government that may have some interest in the application. Within the federal government, the Department of Consumer and Corporate Affairs is informed of all standard procedure cases for comment on the effect the investment might have on competition. The Department of Industry, Trade and Commerce, as the

Department most responsible for industrial policy, receives the majority of cases.

In theory, provincial governments and federal departments are asked only to express an opinion on whether the investment is compatible with appropriate economic policies, but, in addition to doing so, they often provide opinions about the degree of significant benefit in the investment. A few provinces, in fact, according to some sources, appear to have established unofficial parallel screening processes which can contribute to delays in the disposition of cases. It should be noted that applicants are free to contact directly any province or federal department to defend their proposals. This occurs more frequently with the provinces than with federal departments.

In the consultation process there appears to be little conflict. A FIRA survey, for example, showed that in over 97 per cent of resolved cases the final decision to allow or disallow a particular transaction was in agreement with the opinion expressed by the province or provinces consulted. Although no similar survey has been undertaken, FIRA officials claim that the agreement rate with departmental opinions is comparable. Indeed the agreement rate may be even higher because in the 3 per cent of cases where there was disagreement, in almost one-third of them, more than

one province was consulted and the opinions offered were not in agreement with each other.

There are several reasons for the low rate of disagreement between the provincial governments or federal departments and the Agency. First, and likely the most important, is the tendency for all concerned to support investment and growth in the economy. This leads to a bias in most cases to supporting allowance of applications. Secondly, many of the responses are neutral ("not incompatible with" or "not opposed to"), leaving no possibility for substantive disagreements. Thirdly, when disagreements do occur, since the Agency places a high priority on developing a consensus for its recommendations, it will attempt to reconcile any differences that occur. If a province or department suggests that it might be in favour of an investment or, at least, not opposed, if a certain undertaking is obtained, such an undertaking from the applicant will usually be sought actively by the Assessment Officer. One of the reasons the Agency places a priority in obtaining provincial and departmental agreement is that the Minister as well as the Cabinet is informed of the results of the consultation process.

The negotiation phase commences with discussions between an Assessment Officer and the applicant. The basis

for these discussions are normally the Officer's analysis of the application supplemented by preliminary oral comments from provincial and federal departmental contacts with their formal replies integrated into later discussions. It must be emphasized that in these discussions, the purpose is not simply to evaluate or assess the application. The basic purpose is to negotiate or bargain with the applicant to obtain additional concessions or "undertakings" in order to improve the benefits package of the investment. In negotiating with applicants, the Assessment Officers are limited to bargaining in terms of the five factors listed in the statute. However, given the very general nature of those factors, it is obvious that they have considerable discretionary scope within which to conduct the negotiations and seek concessions.

Once these negotiations have been completed, the next stage of the assessment process occurs, which is the Agency's evaluation of the application and the preparation of a memorandum for the Minister and, if he agrees, for Cabinet. The degree of detail of the memorandum depends on the size and importance of the case (as will be discussed in the next section). The memorandum usually includes a recommendation to allow or disallow. In a very few cases a year, the Agency, because of the uniqueness or sensitivity of a particular application, will not include a recommendation

but will limit itself to outlining the reasons on both sides for allowance or disallowance. With the assessment process completed the application then moves to the political level of Minister and Cabinet where the decision to allow or disallow is taken. Before we turn to a discussion of that process, the other assessment procedure must be described.

2. The Small Business Procedure

In order to handle the workload of the review process, in March 1977, a new "streamlined" procedure was introduced for those investments involving less than $2 million in assets and less than 100 employers. Under this procedure, applicants provide substantially less information and the consultation and negotiation phases of the standard procedure are substantially amended. Approximately 78 per cent of all investment proposals are under the threshold levels of the small business procedure, although simply being under the threshold does not guarantee that this procedure will be employed. In fact, a large proportion, roughly 33 per cent, of all small business applications are "bumped", for reasons discussed below, and required to comply with the requirements of the standard procedure.

Under this procedure, the consultation process is significantly shortened. The Agency notifies the affected

provincial governments and federal departments and they are to inform the Agency within 48 hours if they are to inform the Agency within 48 hours if they have any concerns about the investment or if they require more information. If either provincial governments or federal departments express concern that cannot be immediately resolved, it is the policy of the Agency to recommend to the Minister that the applicant be required to submit the standard form.

There are really no significant negotiations under this procedure. The Assessment Officer may contact the applicant for further information or may request obvious commitments if the investment is allowed. However, under this procedure, the Minister has only ten days to decide whether the information provided will be sufficient to enable him to recommend that the investment be allowed or "bumped" and this effectively rules out negotiations. It should be noted that as a rule there are no disallowances of investment under the small business procedure only "bumping" or requiring applicants to follow the standard procedure. The bumping usually occurs when a provincial government or federal department expresses concern. This occurs, as indicated, in roughly one-third of such applications. If the application is not "bumped", then normally no more than a week will pass between submission of the completed application and the recommendation to the Minister that the application be

allowed.

There is a fundamental aspect of this procedure that distinguishes it from the standard procedure. The Act clearly stipulates that for an investment to be allowed it must be of "significant benefit" to Canada. The Agency must determine if this has been satisfied before it can make a recommendation to the Minister. In the case of most small business applications , however, it has been decided that this test is not practical or possible. It is argued that such investments are so minimal in size that no benefits of real economic significance can be identified. For these cases, it appears that the "significant benefit" test really becomes a "no detriment" test (although this has never been admitted to by any government official). Although consistent with what was envisaged in the Gray Report with its emphasis on meaningful thresholds, the use of this "no detriment" test may be contrary to the statute.

There are three problem areas that are associated with, although not exclusively so, the assessment process, particularly when the standard procedure is employed. The first is that a very high degree of discretion is exercised by FIRA officials in the negotiating process. While it is true that FIRA does obtain policy guidance from parliamentary statements

and the other methods described above, from intergovernmental and interdepartmental consultations and from the experience with prior applications which have gone before Cabinet, it is generally acknowledged that the amount of such guidance has been minimal. Indeed many would agree with the assessment of one participant that the degree of public policy articulation, which was promised with experience, has to date been "abysmal". This has had a number of consequences. One is that, with little guidance as to the trade-offs between different policy objectives, FIRA officials are given considerable discretion in their negotiations and assessment of applications. Secondly, contrary to the Gray Report's intentions, bargaining has indeed become "a substitute for...more general policy instruments."[25] Thirdly, it can be argued that the Act consequently cannot be used to its utmost advantage. The Commissioner of FIRA noted in a newspaper interview that "the applicants are more inclined to agree to undertakings which have their basis in enunciated industrial policies. If these policies are not clearly enunciated, the scope for effective use of the screening process in improving benefits to Canada is lessened." [26]

Aside from effectiveness, there are other significant consequences. As the majority of policy guidance is internal to the Government, the system appears to the outsider, especially the investor, as totally ad hoc. When the Act was

introduced, one of its claimed virtues was that it would end the ad hoc approach that had previously existed when the Government had had to respond to the takeover bids for companies such as Denison Mines or Home Oil. Yet, in the eyes of many, the contrary has occured and the FIRA process has institutionalized "ad hocery", with the concomitant emphasis on incremental benefits. The flexible nature of the criteria, the failure to define in more detail those criteria, coupled with the secrecy of the process, have all encouraged such a development. It can be argued that the process is not as ad hoc as it appears to outsiders, because FIRA officers have not only the statute and policy statements but also the Cabinet and interdepartmental policy "understandings", discussed above, to guide them. The fact remains, however, that for those outside the process including investors, unless they have been so unwise as to not choose members of the FIRA Bar, i.e. those who specialize in the process and who may be more aware of "understandings" and informal criteria, to aid them in the review process, the process is highly ad hoc.

This aspect has serious consequences for investors who, in the words of one central participant, have "no idea of what it expected of them other than the motherhood objectives in the Act." Insofar as the standards that guide

decision-making are not known and, additionally, as detailed precedents are not known (because of the information disclosure practices employed, which will be discussed below), applicants and potential applicants face fundamental uncertainties in the review process.

Two analogies have been suggested as best characterizing the present process. For one governmental participant, the negotiating process is akin to a game of water polo in a lake: the absence of specified boundaries results in a situation wherein at some point participants get tired and simply decree an outcome. The other analogy likens the review process to playing football on a soccer field: there are outside boundaries with appropriate end zones but no rules governing how the game is to be played.

Whatever the utility of either analogy, one of the central characteristics of the assessment process is a high degree of ambiguity and confusion. These characteristics lead us to the second problem associated with the assessment process, that of the length of time it takes. When the Act came before Parliament, it contained what the Minister called a "fail-safe mechanism", originally 90 days but subsequently amended to 60 days, wherein if no decision was reached by the Minister and Cabinet, the application was deemed to be approved.[27] This mechanism is found in Section

13 of the FIR Act which provides that, unless the application has been denied by Cabinet, after 60 days have elapsed, the application is automatically allowed. The only other qualification was if the Minister, within 60 days of the full application having been filed, was unable to complete an assessment or to make a recommendation to the Cabinet or to recommend allowance, he could inform by notice the applicant of this situation and advise him of his right to submit "such representations or further representations in connection with the matter as he or they see fit."[28] According to the Minister, the purpose of this 60-day provision was "to try and protect the interests of the investors, so there is no indefinite period whereby this thing could be delayed forever."[29] While it is true that applications have not been delayed "forever", the so-called "fail-safe mechanism" has certainly not worked in the way that it was defended before Parliament.

The 60-day limit has proven to be unworkable and the real "fail-safe mechanism" is not the automatic approval mechanism but the provision empowering the Minister to give notice to inform the applicant of his "right" to make further representations. The effect of this provision is, in effect, to stop the clock which, "effectively permits the Agency to prolong the review period without any further limitation."[30] The importance of this provision can be demonstrated by two

facts. The first is the average number of days it takes to complete review of applications. Table 4 provides information on length of the process.[31]

TABLE 4

Average Number of Days
To Process Standard Procedure Cases

1976	100
1977	80
1978	90
1979	120

What is equally important is the second fact related to delays in the review process which is that, while less than 5 per cent of all cases have been approved by virtue of the claimed "fail-safe mechanisms", 75 per cent of all standard procedure cases require the issuance of S.11(1) notices.

Several reasons have been advanced by participants in the process to account for its unexpected length. According to Agency personnel the primary causes for the delays are three-fold. The first is the slowness of investors in filing requested information, their unwillingness to provide initially substantial undertakings, and their subsequent slowness in responding to agency suggestions during the assessment process for further undertakings. The second is the tardiness of provincial governments and federal departments in providing the Agency with their opinions on the investments

which, it will be recalled, the Agency is required by statute to solicit and take into account in making assessments. The third places some responsibility for the delays on "third party" representations to which the Agency feels compelled to respond. Overarching these particular reasons are two more general ones, namely the reduction of agency staff in the last three years or so coupled with the increased number of cases that must be reviewed.

The investors, not unnaturally, place much of the blame for the length of the process on the Agency. A common position is that the Agency is far too demanding in the information they require from applicants and that satisfying such demands is highly time-consuming. With respect to criticisms concerning applicant behaviour on undertakings, applicants advance several explanations. The first is that given the vague nature of the statutory criteria they really do not know what will or will not be acceptable. There are no firm guidelines for them but rather what they perceive to be simply "shopping lists" for the Agency. Coupled with this is the fact that so little is known about the reasons for decisions on individual cases that they cannot look to results for precedents to guide them. (We shall discuss this aspect below.) Coupled with these arguments is the recognition that the review process is a bargaining process and the concomitant assumption on the part of investors that

whatever "undertakings" are offered the Agency will ask for more. Naturally, therefore, they hold some undertakings in reserve in order to satisfy the "bargaining game."

Although some participants focus on the assessment process as constituting the largest component of the delays and do not see the Cabinet decision-making stage as a significant factor in causing delays, it might be noted that at least in 1979 and 1980 for limited periods, the latter appears to have been a factor. The reasons in these instances were the elections in 1979 and 1980 and subsequent changes of government. With respect to the elections, backlogs inevitably develop because of other demands and in 1979 at least, the presence of a new government not familiar with the process not unnaturally further delayed the process at least in the first few months of its tenure.

The third major problem area in the assessment process involves the consideration of third party representations -- representations by individuals or groups not affiliated to the applicant or to a consulted government. These representations are not solicited by the Agency, which is unable, because of the secrecy provisions of the Act, to even release the names of the applicant or the Canadian business being acquired. If there is an attempted acquisition of shares on

the stock exchange, then the application is a matter of public knowledge and third party representations are often made. If it is a sale of a private company or a new investment which the applicant has kept confidential, few such representations are made. In this situation, the representation is usually made by a competitor or employee group who has heard rumors about a proposed acquisition.

When the Agency receives a representation from a third party, a letter is sent out thanking him and inviting him to supply further information when and if he wishes. No details of the case can be released to a third party and indeed, if the applicant has not stated so publicly, the existence of a case before the Agency cannot even be acknowledged.

The most significant types of third party representations are those from alternative Canadian buyers. Any serious Canadian buyer is asked by the Agency for his plans for the target company. Although there is no legal requirement for the Canadian to divulge his plans, the Agency feels that having competing plans allows them to judge more accurately the extent of significant benefit of the application. If deemed useful by both parties, the alternative Canadian buyer will be invited to the Agency to discuss in more detail his plans. However, a competitive bidding situation with

respect to to significant benefits does not arise. This is because the applicant is not informed that an alternative Canadian buyer exists, and the alternative Canadian buyer is not told what the applicant has offered. Each presents its best plans to the Agency which weighs both proposals. Of course, the alternative Canadian buyer has the inherent advantage of being Canadian, although this advantage may be tempered by the fact that while the undertakings of the applicant are legally enforceable, the plans of the alternative Canadian buyer are generally not.

If the plans of the alternative Canadian buyer are expressed in enough detail, the Agency will show the competing plans side by side in the memorandum to Cabinet. This allows the Minister and Cabinet to compare the relative merits of each plan. Of course, this does not preclude the right of the Agency to analyze and to advise the Minister on what is the best alternative nor for the Minister to do likewise in his recommendation to Cabinet.

The Agency has neither the authority nor the legal right to search out alternative Canadian buyers. Consequently, it is only when a Canadian company hears of the investment through other means (usually the press or industry gossip) does the possibility of an alternative Canadian buyer arise. Consequently, the Government, unaware of the existence of potential alternative Canadian buyers in many cases, makes

its decision based on an imperfect knowledge of the effect which disallowing the investment would have.

Another type of third party representation comes from an applicant's competitor. This type occurs particularly in the case of new business applications. In most circumstances, the competitor, usually a Canadian-owned company, is concerned that there is not enough demand for the product to meet the existing capacity plus the new capacity brought in by the applicant. The Agency and ultimately Cabinet must determine whether the competitor is using the Act solely to ward off unwanted competition or whether an allowance would lead to serious overcapacity problems.

Representations from employees of a target company and local community groups are usually in support of an allowance. Their main concern is with the maintenance of employment, especially when an acquisition involves the purchase of a financially-troubled company. However, there have been cases where the employees have not supported the application. In fact, in a few cases, employees or senior management have banded together to offer themselves as alternative buyers competing against the applicant. This initiative normally arises from a desire to maintain management control of the day-to-day operations of the company or simply

from a desire to see the company remain as an independent entity.

Members of Parliament also make representations to the Agency. Usually, the Member is relaying a concern from a constituent, either a competitor or an affected individual. The member is treated as any citizen, and is not privy to any confidential information.

