VIII. INVESTMENT

There are numerous U.S. federal laws and regulations that limit foreign investment in the United States. Canadians can invest only with restrictions in U.S. radio and television, air carriers, ship building, banking and insurance, maritime transport and fisheries, natural resource industries, communications and defence-related sectors. Federal and state research and development programs sometimes contain regulations that prevent Canadian firms from becoming members of consortia.

A few examples of the legislation and programs affecting Canadian investment are: the **Federal Aviation Act of 1958**, which mandates that air transportation between two points in the United States be carried out only by U.S. companies with at least 75% U.S. ownership, and two-thirds of the management of the board must be U.S. citizens; the **Atomic Energy Act of 1954**, which restricts foreigners or foreign corporations from operating in the nuclear energy industry; and the **Advanced Technology Program**, which denies eligibility to foreign firms unless the parent company of the foreign firm is based in a country that grants national treatment and effective intellectual property protection to U.S. firms. (Other examples are cited in Section IX on Services.)

The United States justifies its federal restrictions almost exclusively on the grounds of national security (only in the fishing industry are federal restrictions on foreign investment based on criteria other than national security). For purposes of investment, the term "national security" has never been publicly defined. In a few industries, such as banking and insurance, treatment given a foreign firm in the United States depends on the treatment given a U.S. firm operating or desiring to operate in the same industry of the foreign company.

The broadest provision governing foreign direct investment in the name of national security is Section 721 of the Defense Production Act of 1950 (commonly referred to as the "Exon-Florio" provision). Since 1975, the Committee on Foreign Investment in the United States (CFIUS) has reviewed foreign investments that, in the judgement of the Committee, might have implications for the U.S. national interest. More recently, Section 5021 (the Exon-Florio Amendment) of the Omnibus Trade and Competitiveness Act of 1988 empowered the President to suspend or prohibit any acquisition merger or takeover by a foreign person on national security grounds. As a result of a 1992 amendment to the Exon-Florio provisions, the President is now required in the context of his review to take into account the potential effect of a transaction on U.S. technological leadership in critical defence areas. "Defence critical technology" has not been defined. Also, CFIUS investigations are now required in all transactions involving entities controlled by or acting on behalf of a foreign government. Furthermore, the President must submit written reports to Congress on each case referred to him by CFIUS.

State governments place restrictions on foreign ownership, particularly in real estate (some 30 states maintain restrictions on non-resident foreigners or foreign corporations), banking, insurance, mining and utilities.

Antitrust Law Exemptions

U.S. antitrust law provides for specific exemptions to the application of U.S. laws. Certain sectoral exemptions may constitute a violation of the principle of national treatment and give rise to investment distortion effects. The practical effect of these types of exemptions is that exporters to the U.S. may be subject to antitrust liability for anti-competitive practices while their U.S.-based competitors will not.