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United States Investment in Ireland

Eugene P. Fanning

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UNITED STATES INVESTMENT IN IRELAND

*Eugene P. Fanning**

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* Partner, Arthur Cox & Co., Solicitors, Dublin, Ireland. LL.M. 1977, Harvard Law School; LL.M. 1976, National University of Ireland; B.C.L. 1973, National University of Ireland. Admitted as Solicitor of Supreme Courts of Ireland. Admitted to practice in California and New York.

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I. INTRODUCTION

In 1984 approximately 800 overseas businesses had direct investments in Ireland[1], and of these, 325 were controlled, directly or indirectly, by United States investors.[2] In the last several years United States investors have been the primary source of direct foreign investment in Ireland. In 1979, 71.4 percent of all the job

1. Ireland has a total labour force of approximately 1.3 million: 200,000 in agriculture, 350,000 in manufacturing industries, and 750,000 in service industries. T. BROWN, IRELAND: A SOCIAL AND CULTURAL HISTORY 1922-79, at 257-88 (1981) [hereinafter cited as BROWN]. A detailed breakdown of these figures and those for unemployment are available in the Irish Government's three year plan. *See* Building on Reality 1985-1987, Irish Stationery Office, Oct. 12, 1984, Pl. 2648, ¶¶ 1.26-.28 [hereinafter cited as Building on Reality]. In February 1985 approximately 233,909 people, 17.5% of the labour force, was unemployed. The number of people out of work has increased by 17,900 since February 1984, representing an increase from 16.3% to 17.5% of the total labour force. Irish Times, Mar. 2, 1985 at 1, col. 1. More than fifty percent of Ireland's population is under the age of 30. BROWN, *supra*, at 290. In 1981 the Irish gross national product was equivalent to $16.6 billion or actual Irish £10,421 million. *See* infra note 191.

2. *See* IDA, U.S. Companies in Ireland (1984).

proposals submitted to the Irish Government by foreign investors originated from the United States.[3] Moreover, as of 1981, labour employed by United States investors in Ireland accounted for forty-two percent of the total employment in foreign-owned manufacturing companies in Ireland, up from twenty-eight percent in 1973.[4] During the same period, the share of total manufacturing employment accounted for by foreign firms increased from twenty-seven percent to thirty-six percent.[5] The importance of United States investment in Ireland is obvious.

The recent easing of the worldwide recession has resulted in an increase in the direct foreign investment in Ireland. Despite the easing of the worldwide recession, however, unemployment in Ireland has continued its two year rise. In response, the Irish Government has been forced to reevaluate the future direction of its industrial development, and as a result, the Industrial Development Authority (IDA) will adapt existing investment programs and create new investment incentives in order to offer increased investment opportunities in Ireland.[6]

The attitude in Ireland toward foreign investment has remained remarkably consistent. All major political parties and predominant public opinion support the active encouragement of foreign investment. The 1982 National Economic and Social Council report (Telesis Report) stated that "undoubtedly in Ireland [there exists] a degree of common purpose regarding industrial development that is rarely found in other countries."[7] This support is evident in several Government programs.[8] The Minister for Finance has guaranteed the availability of an attractive maximum corporation tax rate through December 31, 2000, for manufacturing and certain service industry investments that locate in Ireland.[9] The Irish Government continues to increase the amount

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3. A REVIEW OF INDUSTRIAL POLICY, NATIONAL ECONOMIC AND SOCIAL COUNCIL PAPER No. 64 ex. 4.5, at 364 (Feb. 1982) [hereinafter cited as TELESIS REPORT].

4. *Id.* ex. 4.4, at 363. *See generally,* Building on Reality, *supra* note 1, at ¶¶ 2.21-.32.

5. White Paper on Industrial Policy, Irish Stationery Office, July 12, 1984, Pl. 2491, ¶ 8.2 at 62 [hereinafter cited as White Paper].

6. *See generally,* White Paper, *supra* note 5; Building on Reality, *supra* note 1, ¶¶ 2.21-.32.

7. TELESIS REPORT, *supra* note 3, at 186.

8. The continuing Government support for foreign investment was recently reiterated in White Paper, *supra* note 5, ¶1.13.

9. Although there is no statutory source for the Minister's guarantee, it has

of aid available to new foreign investors through grants (grant-aid). The total amount of grant-aid expended per job increased from £7,644 in 1978, to £10,801 in 1979, and to £9,441 in 1982.[10] In addition, total government expenditure for industrial development rose to £336 million in 1980. This total included £169 million from the IDA (the major source of grant-aid in Ireland),[11] £118 million from other government agencies, and £49 million from government tax expenditures.[12] The comparable figure for total government expenditures on industrial development in 1974 was £113 million: £53 million from the IDA, £79 million from other government agencies, and £1 million from government tax expenditures.[13]

Several factors indicate that foreign investment in Ireland, particularly United States investments, will continue to grow. First, Ireland's admittance into the European Economic Community (EEC) on January 1, 1973, ensures its use as a gateway to the EEC for United States investors. As a member of the EEC, Ireland may export manufactured goods to other member states of the EEC free of customs duty. In fact, a recent survey ranked Ireland as the second most popular location after the United Kingdom for foreign direct investment by electronic companies.[14]

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been expressed on numerous occasions. *See, e.g.*, White Paper, *supra* note 5, ¶ 8.9. The Finance Act of 1980, § 38, discusses a "relevant accounting period" up to Dec. 31, 2000.