The handling of third party representations by the Agency is made difficult by the secrecy provisions of the Act. Section 14 prohibits the Minister or any government official from disclosing "all information with respect to a person, business or proposed business in the course of the administration of this Act." This has been interpreted to mean that the Agency cannot even disclose whether an application is being reviewed. Consequently, opportunities to be forthcoming with third party groups and to obtain relevant information from them are severely restricted. In addition, the applicant cannot respond to accusations by third party groups when they are unaware of their existence.

c) The Decision Making Process

1. The Ministerial Decision

The Foreign Investment Review Act, as indicated above, places upon the Minister certain statutory requirements. The

Minister must review the information gathered by the Agency and place before the Governor-in-Council his recommendation together with a Summary of the information of any other undertakings filed in support of the application. These duties cannot be delegated to others.

As noted earlier, the Minister has the choice of accepting or rejecting the advice of the Agency although rejection is uncommon. In the review of spending estimates by the House of Commons Standing Committee on Finance, Trade and Economic Affairs, Mr. Gorse Howarth, the Commissioner of the Agency, said "Without attempting any precision I would give as an indication that probably in 96 or 97 per cent of cases the advice given by the Agency is compatible with the Minister's recommendation to his colleagues."[32]

It is likely that the degree of compatibility is even higher than this -- possibly approaching 99 percent. There are several reasons for this. First, as with any modern civil service, it is the responsibility of the senior officers of a department to supply to the Minister the relevant facts and to make recommendations based on those facts. In this way the Agency - Minister relationship varies little from that of any other department and its minister.

Another reason for the high degree of compatibility is the feedback that the Agency obtains from the Minister

and his political colleagues. The feedback takes one of three forms. The first relates to general policy concerns about the significant benefit criteria of the Act. For instance, the Liberal Government's policy initiatives concerning research and development in 1978 were a signal to the Agency that this criterion was likely to be given increased weight in the ultimate decisions by Cabinet.[33] Secondly, the government may have special industry concerns which will affect how investments are evaluated. Any investments in the book publishing industry, for example, have had particular difficulty in meeting the significant benefit test. This reflects the belief of the Government that a strong Canadian-owned book publishing industry was vital for Canada's cultural needs. Thirdly, on rare occasions, in some individual cases, the Agency will become aware of certain sensitivities arising from a case. This will affect the way that the Agency evaluates the case. The result of such a situation may be that no recommendation is made by the Agency, as noted above. These cases tend to be the largest and the most controversial.

2. The Cabinet Procedure

The procedure used in deciding FIRA cases is based on size and sensitivity based on industrial, regional and

political considerations. For those cases which go through the small business procedure, a summary sheet is sent from the Agency to the Minister. The summary sheet gives the details of the case and the Agency recommendations. If the Minister agrees, the case goes directly to the Special Committee of Council for Governor-in-Council approval. The Special Committee of Council, made up of members of the Cabinet, generally meet before regular Cabinet sessions to pass Orders-in-Council. While questions concerning the Minister's recommendations have been made, almost all are approved without comment. About 55 per cent of all cases are handled in this manner.

The procedure is the same for those cases which were small enough for the small business procedure (under $2 million and less than 100 employees) but in which the Minister required the submission of the standard forms under S.6(4) of the Foreign Investment Regulations. However, in these cases, the Agency draws up for the Minister a more detailed description of the case with a list of undertakings and conclusions. Then, as with the small business procedure cases, the Minister's recommendation is sent directly to the Special Committee of Council for Governor-in-Council approval. About 20 percent of all cases are handled by this method. The only exception to this procedure is when the Ministerial

recommendation is at variance with the stated position of a consulted province or federal department. In this case, the Cabinet committee procedure described below is used.

The Cabinet committee procedure is used in any case involving over $2 million in assets and more than 100 employees, in any case where a province or federal government department disagrees with the recommendation, or in any case where the Minister responsible for FIRA considers that it warrants fuller consideration. The Agency prepares for the Minister's signature an extremely detailed analysis of the case, in the form of a memorandum to Cabinet. The memorandum includes a description of the firms involved, the industry, the undertakings offered by the Applicant, the views of the provinces concerned, the summary of proceedings, the assessment of benefit under the five criteria of the Act, and the recommendation. This memorandum is then sent to the Economic Development Committee of Cabinet and it is here where the most serious Cabinet evaluation occurs. A decision is made by the Committee and then passed on to the full Cabinet for confirmation. The most important cases may be discussed in detail by the full Cabinet while with others the decision of the Committee may simply be confirmed with little or no comment.

The Liberal government before May 1979 had an intermediary procedure. For those cases over the small business procedure threshold size but under $10 million and with less than 500 employees, a summary of the case was sent to all Ministers. If no Minister raised an objection to the case going directly to the Governor-in-Council, then it would do so. If there was an objection, the case would go to Cabinet Committee. About 10 per cent of all cases were handled in this fashion by the Liberal government. The Conservative government chose not to adopt this procedure.

Under existing procedures, the Economic Development Committee of Cabinet is obliged to consider an average of four cases per week. About 16 cases have to be decided, however summarily, each week by the Committee of Council.

3. The Influence of Individual Ministers

The individual Ministers' roles in the evaluation process vary. Those Ministers who represent departments that have opinions contrary to those recommended by the Minister responsible for FIRA may wish to present the views of their departments to their colleagues. Normally, though, inter-departmental disagreements are handled at the official level and are often solved by obtaining certain undertakings. However, if the conflict persists, a Cabinet decision may be

required to put it to rest.

Some Ministers raise objections on personal grounds. An investment may have an effect on their constituency or they may simply not agree with the Minister responsible for FIRA's recommendation. However, apparently this occurs rarely. Naturally, those Ministers who have a more personal interest in the foreign investment area and those Ministers on the Economic Development Committee become the most involved.

Experience has shown that the Cabinet has been willing to accept the recommendation of the Minister in almost every case. This is because the Minister is usually aware of opinions and concerns of his colleagues before he makes his recommendation. And for those cases where he feels that guidance should be obtained from his Cabinet colleagues, he may choose to send a discussion paper seeking such guidance. For example, he may request authority to negotiate for a certain undertaking without which he will be unable to recommend allowance.

As is evident, the Minister responsible for FIRA plays a key role in the political decision to allow or disallow a case. For those investments under $2 million and

with less than 100 employees and where there are no objections by the provinces or other federal departments, the Minister's recommendation is sent directly to the Special Committee of Council where Governor-in-Council acceptance is almost invariably given with little review. For the larger or more controversial cases, it is a Cabinet committee which he chairs which makes the decision. While the full Cabinet must confirm this decision, time constraints allow them only to discuss in detail the most significant.

There are two identifiable problems associated with the Cabinet decision-making process that are directly relevant to an analysis of Cabinet as regulator. The first involves the amount of Cabinet and ministerial time required in the process and the second pertains to the confidentiality surrounding significant aspects of the outcomes of the process.

There are two aspects of the time dimension, namely the time spent by the Minister responsible for FIRA and the time spent by Cabinet as a whole. With respect to the former it should be immediately obvious that with approximately 800 cases a year, the screening process consumes a great deal of the Minister's time. Notwithstanding his reliance on FIRA recommendations, the Minister cannot delegate his statutory responsibilities to review and recommend. Even

if this process is pro forma and routine in many instances, the fact that the Minister is himself not the ultimate decision-maker, combined with the potential conflict that many cases can entail, necessitates that he take his review responsibilities seriously in a sufficient number of cases. Indeed, it may be argued that the time occupied in reviewing individual cases accounts, at least in part, for the failure to produce more general policy guidance for the Agency and interested parties.

Similar concerns can be raised with respect to heavy demands that the process places on Cabinet's time. Although the process has been streamlined and many applications do not take much of Cabinet's time directly, the fact is that, of the average load of 16 cases per week that must be processed, four of those cases require serious consideration by Cabinet or at least a Cabinet committee. Although it is impossible to obtain documented information, informed sources suggest that no other single agency of government consumes as much Cabinet time that consideration of FIRA cases does. This fact raises serious questions about whether this is the most efficient employment of Cabinet's time in general or with respect to the review process in particular. As in the case of ministerial time, the necessity for Cabinet review of individual cases means less time available for discussion of all types of policy issues, not least of all

foreign investment.

The confidentiality that surrounds the results of the review process is the second significant aspect of the decision process that creates problems. We have already discussed the problem of secrecy in the assessment process with respect to third party interventions. Similar problems exist with respect to the outcomes because reasons for the individual decisions are not released except in the case of disallowed applications where the Government simply states that such applications did not meet the significant benefit test.

The problem in large part can be traced both to the requirements of Cabinet secrecy and to the statute. S.14(4) of the statute confers discretion on the Minister to release information on undertakings except "where, in the opinion of the Minister, the disclosure of such information is not necessary for any purpose relating to the administration or enforcement of this Act, and would prejudicially affect the person who gave the undertaking in the matter or conduct of his business affairs." To date, the practice of the Minister has been to defer to the wishes of applicants with the result that little useful information has been provided. Applicants, either not wanting to divulge their plans to competitors or not wishing to have the public ensuring enforcement of the

undertakings, are generally unsympathetic to requests for disclosure. FIRA has tried several ways to improve this situation such as through press releases which provide some of the undertakings and descriptions of allowed cases in the Annual Reports and the magazine, Foreign Investment Review. However, within the last year, there appears to have been an increased attempt to publish undertakings. In fact, for the first time in the Agency's six years of operation, the Government made public the reasons for a disallowance of an application.[34]

There are two principal consequences of the absence of useful information on the reasons for decisions. The first is that potential applicants, already confronted with limited policy guidance in the statute and ministerial statements, cannot use decisions as precedents to guide them in preparation of their applications. Secondly, it is incredibly difficult, if not impossible, for parliamentarians and other interested parties to evaluate the implementation of the Act and the performance of the screening process. There is simply not enough information available upon which to build informed judgments.

d) Compliance Process

There are two aspects of the compliance process that

are germane to our purposes. One is compliance with the notification provisions of the Act while the other is compliance with the undertakings or commitments made by investors when significant benefit is being assumed. The former, to which reference has already been made, involves the power granted to the Minister by S.8(3) of the Act to insist that a non-eligible person comply with the Act by notifying the Agency of a transaction and subjecting it to review. Although surveillance activities of the Agency are fairly extensive, involving in 1973-79, for example, 300 investigations, to ensure that there is compliance with such provisions of the Act, the responsibilities this section places on the Minister are not particularly demanding. To date, there have been only four occasions when the Minister has issued such notices.

The other aspect of the compliance process is the more significant. Under S.15, the Minister can order investigations into whether or not the terms and conditions which were crucial to the determination of the significant benefit of an application are being respected. There are three aspects of this part of the compliance process that merit comment. In the first place, it was always conceded, beginning with the Gray Report, that while investors would be bound by undertakings to which they committed themselves,

"an investor would not be held responsible for non-compliance due to changing market conditions...."[35] What is significant about this, is that the Minister appears to have unlimited discretion as to the determination of what constitutes "changing market conditions". There are no standards or guidelines for such determinations. Secondly, it is not clear whether the Minister, in the event he decides to modify agreements with investors, is required to submit any modified agreements to Cabinet for approval. According to one newspaper report, it was claimed that when new undertakings were negotiated with the British firm, Marks and Spencer, because it could not comply with its initial undertakings, the minister did not go back to Cabinet for its approval of the changes.[36] We cannot verify the accuracy of the report or indicate what the practice is in this respect.

This leads us to the third and final concern with the compliance process. Given the discretion granted to the Minister to change undertakings and the ambiguity about the need for Cabinet approval, combined with the confidentiality that covers almost all undertakings agreed to by investors, it is impossible to determine how faithfully the Act is being complied with not only by investors, but even more importantly, by the designated Minister and Cabinet itself. As in the determination of significant benefit, a very large degree of discretion has been granted to the

regulatory authorities, but there are no means by which one can determine, let alone assess, how that discretion is being exercised.

CHAPTER THREE

The FIRA Model: An Evaluation

1. Introduction

In this chapter, we offer our evaluation of the FIRA model as an example of a regulatory process in which the Cabinet is the regulatory body and not simply in an appelate role. We emphasize once again that we are evaluating neither the merits of the foreign investment review policy nor the effectiveness of FIRA as a regulatory body. Naturally, however, our evaluation of the structure and process of the FIRA model may be of some relevance to such evaluations. In undertaking an evaluation we will employ two approaches. The first approach will be to assess the model from the perspective of a number of significant criteria commonly employed in the analysis of regulatory processes in general. Obviously, in terms of the model, the criterion of political accountability is a starting point. Other criteria involved procedural values such as openness, predictability, flexibility, and fairness considerations. The second will be to assess the FIRA process in terms of the advantages and disadvantages as seen by the major participants in the process. Accordingly, we will analyse the perceptions and positions of Cabinet, FIRA itself, investors, "target companies", federal departments, provincial governments, Members of Parliament and the general public. In the

last omnibus category we will pay particular attention to "third party intervenors".

2. Criteria

a) Political Accountability

The pressure for greater political accountability for regulatory bodies, as we indicated earlier, is part of a much wider debate ovcer accountability in government.[1] That is, the conclusion that independent regulatory agencies should not make broadly-based "policy" decisions is motivated by concerns about the legitimacy of such decisions taken by those who are not elected. If important policies are to be set, they should be determined by those who have a mandate to do so.

This concern for increased political control of regulatory activity does not necessarily require an end to regulatory agencies nor to the exercise of discretionary authority by such agencies. It would be physically impossible for elected political bodies to undertake detailed regulation in every area of governmental activity, and delegation to subordinates is a necessity. Furthermore, it may be impossible for elected politicians to specify detailed policies at the time of enacting legislation, whether because of a perceived lack of expertise in anticipating problems and designing solutions or because of lack of foreseeability in designing solutions.[2] Therefore, delegation of some discretionary

authority to an independent agency or to a department becomes imperative.

Yet even if delegation to subordinate bodies is a necessity for regulation, there may still be concerns that such regulators remain "accountable" when they exercise decision-making authority. The question that must then be faced is what is meant by the word "accountable". Definitions abound, but one that we endorsed earlier is that put forth by the Royal Commission on Financial Management and Accountability (The Lambert Commission):

> "Accountability is the essence of our democratic form of government. It is the liability assumed by all those who exercise authority to account for the manner in which they have fulfilled responsibilities entrusted to them, a liability ultimately to the Canadian people owed by Parliament, by the Government and, thus, every government deparment and agency.
>
> Accountability is the fundamental prerequisite for preventing the abuse of delegated power and for ensuring, instead, that power is directed toward the achievement of broadly accepted national goals with the greatest possible degree of efficiency, effectiveness, probity and guidance."[3]

The last part of this statement assumes that such goals have been articulated. In some cases, they will only be skeletally defined, making it difficult to criticize the decisions of regulatory agencies which by their actions, are setting these goals.[4] The concern that such bodies are not ultimately accountable to the public, as is an elected decision-maker, leads to the call for greater "political" input and

accountability in the development of these objectives.

"Political" accountability, in a simplistic view, might seem to be achieved then by placing the locus of responsibility for decision-making in the hands of a political body, such as Cabinet. However, that cannot be true without qualification. Political decision-making is not an end in itself, but a means to an end - and that is accountability to the public for achievement of public goals. Thus it is not enough to give a political body such as Cabinet the power to make decisions if those decisions are made for partisan political motives completely inconsistent with the broad purpose or policy objectives established by the legislation under which Cabinet purports to operate and if those decisions are not open to some type of review to ensure compatibility with those objectives. For example, to use the Foreign Investment Review Act, the objective of political accountability in decision-making is not met if Cabinet decides to grant a particular application for approval of a takeover on the basis of the lobbying of a particular interest group or politically well-connected party to an application. Such decisions are to be determined on the basis of objectives out in S.2 of the Act and, particularly, on the basis of the range of factors in S.2(2) which indicate whether the applicant's investment will be of "significant benefit" to Canada. Even

granting that those factors and the concept of significant benefit are so broadly stated as to leave room for a great deal of discretion by Cabinet, the achievement of accountability in the process is only reached if the objectives in the Act are kept in mind as the Cabinet exercises its discretion. The ideal of "political accountability" is therefore not being achieved if partisan considerations dominate the exercise of authority under the Act at the expense of statutory objectives.

Yet if political accountability assumes something more than brokerage and contemplates adherence to certain defined objectives, immediate problems arise as to how to achieve accountability. First is the problem of definition of objectives in more specific terms than those set out in the statute - by what procedure and on what basis should they be fleshed out? Secondly, what procedure is necessary to ensure that overall objectives are being met? Allocating the task of expanding upon broadly framed criteria for approval of foreign investment to a political body such as Cabinet is one step towards increasing accountability, since the ministers, in theory, are collectively responsible to the House of Commons and govern only while they have the confidence of the House. Whether this is a sufficient step can be questioned given contemporary debate of the reality of ministerial responsibility in majority government situations.[5]

Even in minority government situations, there will be accountability problems unless the House,as well as the public or interest groups which impose pressure on Members of Parliament, have access to sufficient information to identify and assess the policy choices made by Cabinet, as it carries out the administration of the Act. Absent articulated criteria for decision-making beyond those in the Act, whether in the form of guidelines, regulations, or published reasons for decision, evaluation of the Cabinet's decisons in terms of their compatibility with the "national goals" established by Parliament in the Act is a difficult, if not impossible, task.

Thus, the locus of decision-making - in Cabinet as opposed to an independent regulatory agency - is not in itself an assurance of greater political accountability. In order to ensure that the goal of accountability is achieved, there must be determinable objectives set by legislative bodies or by decision-makers openly answerable thereto. In exercising discretion granted by such legislative bodies, there must be an effort to do so with those objectives in mind and in such a way that the interpretation or extrapolation of those objectives is subject to scrutiny by those elected members and ultimately by the public. Thus, one fundamental facet of political accountability is access to information - information

about objectives, and about their implementation or non-implementation.

Therefore, while the Cabinet model of regulation found in the Foreign Investment Review Act endows a political body with decision-making authority, it cannot be said to enshrine the ideal of political accountability unless there is sufficient information available with regard to its procedures and decisions to indicate that the objectives under the statute are being pursued.

b) Political Accountability and the Procedural Values of Independent Models of Regulation

While the foreign investment review process is open to criticism for its failure to comply with a paradigm "political accountability" model of regulation, it is equally open to attack for its incompatibility with the procedural values which are often associated with the independent regulatory agency model, such as openness, availability of criteria for decision, notice to interested parties, and the opportunity of an affected party to respond to critical or unfavourable comments and information.[6]

Some of these values are similar to those discussed above as important to the achievement of greater political accountability: openness, disclosure, and the availability of

criteria. It is important to note this in order to recognize that the value of political accountability in regulation is not incompatible with the values of independence, as first impressions might lead one to believe. However, the design of a structure to protect values of procedural fairness may be affected by the emphasis placed on political accountability rather than independence in a particular area of regulatory activity.

The independent regulatory agency is often regarded as the ideal regulatory model in circumstances where decisions are made on the basis of individual applications. The fact that an individual applicant comes forward to seek a right or benefit under a statute leads to an analogy to adjudication in the courts. The inference is easily drawn that decisions about individual rights on a case by case basis should be made through the application of established criteria by independent decision-makers, as discussed in further detail later in this chapter. There is an easily added assumption that such decisions should not be made by "political" bodies, as there is no "policy" element in the application of the standards. What one needs is an adjudication based on the consideration of relevant facts in light of the specified criteria, so as to accord fair treatment to similarly situated applicants.

Several points need to be made here. The most obvious is that there is an element of policy in every decision which applies rules to facts. The element of discretion will vary with the specificity of the criteria, but there will always be some discretion in finding facts and deciding whether the rules apply. Therefore, political accountability is not inimical to an individual application process.

Secondly, the fact that individual applications initiate the decision-making process does not determine whether the decision is a "policy" one which would be more appropriately made by a politically accountable body. That characterization may depend on the scope of discretion left to the decision-maker. If the objectives for judging the decision-maker are left at a great level of generality (as in S.2 of the Foreign Investment Review Act or S.3 of The Broadcasting Act[7]), important policy decisions fleshing out the Act will occur simultaneously with a decision on the fate of an individual application. This policy-making process is similar to the development of the common law by the courts. Each decision builds up a body of principles and precedents that together establish a general policy.

This leads to a third point about the compatibility of political accountability and fairness. There are various ways to take into consideration concerns about fairness in the

exercise of discretion with regard to individual applications, which suggest the need for an independent adjudication model, while at the same time preserving broad policy decisions for the politically accountable. For example, advance and open issuance of guidelines by which individual applications will be judged, made by a politically responsive body, can permit harmonization of the values of the two models.

This last statement, however, presupposes an understanding of just what those independence or structural values are. In the interest of a more worthwhile discussion, these values will be discussed at this point before returning to the question of compatibility between political accountability and independence.

c) The Procedural Values of Independence Models

The decision to implement foreign investment policy through consideration of individual applications immediately suggests that certain procedural values should be followed or, at least, considered before they are abandoned as inappropriate. In any legal system, there are certain ideal characteristics which should be pursued. One could call them ideals of certainty and predictability and the minimization of arbitrariness. As Fuller described them in greater detail in The Morality of Law,[8] they include the requirement of rules formulated in advance of implementation. Those rules

should be understandable, harmonious with each other, prospective in operation, publicly available to those to whom they apply, and fairly stable over time. In addition, such rules should not prescribe conduct beyond the capacity of the affected party nor should they be applied in a manner inconsistent from the way in which they are drafted.

Obviously, Fuller states an ideal and impossible world. In any real life situation, there may have to be tradeoffs between these characteristics (infra). However, the underlying concerns in Fuller's system for certainty, predictability and avoidance of arbitrariness are all important to concepts of justice and acceptability of the legal system. Injustice is perceived when individuals similarly situated are treated in different ways by the legal system. Instead of like cases being treated alike, there is a perceived element of "ad hocery" in policy making, with consequent discontent with the legal system being applied.

Undoubtedly, the point must be made that individuals have no right to expect unchanging laws and that they may well be subject to different rules than their neighbours. While this is true, there should be some reason for distinction between individuals in the application of the law. Furthermore, there are ways to provide for change in laws which take into account the need for flexibility. Overall, it is

important to recognize the concerns about arbitrariness and certainty, concerns which are at the forefront when decisions are made on a case by case basis.

Some of these general comments will be more understandable in the context of a discussion of FIRA, for individual applicants have frequently criticized the uncertainty and procedural inadequacies of the present system.

1. Certainty and Predictability: The Need for Standards

The present process in FIRA is a strange amalgam. It employs individual applications to trigger the process of decision-making. Ultimate decisions as to the acceptability of a particular application are made on the basis of the loosely phrased criteria of significant benefit in S.2(2) of the Foreign Investment Review Act, when considered in light of the various undertakings negotiated between the applicant and the Foreign Investment Review Agency during the approval process. No reasons for decision in an individual case are given by Cabinet, although press releases listing approvals and disapprovals are issued. The undertakings themselves generally are not published, nor can one find enunciated reasons from Cabinet or regulations or published guidelines which suggest what goes into a determination of "significant benefit to Canada". The only guidelines are those published

with regard to initial questions of applicability of, and procedures under, the Act. (for example, with regard to venture capital, non-eligible persons, etc.).

This procedure seems to embody the antithesis of the ideal adjudicative system. Discretion of the decision-maker is somewhat circumscribed, in the sense that some criteria for decision are established, but the criteria are extremely flexible, and the way in which they are implemented is neither articulated in advance nor readily determinable through reasons in other decisions. This leaves the process open to ready criticism on the basis that the decisions made are ad hoc and inconsistent.

The problem in responding to this charge is that we do not know if they are either ad hoc or inconsistent, as we lack the information to evaluate. Officials in the Agency and some lawyers engaged in the processing of applications under the Act say that one can determine policies through the decisions and through mechanisms such as ministerial statements about government economic policy. For example, one can see a modified key sector approach in the way in which applications in non-renewable energy resource areas or applications in the book-publishing field are considered.

Even if this is true, there should be concern about availability of standards to flesh out the statutory criteria.

One concern is that signals not get crossed in determining these policies, and an earlier example in this paper shows that this has occurred. Therefore, the concern for certainty, predictability, and equality would suggest more clear articulation of standards and rules, either prospectively or retrospectively. This allows an applicant to evaluate more easily the likely outcome in his case, and guides the decision-makers (whether in the Agency at the negotiating stage or in the Cabinet at final decision stage), so that they will consider the same factors with regard to each applicant, even if they accord such factors different weight in a particular fact situation.

Articulation of rules has a further advantage, in that it may be more efficient than a process of stumbling in the dark, trying to discern the criteria which are relevant. Advance awareness of standards which govern the application of the criteria of "significant benefit" to be applied tailors both the information provided and the negotiation/discussion stage of the decision process.

One response to the latter comment might be that the "FIRA bar" is aware of the relevant considerations of the process, gathered through experience. Even if some awareness is there, risks of uncertainty of information persist. Furthermore, it is inconsistent with overall concerns of justice to

restrict the information as to criteria to a certain select group, rather than to all those affected by the legislation, including third parties such as the public or competitors.

2. Flexibility

Based on concerns for certainty and justice, it is easy to understand the plea for standards and rules in the review of foreign investment applications. Yet there are competing considerations that must enter into the discussion of the need for rules. While one major concern in the design of an administrative system could be described as "accuracy" (in the sense of compliance with objectives and equality in treatment), there is an equally important concern for flexibility. Often detailed rules can not be articulated at the outset of a programme, whether for reasons of lack of expertise in the initial forum such as the legislative body, or because of lack of predictability of likely events which will affect the delineation of policy. Furthermore, circumstances may change, so that what is a relevant problem today is not so tomorrow. For example, in foreign investment there are changing views as to the proper level of foreign investment generally and in particular sectors of the economy depending upon current levels of unemployment, the state of health of the economy, or the need for security in the supply of a particular resource.

Excessively detailed regulations may well bog down the system, if it becomes incapable of adapting to meet changing circumstances.

While this concern for flexibility is a valid one, it need not be an excuse for a total absence of standards. Articulation of "rules" is a question of "more or less", not presence or absence of detailed prescriptions. There are different ways to articulate policies, with differing degrees of specificity available. For example, there is a range of possible devices for FIRA including: policy guidelines (such as the Canadian Radio-Television Commission's policy on cable television); interpretation bulletins (similar to those issued under the Income Tax Act); regulations; and reasons for decision based on real or hypothetical cases.

These devices provide a great deal of flexibility, and at the same time they can be used to satisfy the need for greater certainty in the FIRA system. For example, policy guidelines can be explanatory, identifying government concerns in sectors and economic factors which affect decisions. Yet they need not be rigidly adhered to, providing needed flexibility.[9]

Guidelines provide a further advantage in that they can identify competing factors which affect decisions, without trying to anticipate every possible combination thereof.

Decisions in the area of foreign investment involve a complex of competing interests, which must be balanced against each other. Polanyi and Fuller have described these as "polycentric decisions", which are unsuited to an adjudicative framework and application of rules.[10] Such decisions as whether or not to have foreign investment in Canada or in varying parts of Canada and how much investment to allow require important tradeoffs between factors such as regional disparity, unemployment, the need for investment, and the need for domestic research and development. Nevertheless, relevant factors may be identifiable, even if detailed prescriptions cannot be efficiently made, so as to guide decision-making.

To return to the question of devices for articulating policy, even if just by identification of relevant factors, it should be noted that implementation of some of these devices would be a problem within the present Act. This is particularly true with regard to the giving of reasons for decision, because of the secrecy provisions of the Act. This will be discussed below under "Confidentiality".

Reasons, as opposed to articulated policies, have the advantage of case by case development of policy within the context of a specific fact situation, allowing flexibility and experimentation. This is true, of course, provided that the "reasons" are full enough to give guidance. However, this device is less advantageous in that it requires slow development

of policy and, until there is a well-developed body of cases, may be inadequate to provide much guidance.

At this point in the history of FIRA, it is difficult to accept an excuse for the failure to articulate in more detail the nature of the policy objectives. Even if at the outset this might have been impossible, six years of experience under the Act must provide enough guidance to allow for an identification of guidelines and weighting of factors relevant to at least classes of decisions.

In sum, then, the decision to set foreign investment policy through individual applications requires consideration of the effects of such a process. In order to proceed in a way which minimizes arbitrariness and proceeds towards the achievement of some overall objective to be applied in all cases, it is necessary to articulate these objectives in some form and to make those articulated objectives available to those participating in the system. Only then can they participate in a meaningful and efficient way and only then can the overall objectives be evaluated (and, as well, can our earlier concern for accountability be satisfied).

3. The Right to be Heard

Along with the need for standards in order to allow for meaningful participation and fairness in the administration

of an Act, there is, as well, a concern that individuals affected by decisions of administrators have an opportunity to intervene in the process and to present their side of the argument. Again, this claim could be pushed to extremes, both in its application in different areas of decision-making and its method of implementation. Thus, at one extreme, any individual citizen might argue that he or she is affected by the articulation of a regulation under any Act and, therefore, entitled to a full, court-style hearing. If this claim were accepted, competing ends of the administrative process, such as efficiency, speed and informality, would fast disappear.[11] Once again, it is a question of more and less, both as to the opportunity to intervene and the manner in which that intervention should be exercised.

The rationale for allowing an individual who may be affected by a decision an opportunity to intervene is one of fairness, based on the conclusion that a person's rights or interests should not be detrimentally affected by the decision of a regulatory body without giving him an opportunity to be heard.[12] This is a right variously described as the right to the protection of the rules of natural justice in Anglo-Canadian law or a right to due process in American terminology.

One of the most vexatious questions is when these rights should be recognized. When that decision is made by

statute, there is no problem. The framers of the legislative policy decide who will be heard.[13] When that decision is not expressly made by a statute, the responsibility is left to administrators in the course of making decisions or to courts in reviewing such decisions for procedural fairness.

The traditional judicial response, in scrutinizing the decisions of administrative bodies to determine whether there has been compliance with the rules of natural justice, has been to focus on the distinction between "administrative" and "judicial" or "quasi-judicial" decisions. Only the decisions of administrative bodies which were judicial or quasi-judicial were required to be made in accordance with the rules of natural justice.[14] In practice, the distinction has been difficult to make. Seemingly, it has turned on an examination of whether decisions affected the "rights" of individuals, and whether those decisions were made on the basis of applied standards. Where the decision affected privileges only or was more policy oriented or discretionary, there was a greater tendency to find the decision "administrative".

If one were to apply this distinction to FIRA, there would be a good argument in favour of finding the decision administrative. The criteria are broadly-framed and give wide discretion to the Minister and Cabinet. Arguably, there is no "right" to invest in Canada or take over a new business.[15]

Yet there are important interests at stake in these cases, and potential investors and target companies have a lot to lose in terms of invested effort and potential profit if the application fails. Therefore, even if the decision is a policy one, it is important to know the case against the applicant and to have an opportunity to present its arguments. Courts have become increasingly aware of such interests held by individuals involved in processes that may well be traditionally "administrative" in character. In the last few years, the bright line drawn between administrative and judicial or quasi-judicial decisions has faded somewhat, and a "duty to act fairly" is slowly taking shape in situations where an individual may be seriously and unfairly affected by a decision unless he is given some form of access to the decision-maker to ensure that information favourable and relevant to his case is available for consideration.[16] The circumstances in which such a duty has been found have varied - from denial of public housing in the Webb case to dismissal of a probationary policy office in Nicholson to the hearing of a telephone rate appeal in Inuit Tapirisat.[17]

In each case, the courts are concerned about the detrimental effect of a decision on the interested party in imposing the duty. One can see characteristics in the FIRA process which might lead to a similar conclusion that the procedures should be exercised fairly. As mentioned above,

the interests of applicants, target companies, and perhaps even some third parties, such as potential Canadian investors, are all significant.

Even if such interests as those of FIRA participants or the discharged employee in a case like Nicholson are worthy of protection, it is still an open question as to what procedures are actually required to satisfy the obligation of fairness. There has never been consensus as to the procedures necessary to comply with the rules of natural justice, let alone the seemingly less stringent duty to act fairly.[18] The tendency in the courts seems to be to adopt a practice of varying the procedural requirement to suit the context. Therefore, a duty to act fairly or to give an applicant a chance to be heard does not require a full adversary proceeding similar to that in a court. To impose such a requirement would defeat one of the major reasons for establishing an administrative agency: the ability to make timely decisions.

That does not resolve the problem of a fair procedure in the context of the Foreign Investment Review Act. Two areas of complaint can be identified. First, there is room for concern about the ability of the applicant to know the information against him and to respond thereto, the basic concern expressed by the phrase audi alteram partem. The second concern is the lack of notice to third parties who

may wish to intervene in the process, whether because they are potential bidders for the target company or potential competitors or employee or interest groups who feel disturbed by the possible takeover or investment.

In both areas of complaint - applicant access and third party notice - the plea is basically one for increased disclosure. That disclosure takes on several forms: disclosure of the fact of application with enough detail to allow meaningful response and disclosure of detrimental information to the applicant to allow opportunity for refutation. The present FIRA procedure does not allow the applicant to have access to information with regard to his application solicited from provincial governments and other federal departments, nor is there opportunity to respond to third party interventions. While some information may come to light through the negotiation process with the Agency with regard to undertakings, there is no guarantee of access to either the contents or general nature of unfavourable material, yet all this information may enter into the consideration of the application by the Minister or Cabinet.

The judicially imposed duty to act fairly does not necessarily require access to all such material, yet it would seem implicit to fairness that unfavourable information be disclosed in enough detail to allow a response, even if the

applicant is only given summaries of the information to be used for decisions.

This last comment raises a particular problem associated with the due process concerns when it is Cabinet which exercises the decision-making function. While concerns for fairness might elicit calls for disclosure of information, the tradition of Cabinet secrecy and the importance of Cabinet confidentiality militate against disclosure. This will be discussed in greater detail in Chapter 4.

An added problem with regard to openness and disclosure arises out of specific prohibitions in the Foreign Investment Review Act which forbid disclosure of information obtained in the administration of the Act, except in very limited situations (S.14). This section may well preclude the effective intervention of third parties in an application in which they might be interested. While some might say that there is no problem here, for third parties would just clog the works and cause further delay, principles of fairness or the rules of natural justice support the consultation of at least some parties who are closely affected by the decision. There may well be third parties (such as possible competitors for the investment, employee groups, or consumer groups) who feel that a particular decision affects them and that the decision might be altered if they are allowed to intervene. The

present secret process, resting on a strict interpretation of S.14 of the Act, prevents notice of applications, acknowledgement of third party notices if the applicant's proposed investment has not been disclosed publicly, and disclosure of the nature of information which might be relevant and helpful to discuss. What third party intervention there is under the present procedure is therefore ad hoc and often a shot in the dark. Such practice does not conduce to effective assistance for the decision-maker nor does it protect third party interests as effectively as it could.

It must then be asked whether there is a necessity for such secrecy and the obstacles to third party intervention. Is there some special characteristic of foreign investment review which requires confidentiality? In addition, are there other reasons which also explain the procedure adopted, specifically concerns for efficiency in decision-making?

The secrecy proviso in the Act may rest on a conclusion that information regarding investment decisions must be confidential in order not to discourage potential investors. The purpose of FIRA is not to put an end to foreign investment, but to facilitate beneficial investment. This may not occur if detailed plans regarding finance, research and development, and expansion must be publicly available.

One might ask why this concern about the detrimental effects of disclosure has not penetrated the securities market. One of the major devices for regulating issuance of shares and takeover bids is through disclosure.[19] The explanation may be that securities market disclosure, while substantial, does not cover the wide range of information that the significant benefit test of FIRA could encompass. Therefore, the detrimental effects to the affected companies would likely be less in that arena.

Secrecy considerations alone need not explain the obstacles to disclosure. A further rationale for limiting participation in the application procedure is institutional in nature: namely, the incapacity of Cabinet to handle more widespread or formalized interventions. Not only would this prey upon Cabinet's limited time; it would also inevitably delay a decision on the merits.

Even so, the first concern, Cabinet's time constraints, might be resolvable through delegation of decision-making powers. Already there appears to be a de facto delegation with the Minister and Cabinet committee making many decisions and with consequent rubber stamping by full Cabinet of all but controversial decisions.

It indicates that there are possible ways to allow for more widespread participation if desired and if some of the features of the present system, such as final Cabinet

decision, are subject to reconsideration and adaptation.

The second concern, timing of decisions, may not be so readily resolved. The present Act placed time limits on decisions, although these are subject to extension by various mechanisms.[20] As the present procedure has been criticized for its delays, one can easily imagine the added and well-founded complaints that would be voiced if greater participation by third parties was possible in every application under the Act. Of course, time limits for such intervention could be imposed. If criteria were also more readily available, the present delays and problems of inadequacy of information might be reduced, and the third party intervention might not have too detrimental an effect.

A final response as to the feasibility and advisability of such interventions would require more detailed discussion of the exact extent of participation, disclosure to the applicant, and the right of the latter to respond.

3. Participants

a) Cabinet/Minister

From the perspective of Cabinet and the designated Minister, the advantages of the FIRA structure and process as it exists are immediately obvious. Elected authorities,

i.e. Cabinet, control, clearly and directly, the foreign investment review process. They are empowered to make the substantive policy decisions about regulations and guidelines and, if they choose, to not have to overcome any statutory hurdles to providing policy direction that can exist with independent agencies.[21] Regulatory policy for investment review is unquestionably in the hands of Cabinet, not in a non-elected group of officials or appointees. Moreover, political control over policy making is reinforced by the politicians', i.e. Cabinet's, authority to make the decisions on individual applications. Thus, policy cannot emerge from case-by-case decision-making by non-elected authorities, a situation common and normal to many regulatory processes.

The advantages that flow to Cabinet and the Minister from the political control they possess over both the process and its individual outcomes are significant. The process permits an extremely high degree of flexibility, not to mention discretion, for policy formulation and application. The criteria and standards for determining significant benefit can be rigid or relaxed depending on international and domestic economic considerations, political pressures, the industry or sector involved or whatever factors Cabinet wishes to include in its decision making. Moreover, the responsiveness of the process to political direction is a complement to flexibility. The fact that Cabinet makes the individual

decisions means, if and when Cabinet chooses to exercise its power of policy direction, that such direction to FIRA can be immediate and direct, a situation that, notwithstanding "political appeals" does not automatically exist with independent agencies.[22] The informality of the process combined with the absence of publication of reasons for individual decisions reinforced by the traditional protection of Cabinet secrecy means that Cabinet need not concern itself with precedents as each case can be treated on its individual "merits". This adds further to the flexibility of the process. A final advantage that accrues to Cabinet and the Minister may be unintended, although this is doubtful, but is, nevertheless, considerable. The existence of a separate non-departmental agency has resulted to a significant extent in criticism for the foreign investment policy and the process being directed at the review agency itself rather than at where it is most appropriate, Cabinet. To possess political control, a tremendous, some might say infinite, degree of discretion, and yet to have others bear the brunt of criticism is not to be lightly dismissed.

The present process is not, however, without its disadvantages for Cabinet and the Minister. The single most important is the demand decision-making on applications makes upon Cabinet and Ministerial time. Although attempts have been made to improve the process and thus cut back on the

workload imposed on Cabinet, the fact is that no other agency or aspect of government today occupies as much time as does the review process. Cabinet must process approximately 16 cases a week and, while only three to four require significant discussion, even this number consumes a great deal of that scarcest of political commodities - time. The time demand is even greater for the responsible Minister who must pay more attention to even more cases in order to avoid difficulties at the Cabinet level. Moreover, regardless of the reliance placed on FIRA advice and notwithstanding the high degree of agreement between the latter and the final outcome, the fact is that Cabinet does not, and apparently cannot, find it possible simply to rubber stamp all applications. Meaningful review requires discussion and consideration. The consequences are two-fold. First, valuable Cabinet time is taken away from policy matters in general and secondly, in terms of the review process in particular, time that could be better spent on developing policies for the review process is consumed by individual cases. Cabinet has been transformed into an adjudicative body at the expense of its policy making roles.

b) FIRA

In view of the arguments advanced above, the advantages that accrue to the Foreign Investment Review Agency should be

obvious. The fact that political authorities make the decisions on both policy and applications should be an advantage to members of the Agency. This situation is at best a mixed blessing for the Agency, however, and the assessment of advantages and disadvantages is much more complicated than a simple emphasis on locus of decision-making might suggest. In fact, there would appear to be few advantages and several major disadvantages for the Agency in the present structure and process.

In terms of Agency - investor relationships, the Agency suffers from the absence of clear policy and guidelines that currently exists. Although the experience that has been gained from the process over the past six years enables Agency officials to bargain intelligently with investors, the fact that little of the guidance that they employ in the negotiations is publicly available to other parties results in misunderstandings and disagreements. They are accused of subjectivity and "ad hocery" by investors (and others) but cannot respond to, let alone refute, such charges.[23] The frustration that investors develop is then directed at the Agency rather than at the appropriate authorities, Cabinet. A special aspect of this frustration concerns the information demands that the Agency makes of investors. Investors contend that the Agency requires far too much information to process the applications. Yet any "information overload" that exists

may be the result of the dependent advisory status of the Agency operating in a controversial, hostile environment. In order to protect itself from potential critics, who may very well be within the federal government, the Agency is denied any "satisficing" option in its information requirements but is required to demand more information that is necessary for processing from applicants with consequential costs and dissatisfaction for them. A related aspect of this is the "trigger" that "bumps" a small business procedure to the standard procedure and its concomitant heavier information requirements. Until recently, the "trigger" has been simply an expression of "concern" by either a federal department or a provincial government. "Bumping" was almost automatic in such situations and the Agency appeared to be unwilling or unable to assess the legitimacy of the concern. However, within the last year, FIRA has been requiring an elaboration of concerns and attempting to judge their validity, the consequence being a reduction of the number of applications now being "bumped". The fact remains, however, that when an application is "bumped" because of the concerns of another party, it is the Agency which incurs the antipathy of the investor.

There are a number of disadvantages that the Agency suffers as a result of its dependent, non-departmental status. This status imposes a number of significant institutional

constraints on the Agency. It has limited resources, a situation compounded by a fairly high turnover in its staff. Additionally, it makes great demands on its Minister's time yet must compete for that time with the regular demands made by the Minister's department. (A related problem in this respect may be a lukewarm or antagonistic position of the minister vis a vis the screening process.) These constraints are most significant when there are no articulated federal and provincial policies and the Agency must therefore consult with federal departments and provincial governments. This results in the Agency engaging in consensus-seeking behaviour insofar as these other participants are concerned. The virtually automatic "bumping" of small business applications when departments or provinces simply express concern is one manifestation of such consensus-seeking behaviour. The Agency is often dependent on other federal departments for expertise germane to the bargaining for significant benefit with the result that it feels it must keep departments "on side". It does so by deferring to their demands. This can be a particular problem when the relevant departments such as DREE or the Bureau of Competition Policy of Consumer and Corporate Affairs may have conflicting mandates. It will be recalled that one of the causes of the length of the process was the need for departmental consultation. An important aspect of this process is that the Agency normally cannot impose

"sanctions" on recalcitrant departments. The fact that the Agency must report the results of interdepartmental consultation to the Minister and Cabinet and the opportunity provided to dissatisfied departments to pursue, through their Minister at the Cabinet level, any disagreements reinforces consensus-seeking behaviour. The disadvantages for the Agency that result from this situation involve the information demands it must make on applicants as well as the delays that result. The Agency, not the departments, however, bears any criticism that results.

Similar problems and disadvantages arise from the need to consult with the provinces. If the Agency lacks "clout" within Ottawa it is even weaker with respect to the provinces. The antagonism of some provinces to the process in principle, plus the general provincial position that their views be duly considered in the assessment process, results, in general, in the Agency being deferential to the provinces. It simply cannot insist that provinces respect the time constraints within which it operates. As is the case with the Departments the fact that the Agency must report to Cabinet on the intergovernmental consultation is an inhibiting factor for the Agency which results in a high priority placed on consensus. Seeking a consensus, however, is time-consuming and the screening process reflects this cost.

The present process imposes further disadvantages on FIRA with respect to third party interventions. The Agency, because of the secrecy provisions in the Act, is placed in the anomalous position of not being able to acknowledge the existence of a reviewable application yet finds it useful in many instances to employ information obtained from third-party interventions in the assessment process. There is a certain "catch-22" quality to this aspect of the process inasmuch as the Agency cannot acknowledge the existence of the relevant application yet often solicits further information from intervenors. The constraints thus placed on the Agency are obvious and do not require detailing.

Finally, the Agency suffers from being routinely treated as if it were an independent regulatory agency. It is criticised for decisions and for the failure to provide useful information on individual decisions. This situation is particularly difficult when the Commissioner appears before a House of Commons Committee to defend the estimates of the Agency. Although it appears that this practice was not deliberately introduced, the fact is that it is the Commissioner and not the Minister who appears before the Committee. This is comparable to the chief executive officer of an independent agency appearing when, in fact, it should be the Minister appearing, as he would have to for departmental estimates supported by relevant departmental subordinates.

Such appearances only further reinforce the erroneous assumption that the Agency is a decision-making rather than advisory body, and, therefore, subject to the kind of criticism reserved for decision-makers.

c) Investors

Aside from the very high percentage of successful applications (approximately 85 per cent) which should constitute a significant advantage, for investors in general there would appear to be but one major advantage in the present process. That advantage is the confidentiality that surrounds both the assessment and negotiating process and the outcomes. The advantages are particularly significant with regard to the latter for the government has almost without exception deferred to the wishes of applicants in not disclosing the reasons behind the decisions, especially those involving undertakings promised by applicants. Consequently, in exercising his discretion the Minister has provided very little information on the individual cases and the investors believe this system provides them with a high degree of protection for what they regard to be private information. For particular investors who may be well-connected politically, at either the federal or provincial level, the confidentiality of the screening process may be an advantage insofar as they may be more successful under such conditions than they

otherwise might be.[24]

Offsetting these not insignificant advantages, however, are five serious disadvantages encountered by investors. The first is the absence of specific standards upon which determinations of significant benefit are based. This fact, combined as it is with the noted absence of policy guidance, gives the process a subjectivity that investors generally find highly disagreeable. Investors defend, for example, their initial submissions which the Agency often finds lacking on the grounds that they do not know what in particular the Agency requires. A related disadvantage for investors is what for them is the apparent arbitrariness in "bumping" small business applications to the standard application procedure. The only explanation they are given is that the Minister cannot make a recommendation on the basis of the information available and therefore additional information is required. Providing such information, investors maintain, is extremely costly and this is what they perceive to be the third major disadvantage of the process. The information demands are perceived to be excessive, often considered to be "fishing expeditions", and unnecessary. The open-ended nature of the criteria, it is claimed, is a principal cause of the information demands.

The fourth disadvantage investors encounter is the length of the process. As indicated in the preceding chapter, the putative 60-day "fail-safe" mechanism is inoperative and the process has become virtually open-ended. While some of the delays, undoubtedly, can be attributed to investor behaviour during negotiations, investors contend that primary responsibility should be placed on other participants in the process. The delays are considered to be particularly costly insofar as they affect the implementation of investment plans by applicants. The final disadvantage for investors concerns interventions by third parties. Although the confidentiality provisions protect the applicants, in the first instance, nevertheless, the fact that they are not directly informed of the content of such interventions plus the fact that the Agency uses information gained from them in the course of negotiations and in advising the Minister on the applications, is deemed to be unfair to them.

The special problems that a particular group of investors often face should be mentioned. The group in question are the owners of "target" companies, i.e. those which non-eligible persons seek to acquire. Owners of such companies are the forgotten participants in the review process because there is no provision in the statute for their participation. It is solely at the discretion of the applicant. In many cases the applicant finds it useful to have the support of the

target in presenting his case, but there have been occasions when the target company has been completely unaware of the negotiations. There is the additional problem of the fate of companies whose acquisitions are disallowed by the Cabinet. According to one participant, such companies, which may in fact not have participated in the review process, can suffer doubly in that they will be "open to rape", i.e. their value will be discounted to Canadian, and thus non-reviewable, purchasers. Although the evidence is inconclusive and conflicting in this regard, if, in fact, such discounting does occur, the inability of these companies to defend their interests during the review process constitutes a serious disadvantage and hardship for them.[25]

4. Federal Departments/Provincial Governments

These two categories of participants are grouped together because the advantage/disadvantage equation is almost identical for each of them. Indeed the present process as it operates occasions little that can be classified a disadvantage for them. (Note we are taking the process as given in making this comment. The fact or existence of the policy and process are obviously not without costs for them but such costs are not the subject of this study.) Rather, given the present process and the emphasis on consensus-seeking imposed on the Agency for reasons discussed above, the federal departments and provincial governments garner

considerable advantages in the process. They are not required to articulate publicly their positions either on policy matters or permitted, because of the statute, on applications. Indeed, the provinces may articulate publicly a certain general policy but take a contrary view privately with the federal government, but, because of the confidentiality provisions under FIRA, not have to justify any inconsistencies in their policies. Furthermore, once an application officially becomes public knowledge, a province, because its representations are confidential, may take a position at variance with those representations without anyone in a position to challenge them. This latter advantage is not, however, shared by the federal departments which are bound by Cabinet solidarity. The fact that the Act, as interpreted, has come to mean that both departments and provinces must be consulted, has come to give them not only considerable influence and leverage over the process in general and individual applications in particular, but a significant degree of discretion in how they will exercise such influence and leverage. It is this discretionary power which largely accounts for the advantages which accrue to these participants, as it does for the Cabinet in the present process.

5. Members of Parliament

Members of Parliament are among the most seriously disadvantaged by the present process without any compensating

advantages. When the process was created, it was defended on the grounds that politically accountable authorities, i.e. Cabinet, would be making the decisions. The Act confers incredible discretion on Cabinet to make decisions that not only can have fundamental impact on the Canadian economy but also, and not insignificantly, can affect the rights of individual Canadians to dispose of their own property. Yet as the process has been implemented and the statute interpreted, there is no basis for informed parliamentary debate on the implementation of the statute and the operations of the process. Herb Gray, the present Minister responsible for FIRA, is quoted as stating, while a backbencher, that "the agency's operations are so shrouded in secrecy that it is impossible to judge whether it has wrung additional benefits from a new investor or whether the jobs and export contracts would have been obtained no matter who owned a particular company."[26] When he made this comment, Gray was reflecting the frustration felt by all MPs who have sought to obtain useful information on the process upon which to build judgments but have been repeatedly rebuffed. There is almost no way for MPs to determine if the Act is being administered properly and in accordance with the intentions of Parliament. The only option, according to one participant, is "to trust Cabinet". As this is not a particularly meaningful alternative, it is difficult to see how one can realistically

conclude that Cabinet is accountable, i.e. answerable, for the exercise of their responsibilities, under the Foreign Investment Review Act.

One particular aspect of 'the difficulties' faced by parliamentarians is the practice, referred to earlier, of the Commissioner of the Agency and not the Minister responsible, which is the normal constitutional practice, defending the estimates of the Agency before the Standing Committee. Although some factual information is made available during such appearances, as soon as policy questions are raised the Commissioner is naturally required to decline offering any response. This has regularly caused considerable tension during Committee hearings. In 1978, for example, when such a situation developed, John Crosbie decried it as "a scandalous situation." He went on to ask: "If we cannot get any information from officials on matters like this, what are the officials doing here? What questions are we going to ask them? If this is the situation what is the good of having the officials?"[27] It should be noted here that Members of Parliament have every constitutional right to refuse to hear the Commissioner and to insist that the appropriate authority, the Minister, appear to defend the estimates of the Agency. They have not done so nor have they followed up on their questions with the Minister when he

has subsequently appeared on departmental estimates. Thus, unlike other disadvantages in the FIRA process, this is self-inflicted.

6. Public

If parliamentarians suffer disadvantages resulting from the present process, then the general public must also, and does, inevitably suffer similar disadvantages. It will be recalled that the Lambert Commission defined accountability to be "...the liability assumed by all those who exercise authority to account for the manner in which they have fulfilled responsibilities entrusted to them...."[28] Elsewhere, the Commission noted that "accountability relies on a system of connecting links - a two-way circuit involving a flow of information that is relevant and timely.[29] It is the absence of the "two-way circuit" - the flow of information about the performance of the regulators, Cabinet, that so disadvantages the public and their representatives. The confidentiality provisions of the Act, buttressed as they are by the traditional secrecy surrounding Cabinet decision-making, have resulted in a situation where there is a virtual vacuum of useful information on the operations of the review process. No informed public debate can ensue and, thus, those who exercise authority under the Act, i.e. Cabinet, cannot be truly and

effectively held to account for the manner in which they perform their responsibilities. Like Members of Parliament, the public must "trust the Cabinet" that the Act is being administered properly. This is hardly a salutary basis for accountability, particularly given the extremely large degree of discretion that has been delegated to public authorities to affect and influence not only the Canadian economy but the individual rights of Canadian citizens.

CHAPTER FOUR

Other Cabinet Regulatory Models

The process established by the Foreign Investment Review Act is unique in the federal regulatory area, conferring, as it does, primary decision-making authority on the Cabinet, with the administrative agency confined to an advisory role. Earlier chapters in this study have shown that there are problems inherent in such a structural design, particularly when decisions are taken on a case by case basis in an area where there are frequent demands for exercise of the decision-making authority. Openness, fairness, and accountability come into conflict with efficiency and flexibility.

What this chapter proposes to do is to look at other areas in which Cabinet exercises regulatory authority at both the federal and provincial levels of government. The rationale for doing so is twofold: first, to try to identify when legislative bodies have decided to confer such authority on Cabinet and, secondly, to try to identify the most suitable methods by which Cabinet can exercise regulatory powers.

The major focus in this chapter will be on the federal Cabinet, although brief reference will be made to examples

of Cabinet as a regulatory body at the provincial level. It should be noted at the outset that this chapter does not attempt to provide a comprehensive description of the ways or areas in which Cabinets function as regulator. Rather, it identifies some of the areas and ways in which it does so and tries to draw some conclusions therefrom. A detailed study is beyond the scope of this project.

1. Cabinet as Regulator: The Federal Level

There are four ways in which Cabinet functions as a regulator at the federal level of government: (a) as an appellate body, hearing appeals from decisions made by an independent regulatory agency; (b) as an approval body, accepting or rejecting decisions made by an independent agency; (c) as a policy-approving body, approving regulations issued by an independent agency; and (d) as a policy-making body, issuing policy directives to an agency or making regulations to restrict the administrator's discretion. Each of these functions will be discussed briefly, including a discussion of some of the procedural problems associated with each form of activity by Cabinet in light of the values discussed in Chapter 3.

a) The Appellate Function

Discussion of the appropriateness of Cabinet acting as an appeal body has been frequent. It is in two important

areas that this power has been exercised: regulation of broadcasting and telecommunications and regulation of transportation rates. Under section 23 of The Broadcasting Act,[1] Cabinet has the power to hear appeals from a decision of the Canadian Radio-television and Telecommunications Commission (CRTC) issuing, amending or renewing a broadcasting licence. On such an appeal, the Cabinet can set aside the decision and/or refer it back to the CRTC for rehearing and reconsideration, stating matters that Cabinet feels are material or which have received inadequate consideration. Cabinet's powers are somewhat restricted by the Act, for it cannot vary the CRTC's decision nor substitute its own. In addition, it can only hear appeals if the CRTC grants a licence - not if the Commission refuses at the outset to issue the licence.

In contrast to Cabinet's role in the broadcasting context are Cabinet's powers in appeals from the CRTC's decisions with regard to telecommunications. Under the National Transportation Act,[2] Cabinet can hear an appeal from the CRTC's decision with regard to telecommunication carrier rates either on its own motion or on the petition of any party, person or company interested.[3] On such an appeal, Cabinet's powers are much wider than in the broadcasting area, and Cabinet has the power to vary or rescind the rate decision made by the CRTC. Thus, there is much greater scope for

Cabinet intervention, because of the initiation power and the actual power of variation.

The Canadian Radio-Television Commission is not the only regulatory agency subject to Cabinet review. Cabinet also hears appeals from decisions of the Canadian Transport Commission (CTC) under the same provision of the National Transportation Act governing telecommunication rate appeals.[4] That section gives Cabinet the authority to vary or rescind any order of the CTC with regard to railway rates, air carrier licensing and tariffs or regulations made under the authority of the Act. Again, Cabinet can act on its own initiative or on the petition of an interested party or person.

A related form of appeal exists under the National Transportation Act with regard to certain licence applications. Under S.25 of the Act, appeals to the Minister of Transport are provided with regard to the issuance, cancellation, amendment or suspension of a licence to operate a transportation service. The Minister certifies his opinion to the CTC, which must comply therewith.

These appellate functions are not in widespread use in the governmental system, and it is clear that to advocate widespread use could lead to serious encroachments on Cabinet

time. At present, the number of Cabinet appeals is limited in number, although they are on the increase over the last decade.[5] Even in the limited number of situations in which Cabinet appeals are allowed, they do give cause for concern. They are criticized on a procedural basis, because of the deficiencies of the appellate process, and they are criticized because of the input of political considerations into what many regard as decisions which should not be made on political grounds.

To deal with the second criticism first, it has been argued that Cabinet should not be involved in the disposition of individual applications for decisions such as issuance of a transport licence or setting of the proper rates for telephone services. Such decisions should be made on the basis of criteria stated in advance, leaving to Cabinet its proper policy-making function, but ensuring that an individual applicant is not subject to extraneous political considerations.[6] Whether this is the best view to take depends on one's view of the nature and complexity of decisions on such issues and the susceptibility of those decisions to articulation of guidelines in advance (just as in the foreign investment area). As Andrew Roman has said,

> "There can be little doubt that such appellate decisions are determined on political grounds, but whether one considers this laudable accountability or unjustifiable intrusion into the rule

> of law depends upon whether one views the proper role of Canadian tribunals as quasi-courts outside the political process, or as quasi-ministerial decision-makers, making decisions with a large political component."[7]

Thus, if such decisions as the proper rate for a Bell increase do involve complex social and economic factors bearing upon the "public interest", it is arguable that a political body like the Cabinet should make them, rather than an independent regulatory authority.

If that is the case and political accountability the concern, there are still problems of procedural fairness which arise when Cabinet acts as an appellate body. Some of these problems arose in Chapter 3 when the foreign investment review process was being discussed. Specifically, the resort to Cabinet as a decision-making or an appellate body causes problems largely because of the principle of Cabinet confidentiality. Cabinet's proceedings are secret, as are the documents submitted for its consideration. Therefore, appellants and intervenants under The Broadcasting Act or the National Transportation Act have no right to obtain documents submitted to the Cabinet nor to consider the advice or summaries provided by departmental officials and, therefore, to reply to that material. Concerns about access to information recently generated a challenge to Cabinet's procedure by the Inuit Tapirisat of Canada in the appeal of a Bell rate increase. The Inuit Tapirisat convinced the

Federal Court of Appeal, in a decision now under appeal to the Supreme Court of Canada, that the federal Cabinet is subject to a duty to act fairly when it acts as an appellate body.[8] However, the duty to act fairly is a flexible concept, and Mr. Justice LeDain was faced with the difficult problem of balancing Cabinet secrecy against the applicant's request for information regarding departmental advice to the Cabinet and its protest that the Cabinet had only received a summary of its position. In rejecting the claim for disclosure of advice, LeDain J. stated:[9]

> "In view of this well-established character of the proceedings in the Cabinet and the Privy Council, it would not in my opinion be reasonable to ascribe to Parliament an intention that the duty to act fairly should impose on the Governor in Council - that is, in effect, on the Cabinet - any particular manner of considering a petition or appeal, any particular limits to the right to consult, or any particular duty of disclosure with respect to intra governmental submissions. These are all matters which go to the very heart of the Cabinet's need to be the master of its procedure and to receive from governmental sources the advice it requires concerning policy under the protection of the secrecy which all members of the Council have sworn to observe."

This limitation on disclosure and, hence, on effective participation by interested parties has been a major factor leading several critics to argue for abolition of Cabinet appeals and substitution of political control through advance issuance of guidelines.[10] In addition, the view is expressed that

Cabinet's policy-making role is better implemented through generalized policy directives or guidelines, rather than through ad hoc decisions. The latter are often made on the basis of short-term considerations, without giving adequate attention to the advancement and articulation of regulatory objectives.

b) Approval Functions

Somewhat related to Cabinet's appellate function under The Broadcasting Act or the National Transportation Act is its approval power under the National Energy Board Act. Under that statute, Cabinet must approve the decisions of the National Energy Board with regard to the issuance of certificates of public convenience required prior to the construction of gas pipelines and international power transmission lines, as well as their suspension or revocation.[11] In addition, Cabinet must approve all licences for the exportation of gas or power or for the importation of gas or exportation of oil if the period covered exceeds one year.[12] The Cabinet can not alter the Board's decisions, but can only confirm or reject them.

Such approval or rejection power is subject to the same concerns as those voiced with regard to Cabinet appeals and foreign investment review. Cabinet decision-making

seems to ensure that important policy decisions about disposition of certain sources of energy are made by a politically accountable body, yet once again, active intervention by Cabinet gives rise to procedural concerns. Confidentiality, and lack of access by participants to Cabinet's decision-making process raise serious questions of procedural fairness, particularly if the regulatory body has engaged in some type of hearing procedure prior to making its own decision.

c) Approving Regulations

Under certain statutes, Cabinet has an approval power different in nature from that just discussed. Instead of considering individual decisions by the regulatory agency, Cabinet has a power to approve the regulations made by the agency before these regulations take affect. Thus, under S.88 of the National Energy Board Act Cabinet must give its approval to regulations made by the Board. A variant of this approval power is found in the National Transportation Act. Under that Act, Cabinet need not give prior approval to regulations made by the Canadian Transport Commission, but it has the power to vary or rescind such regulations under S.64(1) of the Act.

The practice of Cabinet approval of regulations made by an independent agency is much more satisfactory to many

critics than is the appellate function discussed earlier. Cabinet's intervention is at a generalized level, that is, it is engaged in the delineation of general policy rather than the disposition of individual applications. The expertise of the agency can be brought to bear in the framing of regulations, but Cabinet retains final say in the design of the policy.

There still may be some concern about the adequacy of this administrative model to satisfy concerns about political accountability. The Cabinet does have the power to accept or reject the regulations made by the administrative agency. However, if there has been public or participant input into the regulation-making process, frequent overturning or amendment of the agency's output by Cabinet could reduce the legitimacy of the agency. This may be a constraint on Cabinet's freedom to act.

d) Policy Direction

Related to the power to approve regulations is the power of Cabinet to issue policy directives to administrative bodies. These may take the form of regulations. For example, under S.28 of the Foreign Investment Review Act[13] or S.89 of the National Energy Board Act, Cabinet itself can make regulations. Alternatively, they may take the form of policy directives from Cabinet to an independent regulatory agency.

For example, under S.258 of the Railway Act,[14] Cabinet can issue policy directives to the Canadian Transport Commission stating which railway branch lines can not be abandoned. Similarly, under S.22 of the Broadcasting Act, Cabinet can issue binding policy directives to the Canadian Radio-Television Commission regarding the maximum number of channels that may be used in a specific geographical area, the reservation of channels or frequencies for the CBC or for any special purpose stipulated in a directive and prohibition of certain classes of applicants from holding broadcasting licences.

The advantages of this type of process have been discussed elsewhere.[15] One advantage is the generalized nature of the process. Again, Cabinet, a politically accountable body, engages in delineation of general policies to guide an independent decision-maker in making decisions with regard to individual applicants or licensees. This process can be (and arguably should be) more open and fairer to parties than a case-by-case decision-making process. This is particularly true if case-by-case decision-making occurs without issuance of adequate reasons.

e) Summary

It can be noted from the brief discussion above that there are a variety of ways in which Cabinet exercises

regulatory authority at the federal level. It should be clear, as well, that there is no apparent consistency as to the types of powers given to Cabinet, even when the subjects of regulatory concern seem analogous. For example, the Cabinet can vary or rescind telecommunication rate decisions made by the CRTC, but not licensing decisions made by that body. Regulations issued by the National Energy Board must be approved in advance by Cabinet, whereas those of the CTC can be subsequently reviewed. In contrast, the regulations made by the CRTC under The Broadcasting Act are not subject to Cabinet scrutiny.

What can one conclude from this canvass of Cabinet's regulatory roles? According to Janisch, the regulatory powers given to the federal Cabinet are best described as "The Canadian Muddle". There seems to be no underlying rationale to explain the inconsistencies in the powers allocated to Cabinet in different areas of activity.[16]

2. Provincial Examples of Cabinet as a Regulatory Body

A similar picture of inconsistent use of Cabinet regulatory power is seen at the provincial level in Canada. Before embarking on a discussion of provincial models of Cabinet regulation, it is necessary to express a few cautionary words with respect to methodological problems. The first

problem is knowing where to start in seeking information on Cabinets at the provincial level. One could begin by canvassing the statute books. Such a task would be mammoth,[17] and while some useful comparative information might be disclosed, it would provide at most a crude starting point for the concerns of this study - namely, when Cabinet should act as a regulator and by what procedures. While statutes may disclose that a provincial Cabinet has appellate jurisdiction in one area, initial powers of approval in another and regulation-making or approval power in still another, this statutory "snapshot" will fail to indicate two important pieces of information: the degree of activism or interventionism evident in the exercise of these powers, and, as a corollary, the demands on Cabinet time. As well, the statute books will usually fail to indicate the procedures followed in the exercise of those powers. Thus, a power to approve regulations may give Cabinet a quite significant policy-making role in a particular area of regulatory activity if there is close scrutiny of the proposed regulations or if information about Cabinet policy preferences is conveyed to the regulation-making authority. Conversely, an approval power may be only pro forma and actually an abdication of policy-making authority to another regulatory body (whether department or agency) in another case. Without empirical evidence to

demonstrate how such regulatory powers are exercised by Cabinets, there is little utility in compiling lists of the number of possible ways in which Cabinet may regulate.

This leads to a second major methodological problem which arises in the provincial sphere and that is the dearth of empirical material on provincial Cabinets and their relationships with administrative agencies. Without this evidence, reading the statute books is a sterile exercise. Yet the gathering of such evidence is well beyond the time and resources available for this study.

Finally, while some evidence can be found of Cabinet as a regulatory body at the provincial level, it must be asked how relevant such information is to a study of Cabinet as a regulatory body at the federal level. The areas of activity in which Cabinet plays an active role will differ at the two levels of government, partly because of constitutional strictures on governmental activity and partly because of the perceived importance of a particular activity and the need for political control will vary with the jurisdiction. For example, non-resident ownership of land may be of concern in Prince Edward Island and therefore, be the subject of Cabinet approval, whereas in Ontario this may not be seen as a problem. Ontario, however, may feel it important to have Cabinet set utility rates or the location of certain

kinds of power transmission lines.

Even if one can make generalizations, such as "Cabinets are involved in areas of importance", it is difficult to regard the experience of most, if not all, of the provincial Cabinets as analogous to the federal Cabinet, particularly if one is concerned with the design of acceptable procedures. The federal Cabinet, faced with the problems of governing the whole country and supervising a bureaucracy of over 272,000 civil servants, will undoubtedly have demands placed on its time and resources which are not faced by Cabinets in smaller jurisdictions.[18] This necessarily affects the design and feasibility of Cabinet's role as a regulatory body.

With these caveats in mind, it is possible to point to various examples of Cabinet regulatory activity, and immediately one can tabulate a list of different areas of government policy.[19] If one starts with Ontario, there are several examples that come to mind. Cabinet takes direct responsibility for decision-making with regard to electricity rates, acting on the recommendation of the Ontario Energy Board, which makes a report following a public hearing.[20] Under the Ontario Energy Board Act, as well, Cabinet must approve the sale or amalgamation of a gas transmission system, after receiving the opinion of the Board.[21] Finally, completing the whole range of Cabinet functions discussed above,

Cabinet has appellate functions under the Act (S.34), power to approve certain regulations of the Board (S.28), and power to make regulations directly (SS.36, 37h).

Another area where there is extensive political input in Ontario, although through a minister rather than Cabinet, is environmental protection.[22] The Minister decides whether to accept and approve projects with environmental impact. He decides whether there should be a hearing by the Environmental Assessment Board (S.7). The Minister, with Cabinet approval, can exempt an undertaking from the Act (S.30). As well, the Minister, with Cabinet approval, can hear appeals from the Board's decision and vary or substitute its decision or require a new hearing (S.24(1)). Finally, the Cabinet has authority to make regulations under the Act (S.41).

There are several other examples of Cabinet regulatory authority in Ontario; appeals from the decisions of the Ontario Municipal Board,[23] from the Ontario Telephone Service Commission,[24] and from the Ontario Highway Transport Board.[25]

In addition to appellate functions in the area of trucking regulation, under the Public Vehicles Act Cabinet can also issue policy directives to the Ontario Highway Transport Board setting out factors to be considered in determining public necessity and convenience.[26]

The same exercise of canvassing the range of Cabinet regulatory powers could be followed with the other provinces. For example, in Prince Edward Island, Cabinet must approve purchases of land by non-residents under the Real Property Act.[27] In that province, as well as in several others (eg. Nova Scotia and Manitoba) Cabinet has appellate or initial decision-making powers in protecting the environment.[28] Similarly, Cabinet has input into land use decisions in several provinces (eg. New Brunswick, Manitoba, British Columbia).[29]

The list could go on and on, but at this point, it is preferable to stop and return to the questions posed at the outset of this chapter. When is Cabinet being used as a regulatory body and what methods are most suitable for Cabinet in exercising regulatory powers?

Scanning the range of activities in which Cabinet is involved, both provincially and federally, it is probably impossible to draw any general conclusions as to when Cabinet acts as a regulator. The decision to retain control over an area of regulatory activity appears to be made on the basis of individual cases and political circumstances, without any unifying characteristic except that a political decision has been made that political controls should be retained or imposed at some stage of the regulatory process.

Similarly, there is no consistency with regard to the decisions as to the method by which Cabinet should exercise regulatory authority. Sometimes, case-by-case intervention is provided; at other times, policy directives and regulation-making authority.

CHAPTER FIVE

CONCLUSIONS

The objective of this study has been to analyse a regulatory process, created by the Foreign Investment Review Act, in which Cabinet acts as the regulatory body. In previous chapters we have attempted to identify some of the more important considerations that influenced the decision to assign such a regulatory role to Cabinet and to describe the principle regulatory responsibilities that have been assigned to Cabinet. We have also attempted to identify the central problems that have resulted from Cabinet's regulatory roles. In our third chapter, we examined the FIRA regulatory process in terms of a number of basic criteria germane to the assessment of regulatory processes as well as in terms of the advantages and disadvantages as perceived by the participants in the process. In this chapter, our goal is to employ the two sets of assessments found in Chapter Three to develop our overall evaluation of the FIRA process as an example of Cabinet as the regulatory agency.

The fundamental purpose has been to determine the advantages and disadvantages that can result from the employment of Cabinet as a regulatory body. More specifically, we wanted to analyse the FIRA process from the perspective of political accountability, inasmuch as a concern for accountability

has been a central focus in many of the current debates on regulation, regulatory agencies and regulatory processes.

We suggested that there were two aspects, or faces, of the concept of political accountability relevant to such agencies and processes. One was the relationship between elected and non-elected authorities. The issue of political accountability in this relationship revolves around the goal of political control by the elected over the non-elected authorities. Such a goal is premised on the principle that the making of policy should be the responsibility of those elected by, and responsible to, the public. The second face of political accountability was "answerability" and here the concern shifted to the relationship between two sets of elected authorities, Cabinet and Parliament. In our parliamentary system, policy-making is essentially the responsibility of Cabinet which in turn must be accountable to Parliament for the exercise of its responsibilities. For its part, Parliament also bears a significant burden in such a system in that it must give continuous scrutiny to Cabinet's activities. Our evaluation of the FIRA process will concentrate exclusively on the two dimensions of political accountability, political control and answerability.

The FIRA Process and Political Control

The FIRA process is one in which the principle of control by elected authorities is clearly evident. Cabinet has been granted not only the overt policy-making roles to issue policy guidelines and regulations, but also to make the decisions on individual applications. The latter power was assigned to Cabinet on the grounds that such applications involved significant "policy determinations" in themselves and, as such, should not be delegated to non-elected authorities.

It is clear that, in practice, the principle of political control over the FIRA process has been satisfied. There are no obstacles to such control in the statute and policy-making as well as policy-implementation are demonstrably in the hands of Cabinet and the designated minister. There is no evidence to suggest that, as the process has developed, the principle of political control has been diluted or abridged. But to state that there has been no slippage, no transfer of decision-making to non-elected officials, is not to suggest that there have been no disadvantages associated with implementing the principle of political control.

One major disadvantage concerns the amount of Cabinet and ministerial time consumed by decision-making on individual cases. The fact that Cabinet must make the decisions, however

summarily, combined with the number of cases that resulted from the absence of meaningful thresholds, has resulted in a situation wherein no other individual activity routinely takes as much Cabinet time as acting as the decision-maker on individual FIRA applications. This is a most significant cost associated with the principal of political control.

There is an even more important problem associated with political control over individual applications. That problem is the failure to develop or refine policies governing foreign investment to be implemented by means of the FIRA process over the past six years. It will be recalled that the criteria in the Foreign Investment Review Act were criticized for their generality and subjectivity when the Act was before Parliament. A promise was made by the minister to publish guidelines that would "flesh out" the criteria when experience had been gained with the process. To date, policy enunciation and refinement has, at best, been tangential and incremental.

While it would be inaccurate to argue that a policy vacuum has developed - there are the statutory criteria, after all - it is accurate to argue that there has been very limited development of foreign investment policy to guide the review process in the past six years. Cabinet appears to have succumbed to, or been overwhelmed by, its "adjudicative role"

at the expense of its legislative role, inasmuch as it appears to have concentrated on deciding matters "on a case by case basis, seeking to apply known principles to the facts of each case."[1] Whether Cabinet has been forced to do so because of the volume of cases it must process or has opted for this approach out of choice, the fact is that it has assumed an "excessively adjudicative approach". Consequently, in the foreign investment review process, where we have political control over policy development, we are no better off than in areas of transportation regulation where policy development, to a large degree, has been delegated to an independent agency, the CTC. In both areas, we have had minimal policy development.

In the case of Cabinet, however, the failure to develop policy, given that Cabinet deliberately reserved to itself such a responsibility, because of the principle of political control, is all the greater because policy-making is its responsibility. Cabinet's "primary purpose", J.R. Mallory has observed, "is to reach agreement on what the policy of the government should be. It is the policy-making organ of government."[2]

In short, although the FIRA process allows for complete political control over both policy development and the

disposition of individual cases, it is the latter which has almost completely dominated Cabinet decision-making. Those who argue for enhanced political control over regulatory processes to ensure that policy development rests with elected authorities must surely be disappointed with the record of the past six years of the FIRA process if they expect such control to result in policy development. Political control, the FIRA case demonstrates, does not, and cannot, ensure that elected authorities will employ the powers granted to them.

The FIRA Process and Answerability

The failure of Cabinet to exercise political control over policy making pales in significance, however, compared to the loss of political accountability in the form of answerability that has developed with the FIRA process. Accountability, it will be recalled, was defined by the Lambert Royal Commission to be "the liability assumed by all those who exercise authority to account for the manner in which they have fulfilled responsibilities entrusted to them, a liability ultimately to the Canadian people owed by Parliament, by the Government and, thus, every government department and agency." It is our conclusion that the existing FIRA process is not a politically accountable process in any meaningful sense, inasmuch as those who have been granted powers by the Foreign Investment Review Act, namely the Cabinet and the designated minister, have

not had to give an effective accounting of how they performed their responsibilities. Furthermore, we believe there are fundamental obstacles that the responsible authorities have exploited to avoid just such an accounting.

There are two, albeit indirect, measures that suggest the absence of effective accountability surrounding the FIRA process. One is the variety, indeed the extremities, of the perceptions of the process. For some, the present process is a sham, a fraud, a cosmetic symbol behind which nothing is done to curb the extent or impact of foreign investment in Canada. For others, the process involves "a distasteful, bureaucratic arena",[3] "a bureaucratic iron curtain";[4] it is a process that resembles a "star chamber proceeding". While widely divergent perceptions such as these can spring from a variety of causes, we would suggest that the secrecy and ambiguity that surrounds the process give rise to such conflicting perceptions. The fact that those responsible do not have to account for decisions made as part of the process permits and indeed encourages such perceptions.

The second measure is that when criticism is directed at the FIRA process it is almost inevitably directed, by editorialists, Members of Parliament and even participants, not at the responsible authorities, Cabinet and the designated minister, but at the Foreign Investment Review Agency, even

though the Agency possesses absolutely no independent decision-making capacity. The Agency is no more responsible for the foreign investment review policy and its implementation than, for example, officials in the Department of Transport are responsible for transportation policy. Notwithstanding the fact that the FIR Act is clear on lines of responsibility the myth has developed and been perpetruated that FIRA is a decision-making body. Although it could be suggested that such a myth is the fault of the critics not of the responsible authorities, to a very large extent such a response fails because in part the decision to create an agency outside of departmental structures was an obvious attempt to focus attention away from Cabinet and the minister. The attempt has succeeded. The habit of having the Commissioner, and not the responsible minister, defend the Agency's estimates before the parliamentary committee as if it were comparable to the CTC or NEB has also reinforced the image of an independent agency.

Cabinet and the designated minister have not had to give an accounting of how they perform their responsibilities under the Act for two reasons. The first pertains to the power delegated to Cabinet to make the decisions on individual applications. Given the confidentiality that protects Cabinet decision-making, Cabinet is not required to, and is protected from, giving reasons for its decisions. If this was not protection enough, the Act confers discretion on the Minister to publish or not to publish the undertakings which applicants

agree to as a condition of approval. Although this provision of the Act was designed ostensibly to protect applicants, it has evolved as a further safeguard to protect Cabinet from being required to disclose some of the rationale behind its decision-making.

The Lambert Commission insisted that "accountability relies on a system of connecting links - a two way circuit involving a flow of information that is relevant and timely...."[5] The foreign investment review process does not satisfy this condition. The "links" between the decision-makers and those to whom they owe an accounting, Parliament, and ultimately the public, have been broken. The absence of meaningful standards and criteria, publicly stated, the confidential nature of the review process, the failure to provide reasons for individual decisions, all these factors have produced a process which denies accountability. There is no answerability for actions because there is no meaningful information available.

The absence of answerability is the primary, if not sole, cause for the divergent perceptions described above. We do not know, and under the present system cannot know, if Cabinet has been consistent, prudent, honest or indeed lawful in its implementation of the law. We do not know if Cabinet has been arbitrary or capricious in its decision-making. We

do not know if Cabinet has been subject to, and a participant in, manipulation by politically effective groups or individuals. We do not know if the process is a meaningful attempt to address a perceived public problem or a "cosmetic symbol", a fraud to delude the public. We do not know and cannot know these things in the present system. We cannot have accountability as a result. What we do know is that Parliament has conferred on Cabinet an extremely high degree of discretionary authority that can have a far-reaching and direct impact on national and regional economies, on the jobs of individual Canadians and on the rights of Canadians to dispose of their property. We also know that the potential for abuse of public trust is also there. Given that power, it is surely unacceptable that those who exercise do not have to give an accounting of its employment.

In Chapter One, it was mentioned that political accountability imposed a significant burden on Parliament to subject Cabinet to continuous scrutiny. Parliament has not fulfilled its responsibility in this regard. Admittedly in a majority government situation, it is difficult, if not impossible, for Parliament, read Opposition members, to compel members of the Cabinet to justify their actions. Even allowing for this situation, Parliament must bear some of the criticism. In the

first place, the Government did not have a majority when the Foreign Investment Review Act was passed and, if Members had so desired, could have insisted that adequate safeguards and appropriate accountability mechanisms be built into the legislation. This they did not do with the result that the Cabinet was not only given a statutory "blank cheque" to regulate foreign investment but also was allowed to make "withdrawals" in secret. It was as if Cabinet had been given authority to draw on an account in a Swiss bank. No one who wanted to exercise discretionary power could ask for more. Nor could they be granted more! Given this situation, once a majority Government was elected, it was unlikely that the Opposition could successfully demand that the Government renounce some of its discretion. Secondly, Members of Parliament have been as responsible as others in developing the myth of FIRA as an independent agency which should be held responsible for its actions. They have done this by permitting the Commissioner of FIRA to appear on the Agency's behalf before the parliamentary committee and not insisting that the Minister appear, supported by his officials. This may appear to some to be a trivial concern but it assuredly is not. It goes to the heart of the issue of accountability and of Parliament's responsibility where necessary and possible to insist that decision-makers defend their decisions.

A Final Statement

Our task was to determine, on the basis of an analysis of the Foreign Investment Review Act, what advantages and disadvantages can result when Cabinet is employed as the regulatory agency. The FIRA process as an example suggests that the advantages may be wholly theoretical while the disadvantages may be all too real. The foreign investment review process, as it currently exists, has resulted in a situation in which Cabinet has failed dismally to exploit the power of political control mechanisms for the primary purposes for which they were conferred. But it has resulted in a process for which they do not have to give an effective accounting for the actions and decisions they do take. Surely, it is the worst of all possible systems: political control without meaningful effect and decision-making without answerability. It is impossible to recommend that there be an extension of such a system into other areas of regulation. Moreover, the failure of the Cabinet to exploit, publicly at least, its policy making authority should give pause to those who would recommend enhanced political control over other regulatory processes. The example of FIRA clearly and unequivocally argues that granting a power does not guarantee its use.

We subscribe to the principle that in a democratic system policy making should be the responsibility of elected

officials. But substituting elected for non-elected officials in the policy making process is only the first step towards accountable regulation. It provides for political control. Such a substitution, however, does not guarantee political accountability in the sense of decision-makers being required to answer for their actions. The example of FIRA, in fact, suggests the opposite can occur, that accountability can be diluted if only because decision-making is concealed behind a mask of legitimacy. True and meaningful accountability requires that all the participants, not just some, have the appropriate resources with which they can assess the behaviour of others. One of, if not, the most important resources is meaningful information. This is denied in the present FIRA process.

"Trust Cabinet", the prescription of one participant, in itself is not a satisfactory basis for political accountability. Trust between governors and the governed and their representatives is a necessary bond for any polity but surely we have long learned that trust is insufficient in itself for a healthy democratic society. In the case of the foreign investment review process, this should now be self-evident. The present FIRA process does not meet the test of accountable regulation.

ENDNOTES

Introduction

1. A comprehensive bibliography of recent literature on the issues involved in the debate on accountability and regulatory agencies is found in H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada", Osgoode Hall Law Journal, 17 (1979) pp. 46-106. See especially Footnote 2, p. 46.

2. Royal Commission on Financial Management and Accountability (Lambert) Final Report (Ottawa: Minister of Supply and Services, 1979) p. 21.

3. Ibid. p. 370.

4. In this study we employ the designation "independent regulatory agencies" as it is commonly used to indicate relative not absolute independence by commentators and analysts such as H.N. Janisch, op. cit., Richard Schultz, "Regulatory Agencies in the Canadian Political System" in Kenneth Kernaghan (ed.) Public Administration in Canada (3rd ed.) (Toronto: Methuen 1977), John Willis (ed.) Canadian Boards at Work (Toronto: Macmillan, 1941), the Royal Commission on Financial Management and Accountability (Lambert) Final Report and the Law Reform Commission of Canada in studies such as Independent Administrative Agencies (Ottawa: Minister of Supply and Services Canada, 1980) and Lucinda Vandervort, Political Control of Independent Administrative Agencies (Ottawa: Minister of Supply and Services Canada, 1979). For useful American references that discuss the relative, albeit usually larger degree of independence of their independent agencies see Emmette Redford, Administration of National Economic Controls (New York: Macmillan, 1952) pp. 275-292, and Committee on Governmental Affairs, United States Senate, Study on Federal Regulation, Vol. V, Regulatory Organization (Washington: USGPO, 1977) pp. 25-82.

5. Foreign Investment Review Act, S.C. 1973-74, c. 46, s. 7(1). The individual sections of the Act to which the following comments pertain will be cited in full in Chapter Two.

6. For an extended discussion of such criteria see Economic Council of Canada, Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) and especially the Law Reform Commission, Independent Administrative Agencies, op. cit.

Chapter One

1. Government of Canada, Foreign Direct Investment in Canada (Ottawa: Information Canada, 1972) (henceforth Gray Report).

2. In addition to the various government-commissioned reports cited herein, background to the debate and historical evolution of Canadian policy on foreign investment can be found in A.E. Safarian, Foreign Ownership of Canadian Industry (Toronto: McGraw-Hill, 1966), D. Godfrey and M. Watkins (eds.) Gordon to Watkins to You - A Documentary: The Battle for Control of Our Economy (Toronto: New Press, 1970), Kari Levitt, Silent Surrender: The Multinational Corporation in Canada (Toronto: Macmillan, 1970), D.W. Carr, Recovering Canada's Nationhood (Ottawa: Canada Publishing Co., 1971), Isaiah Litvak et al., Dual Loyalty: Canadian-U.S. Business Arrangements (Toronto: McGraw-Hill, 1971), W. Pope, The Elephant and the Mouse: A Handbook on Regaining Control of Canada's Economy (Toronto: McClelland and Stewart, 1971) and John Fayerweather, Foreign Investment in Canada: Prospects for a National Policy (White Plains, New York: International Arts and Science Press, 1973). An excellent overview of the background and a detailed analysis of the law is found in Thomas M. Franck and K. Scott Gudgeon, "Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice", New York University Law Review 50 (1975) pp. 76-146.

3. Canada, Royal Commission on Canada's Economic Prospects (Gordon) Final Report (Ottawa: Queen's Printer, 1957).

4. Revised Statutes of Canada 1970, c. C-31.

5. These are provided in the Gray Report, pp. 324-25.

6. On the Home Oil intervention see Phillip Smith, The Treasure Seekers: The Men Who Built Home Oil (Toronto: Macmillan, 1978).

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

8. The Watkins Report linked national independence with the impact of extra-territoriality and the deference shown by American subsidiaires to American law at the expense of Canadian interests. The following citation illustrates this concern: "The most serious cost for Canada resulting from foreign ownership is the intru-

sion of American law and policy into Canada. For Canada, the essential feature of the problem is not the economic cost but the loss of control over an important segment of Canadian economic life. While there are no easy solutions to extra-territoriality, Canadian national policy should be directed toward strengthening Canadian law and administrative machinery to countervail extra-territorial operations of American law and administrative machinery" (p. 345).

9. Ibid., pp. 40, 112-113, 243-244.

10. Ibid., pp. 369-70, 395-397, 403.

11. Ibid., p. 121.

12. House of Commons (28th Parliament, 1969-70), Standing Committee on External Affairs and National Defence, Eleventh Report (Proceedings No. 33), pp. 94-98.

13. Ibid., pp. 98.

14. Ibid., pp. 98-100.

15. Ibid., pp. 96, 100, 102.

16. Gray Report, Foreword, p. v.

17. Ibid., p. 513.

18. Ibid., p. 511.

19. Ibid., p. 501.

20. Ibid., p. 7.

21. Ibid., p. 430.

22. Ibid.

23. Ibid., p. 418.

24. Ibid., p. 440.

25. Ibid., p. 449. The more general policy instruments are discussed in the Report, pp. 433-37.

26. Ibid., p. 452.

27. Ibid., p. 456.

28. Ibid., p. 457.

29. Ibid., p. 463. This phrase is repeatedly used.

30. Ibid., p. 441.

31. Ibid., p. 453.

32. Ibid., p. 453.

33. Ibid., p. 491.

34. The Lambert Royal Commission on Financial Management and Accountability, Final Report, pp. 310-11 maintained that "agencies should not be established outside department structures where there is no apparent need for special non-departmental status" and cited FIRA as "a classic example of how the creation of an agency can unnecessarily confuse the lines of accountability."

35. Gray Report, p. 480.

36. Ibid., p. 481.

37. For information and alternative explanations and assessments of such developments see Gordon Robertson, "The Changing Role of the Privy Council Office", Canadian Public Administration 14 (1971) pp. 487-508, Marc Lalonde, "The Changing Role of the Prime Minister's Office", ibid., pp. 509-537, Thomas d'Aquino, "The Prime Minister's Office: Catalyst or Cabal?...", ibid., 17 (1974) pp. 55-79, with comment by Denis Smith, pp. 80-84, G. Bruce Doern, "The Development of Policy Organizations in the Executive Arena", in G. Bruce Doern and P. Aucoin (eds.) The Structures of Policy-Making in Canada (Toronto: Macmillan, 1971) pp. 39-78 and Richard D. French, "The Privy Council Office: Support for Cabinet Decision-Making" in Richard Schultz et al. (eds.) The Canadian Political Process (3rd ed.) (Toronto: Holt Rinehart and Winston, 1979) pp. 363-394.

38. Bill C-201 (Foreign Takeovers Review Act) (received First Reading, House of Commons, May 4, 1972) s. 11.

39. This is discussed below on pp. 28-29.

40. On the importance and various roles that symbols can play in political life, see Murray Edelman, The Symbolic Uses of Politics (Urbana: University of Illinois Press, 1964).

41. Gray Report, p. 480.

42. Ibid.

43. Roberto D. Qualtieri, "Canada's New Foreign Investment Policy", Texas International Law Journal 10 (1975) p. 59.

44. Lloyd D. Cutler and David R. Johnson, "Regulation and the Political Process", Yale Law Journal 84 (1975) p. 1399.

45. There is a great deal of debate now current about the appropriateness of the "political appeal" mechanism as a policy instrument. See H.N. Janisch, "Policy Making in Regulation...", Osgoode Hall Law Journal 17 (1979) pp. 46-106, Richard Schultz, Federalism and the Regulatory Process (Montreal: Institute for Research on Public Policy, 1979), Royal Commission on Financial Management and Accountability Report, pp. 318-19. The Economic Council, Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) pp. 63-67 and Law Reform Commission of Canada, Independent Administrative Agencies (Ottawa: Minister of Supply and Services, 1980) pp. 73-93.

46. On the National Energy Board, its powers and relations with Cabinet, see A.R. Lucas and T. Bell, The National Energy Board: Policy, Procedure and Practice (Ottawa: Law Reform Commission, 1977).

47. See the submissions of the provincial governments of New Brunswick, Quebec, Saskatchewan and Ontario in House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Proceedings, 29th Parliament, 1st Session, Issue 42 (July 19, 1973) Vol. II and III. Although the Gray Report and the Government when the Foreign Investment Review Act was introduced insisted that it was within the constitutional competence of the federal government, both acknowledged both the legitimate concerns felt by provincial governments on the matter and the need to consult with them on the screening of applications. See the Gray Report, pp. 487-489.

48. These issues are surveyed in Richard Schultz, Federalism and the Regulatory Process (Montreal: Institute for Research on Public Policy, 1979) op. cit.

49. For statements of business community positions on these issues see W.A. Macdonald and J.W. Rowley, "Bill C-13: An Analysis of the Central Issues", and A.J. MacIntosh and Warren Grover, "Bill C-13: Mergers, Regulated Industries and the Competition Board" in J.W. Rowley and W.T. Stanbury (eds.) Competition Policy in Canada (Montreal: Institute for Research on Public Policy, 1978). See also L.A. Skeoch and Bruce C. McDonald, Dynamic Change and Accountability in a Canadian Market Economy (Ottawa: Minister of Supply and Services Canada, 1976) pp. 277-315.

50. Foreign Investment Review Act, S.C. 1973-74, c. 46, s. 7(1). The Act received Royal Assent on December 12,

1973 and was subsequently proclaimed in force in two phases: Phase I, relating to the acquisition of control of Canadian business enterprises, on April 19, 1974 and Phase II, relating to the establishment of new businesses, on October 15, 1975.

51. Bill C-201 (Foreign Takeovers Review Act) was introduced on May 4, 1972 and given First Reading on May 29, 1972.

52. The following extracts from the House of Commons Debates represent the NDP position. The speaker is the Leader of the NDP, David Lewis:

> Mr. Speaker, I think it was clear to everyone who listened to the minister that he was engaged in a defensive speech, defending the bill and a policy he knew had very little meaning for Canada and for the future of this country.... If I heard the minister correctly, he expressed the hope there would be unanimous support for the bill. I want to tell him now that there is not. This is a poor bill and a poor substitute for action to protect our country and its future, so we do not intend to support such a useless step as the minister has proposed.
>
> May 29, 1972, p. 2639.

> ...the Gray Report set out five channels of foreign penetration of our economy. This bill only deals with one of these, takeovers of existing Canadian firms. It deals with this one of the five, the least important which covers the smallest part of the foreign capital investment in this country.
>
> May 29, 1972, p. 2640.

53. Foreign Investment Review Act, s. 10.

54. Gray Report, pp. 455-458.

55. See the summary description of the statutory criteria for the CTC, CRTC and NEB, in Richard Schultz, op. cit., pp. 29-44.

56. Foreign Investment Review Act, op. cit., s. 2(2).

57. House of Commons Debates, March 30, 1973, p. 2783.

58. Ibid., Standing Committee on Finance, Trade and Economic Affairs, Proceedings, 26:19 (June 5, 1973).

59. Debates, April 3, 1973, p. 2914.

60. Ibid., April 4, 1973, pp. 2978-79.

61. The NDP did attempt to amend Sec. 2, not by making the factors more specific, but by extending the list to include the screening of imports of parts and components, the export of raw materials, export agreements and foreign expansion into related businesses. See Standing Committee on Finance, Trade an Economic Affairs, Proceedings, 39:26 (July 10, 1973).

When the Government resisted, with the support of Conservative Members, the NDP withdrew amendments and instead moved the following amendment be made to s. 2 (2)(a) of the Bill:

> (a) the effect of the acquisition or establishment 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; (amendment underlined).

Ibid., 40:3 (July 12, 1973).

62. Ibid., 26:7 (June 5, 1973).

63. Foreign Investment Review Act, s. 5(1)(c). Between the time of proclaiming Part One of the Act in April 1974 and the introduction of the new business provisions in October 1975, the threshold level applied to all acquisitions. After October 1975, it only applied to acquisitions by non-eligible persons already operating in Canada of a related business.

64. Among the groups opposed were the Canadian Bar Association, the Canadian Chamber of Commerce, the Canadian Real Estate Association, the Mining Association of Canada, the Canadian Manufacturers' Association, Imperial Oil, the International Council of Shopping Centers, the Independent Petroleum Association of Canada, and the Urban Development Institute. Details on the rationales underlying their positions can be found in their submissions to the Standing Committee on Finance, Trade and Economic Affairs (29th Parliament), Proceedings, Issue 42 (July 19, 1973).

Chapter Two

1. Canada Gazette, Part II, Vol. III, No. 6, March 23, 1977.

2. Ibid., Part I, April 6, 1974.

3. Ibid., January 5, 1976.

4. Ibid., August 2, 1975 and amended March 19, 1977.

5. Ibid., April 26, 1975 and amended March 19, 1977.

6. Ibid., April 27, 1974.

7. J.A. Langford, Canadian Foreign Investment Controls (2nd ed.) (Don Mills, Ontario: CCH Canadian Ltd., 1979) p. 39.

8. Globe and Mail, October 4, 1977. This is also the opinion of Louis A. Calvet in "Canadian Controls of Foreign Business Entry: Present Form and Future Prospects", Alfred B. Sloan School of Management, Massachusetts Institute of Technology, Working Paper 959-77, September 1977, pp. 12-13.

9. Richard D. French, How Ottawa Decides: Planning and Industrial Policy-Making 1968-1980 (Toronto: James Lorimer and Co., 1980) esp. Chapters 5 and 6.

10. This is not unique to the foreign investment review process. For a valuable survey of examples involving independent agencies see H.N. Janisch, "Policy-Making in Regulation..." Osgoode Hall Law Journal 17 (1979) pp. 46-106.

11. Hon. Alastair Gillespie, House of Commons Debates, Oct. 10, 1974, pp. 308-309.

12. Statement by the Secretary of State for External Affairs, the Hon. Mitchell Sharp, on the Government's Policy on International Bridges, with particular reference to the Ambassador Bridge, October 15, 1973.

13. Hon. Romeo LeBlanc, Minister of Fisheries and the Environment, "Restrictions on Joint Fishing Ventures" News Release, Feb. 9, 1977.

14. Hon. Alastair Gillespie, House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Proceedings, 44:29 (May 6, 1975).

15. For a discussion of some of these problems involving an independent agency see H.N. Janisch, The Regulatory Process of the Canadian Transport Commission (Ottawa: Law Reform Commission of Canada, 1978).

16. Hon. Don Jamieson, Foreign Investment Review Act Annual Report 1974-75, p. 4.

17. See Louis A. Calvet, op. cit., pp. 18-19.

18. See note 1 above.

19. Globe and Mail, February 3, 1977; Financial Post, Jan. 29, 1977.

20. Gray Report, op. cit., pp. 440, 451-482 passim and statement by Alastair Gillespie, Minister of Trade and Commerce during second reading on the legislation, House of Commons Debates, March 30, 1973, p. 2781.

21. Government of Canada, Foreign Investment Review Agency, A Guide to Filing Notice with the Foreign Investment Review Agency, p. 19.

22. Ibid.

23. Ibid.

24. Foreign Investment Review Act, s. 2(2)(e) and s. 9(d).

25. Gray Report, p. 449.

26. Globe and Mail, October 4, 1977.

27. Alastair Gillespie, Minister of Industry, Trade and Commerce, House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Proceedings, Issue 27:33, June 7, 1973.

28. Foreign Investment Review Act, s. 11(1).

29. Gillespie, ibid.

30. R.A. Donaldson and J.D.A. Jackson, "The Foreign Investment Review Act", Canadian Bar Review, 53 (1971) p. 196.

31. The 1976, 1977, and 1978 figures were provided by the Commissioner of FIRA in appearances before the House of Commons Standing Committee on Finance, Trade and Economic Affairs. See the Committee's Proceedings for those years at 107:6, May 13, 1976, 29:6, March 22, 1977 and 20:5, April 11, 1978. The 1979 figure was provided during discussions with FIRA officials.

32. Ibid., Proceedings, 20:10, April 11, 1978.

33. See the speech by the Minister of State for Science and Technology, Mr. Judd Buchanan, House of Commons, Debates, pp. 5964-65, June 1, 1978.

34. The application was by Canadian General Electric Company Ltd. to acquire control of Federal Pioneer Ltd. See Foreign Investment Review Agency, "Press Release", April 21, 1980.

35. Gray Report, p. 482. This is known as the "Frizbee qualifier" after the example provided by Alastair Gillespie during parliamentary debate on FIRA. He stated that if "the failure to comply with an undertaking is clearly the result of changed market conditions, for example, the undertaking to export frizbees is followed by the collapse of the frizbee market - the person would not be held accountable." See note 27 above at 26:16.

36. Maclean's, July 1977, p. 20.

Chapter Three

1. See, for example, H.N. Janisch, Policy-Making in Regulation: Towards a New Definition of the Status of Independent Agencies in Canada (1979), 17 Osgoode Hall Law Journal 46; L. Cutler and D. Johnson, Regulation and The Political Process (1975), 84 Yale Law Journal 1395; Canada, Royal Commission on Financial Managment and Accountability (Lambert Commission) Final Report (Ottawa: Minister of Supply and Services Canada, 1979).

2. K.C. Davis, Discretionary Justice: A Preliminary Enquiry (Baton Rouge: Louisiana State University Press, 1969) p. 43.

3. Lambert Commission, supra, note 1 at 21.

4. See, for example, Baum's critique of the discretion of the Canadian Radio-Television Commission in "Broadcasting Regulation in Canada: The Power of Decision" (1975), 13 Osgoode Hall Law Journal 693.

5. For a useful review of the debates on the reality of ministerial responsibility see, T.M. Denton, "Ministerial Responsibility: A Contemporary Perspective" in Richard Schultz et al. (eds.) The Canadian Political Process (3rd ed.) (Toronto: Holt, Rinehart & Winston, 1979) pp. 344-362.

6. See Economic Council of Canada, Responsible Regulation (Ottawa: Minister of Supply and Services Canada, 1979) pp. 30-31.

7. R.S.C. 1970, c. B-11.

8. L. Fuller, The Morality of Law (New Haven: Yale University Press, 1964) at 39.

9. Capital Cities Communications Inc. v. Canadian Radio-Television Commission (1977), 81 D.L.R. (3d) 605 (S.C.C.) at 628-629.

10. M. Polanyi, The Logic of Liberty (Chicago, Ill.: University of Chicago Press, 1951); L. Fuller, "The Forms and Limits of Adjudication" (1978), 92 Harvard Law Review at 353.

11. J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 University of Toronto Law Journal 351 at 358.

12. Board of Education v. Rice, (1911) A.C. 179; D. Mullan, "Human Rights and Administrative Fairness" in Macdonald and Humphries (eds.) The Practice of Freedom (Toronto: Butterworths, 1979) p. 111.

13. See, for example, The Statutory Powers Procedure Act, S.O. 1971, c. 47; The Public Service Staff Relations Act, R.S.C. 1970, c. P-35, as am. by s. 91.

14. Calgary Power Ltd. v. Copithorne, (1959) S.C.R. 24; Mitchell v. The Queen, (1976) 2 S.C.R. 570.

15. Similarly there is no "right" to acquire a new or existing broadcasting licence or to take over a transportation undertaking under federal jurisdiction. Both actions require prior approval of appropriate federal regulatory authorities.

16. Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671 (S.C.C.); Re Webb v. Ontario Housing Corp. (1979), 93 D.L.R. (3d) 187 (Ont. Div'l Court); Mullan, supra, note 11.

17. Inuit Tapirisat for Canada v. Leger (1979), 95 D.L.R. (3d) 665 (F.C.A.).

18. See Nicholson, supra, note 15 at 681.

19. M. Connelly, Securities Regulation & Freedom of Information (Ontario Commission on Freedom of Information and Individual Privacy, Research Publication No. 8, 1979).

20. See discussion, supra, about notices under s. 11(1) and reference to the average processing time of 120 days.

21. See H.N. Janisch, op. cit., Richard J. Schultz Federalism and the Regulatory Process (Montreal: Institute for Research on Public Policy, 1979) and the Law Reform Commission of Canada, Independent Administrative Agencies, for discussions of such hurdles and examples where they have been encountered.

22. For discussion of two examples of assertions of regulatory independence, see H.N. Janisch, The Regulatory Process of the Canadian Transport Commission, pp. 119-120 and Law Reform Commission of Canada, Political Control of Administrative Agencies, pp. 90-94.

23. See, for example, the article by "Thomas Bakelin", in the Financial Post, April 12, 1980. See also the reply by the Commissioner of FIRA, May 10, 1980.

24. This is, of course, one of the fundamental criticisms of the "political appeal" process involving independent regulatory agencies. See the sources cited in note 21 above.

25. See Steven Globerman, U.S. Ownership of Firms in Canada (Montreal: C.D. Howe Research Institute, 1979) pp. 84-95 for suggestions that such discounting may have occurred. The Agency, however, strongly disputes the existence of such discounting. See Foreign Investment Review Agency, Annual Report 1977-78, p. 23.

26. Calgary Herald, July 13, 1978.

27. House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Proceedings 20:10, April 11, 1978.

28. Lambert Commission Report, p. 21.

29. Ibid., p. 10.

Chapter Four

1. Broadcasting Act, R.S.C. 1970, c. B-11, s. 23.

2. National Transportation Act, R.S.C. 1970, c. N-17, as am. by S.C. 1974-75, c. 49, s. 14.

3. Id., s. 64(1): "The Governor in Council may, at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of

the Commission, whether such order or decision is made inter parties or otherwise, and whether such regulation is general or limited in its scope an application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties."

4. S. 64(1).

5. For statistics on the frequency of Cabinet appeals see P. Kenniff, "Political Control of Independent Regulatory Agencies" in P. Garant (ed.) Aspects of Anglo-Canadian and Quebec Administrative Law (Quebec: Université Laval, Faculté de Droit, 1979) pp. 66-95.

6. H.N. Janisch, "Policy-making in Regulation: Towards a New Definition of the Status of Independent Agencies in Canada" (1979), 17 Osgoode Hall Law Journal 46 at 64, 81-84; R.J. Schultz, Federalism and the Regulatory Process (Montreal: Institute for Research on Public Policy, 1979) p. 83; D. Hartle, Public Policy Decision-Making and Regulation (Montreal: Institute for Research on Public Policy, 1979); Canada, Royal Commission on Financial Management and Accountability Final Report (Ottawa: Minister of Supply and Services Canada, 1979) pp. 318-319.

7. A.J. Roman, "Regulatory Law and Procedure" in G.B. Doern (ed.) The Regulatory Process in Canada (Toronto: Macmillan of Canada, 1978) p. 68 at 76.

8. Inuit Tapirisat of Canada v. Leger (1979), 95 D.L.R. (3d) 665 (F.C.A.).

9. Id. at 675.

10. See authorities cited, supra, note 6.

11. National Energy Board Act, R.S.C. 1970, c. N-6, ss. 44, 47(1). By s. 17, the Board can change certificates and licences or permit assignment or transfer of certificates and licences only with Cabinet approval.

12. Consolidated Regulations of Canada, 1978, Vol. 11, c. 1056.

13. Foreign Investment Review Act, S.C. 1973-74, c. 46 as am.

14. Railway Act, R.S.C. 1970, c. R-2.

15. Lambert Commission, supra, note 6 at 318; H.N. Janisch, supra, note 6 at 104-106.

16. H.N. Janisch, supra, note 6 at 62, 63.

17. H.N. Janisch and K. Ward, Compilation and Analysis of Selected Provincial Regulatory Statutes (Ottawa: Federal-Provincial Consultative Committee on Regulation, 1979). This is a comprehensive compilation of selected provincial regulatory statutes dealing with energy, the environment, planning, liquor, public utilities and securities.

18. R. Bird and D. Foot, "Bureaucratic Growth in Canada: Myths and Realities" in G.B. Doern and A. Maslove (eds.) The Public Evaluation of Government Spending (Montreal: Institute for Research on Public Policy, 1979), p. 121 at 124-125.

19. See H.N. Janisch and K. Ward, supra, note 17.

20. The Ontario Energy Board Act, R.S.O. 1970, c. 312, as am. by S.O. 1973, c. 55, s. 37a; S.O. 1976, c. 21, s. 37a(3a)(3b).

21. Id., s. 26, as am. by S.O. 1973, c. 55.

22. Environmental Assessment Act, S.O. 1975, c. 69.

23. The Planning Act, R.S.O. 1970, c. 349, as am. by s. 94. Planning is essentially a political process in Ontario, with Ministerial approval required for official plans and subdivisions.

24. The Telephone Act, R.S.O. 1970, c. 457, s. 18.

25. Ontario Highway Transport Board Act, R.S.O. 1970, c. 316, s. 21.

26. R.S.O. 1970, c. 392, as am. by S.O. 1978, c. 23, ss. 26, 27.

27. Real Property Act, S.P.E.I. 1972, c. 40, s. 1.

28. Environmental Protection Act, S.P.E.I. 1975, c. 9, s. 27; Environmental Protection Act, S.N.S. 1973, c. 6, s. 38; Clean Environmental Act, 1972, S.M. 1972, c. 76, s. 13(2).

29. Community Planning Act, R.S.N.B. 1973, c. C-12, ss. 17, 18(5); Planning Act, 1978, S.M. 1975, c. 29, ss. 8, 13, 14, 32.

Chapter Five

1. H.N. Janisch, "Policy Making in Regulation..." Osgoode Hall Law Journal 17 (1979) p. 50.

2. J.R. Mallory, The Structure of Canadian Government (Toronto: Macmillan, 1971) p. 76.

3. "Thomas Bakelin", Financial Post, April 12, 1980.

4. Barrons Magazine, quoted in Macleans, July 1977, p. 20.

5. Canada, Royal Commission on Financial Management and Accountability, Final Report, p. 10.