10. *See* INDUSTRIAL DEVELOPMENT AUTHORITY OF IRELAND, ANNUAL REPORT 1982, at 88 [hereinafter cited as IDA ANNUAL REPORT 1982] (unless otherwise stated, monetary figures are in 1982 Irish pounds).

11. *See infra* text accompanying notes 48-49.

12. TELESIS REPORT, *supra* note 3, ex. 5, at 249. Tax expenditures include tax-based leasing, *see infra* section VI(A); Section 84 loans, *see infra* section VI(B). For a general discussion of tax expenditures and its budgetary importance, see Mactouf & Surrey, *Tax Expenditure Analysis and Tax and Budgetary Reform in Less Developed Countries*, 15 L. & POL'Y INT'L BUS. 739 (1983). The tax expenditure figure does not include taxes foregone by the Irish Revenue Commissioners whose estimated revenue foregone under Export Sales Relief, an earlier form of corporation tax relief, in 1979-80, was £85.6 million. *See* TELESIS REPORT, *supra* note 3, ex. 5, at 249; *see also id.* ch. 6.

13. TELESIS REPORT, *supra* note 3, ex. 5, at 249.

14. Electronics Location File, Irish Times, Mar. 23, 1983, at 14, col. 4. This is a remarkable statistic because the majority of the United States corporations that have existing plants in the United Kingdom, Germany, and other EEC countries would use new investments to expand those plants, suggesting that a significant amount, possibly a majority, of mobile, green-field investments would locate in Ireland.

Ireland's maximum corporation tax rate of ten percent for manufacturers and certain service industries is very low compared to that of other industrial EEC countries.

Several additional factors have served to attract United States investment to Ireland. These factors include similarities in business practices, languages, and common law legal environments; historical links with the United States; a young population of highly educated and skilled workers including good management staffs; good labour relations; and comparatively low wage levels.[15] These factors have combined to provide a high rate of return on investments. According to a 1983 United States Department of Commerce report, the average return on United States direct investment in Ireland was 30.71 percent between 1977 and 1982—twice the worldwide average for the same period.[16]

Although Ireland's low corporate tax rate and its admission into the EEC are the two factors which foreign investors find most attractive, a study conducted in August of 1980 found that the single most persuasive factor in the opinion of corporate executives who chose Ireland for investment purposes was its overall favorable tax structure.[17] The Telesis Report endorsed this finding and concluded that the importance of this tax structure had to be analyzed in the context of Ireland's membership in the EEC, as over eighty percent of the companies polled had decided to locate in Ireland "primarily because it provided a tax shelter for penetrating the EEC."[18]

This Article will examine in general the structure of the Irish Government relating to foreign investment, and describe the role of the government agencies that provide incentives for foreign direct investments. The Article will focus on the negotiation process between those government agencies and foreign investors, and examine the typical investment contract entered into by United States investors. The Article will also describe some important aspects of the typical forms of direct investment in Ireland: manu-

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15. Compare with the list of advantages set forth in White Paper, *supra* note 5, ¶ 1.13.

16. *See* U.S. DEPARTMENT OF COMMERCE, SURVEY OF CURRENT BUSINESS (Aug. 1983); TELESIS REPORT, *supra* note 3, ex. 4.20, at 379.

17. *See* IRISH MARKETING SURVEYS LIMITED, REPORT ON ATTITUDES OF OVERSEAS COMPANIES TOWARD INVESTMENT IN IRELAND (1980). The report was commissioned by Allied Irish Banks Limited.

18. TELESIS REPORT, *supra* note 3, at 135. The second most persuasive factor was the availability of IDA grant-aid.

facturing, service industry, and joint venture investments. This Article will examine the concept of tax-advantaged lending in Ireland, Ireland's foreign exchange control regulations, and its attitude toward repatriation of profits. Finally, the Article will review the recent debate about Irish industrial development, examine the new Finance Act of 1984, and attempt to predict future foreign investment trends in Ireland.

II. THE IRISH LEGAL SYSTEM

Ireland is an independent parliamentary democracy with over sixty years of stable and consistent political experience. The Irish Constitution guarantees its citizens extensive fundamental rights, including the right to own private property.[19] Recent decisions of the Irish Supreme Court have upheld this right by striking down several actual and potential restrictions, such as rent control regulations, which would have impinged on the Irish citizen's right to own private property.[20] Since achieving independence in 1922, the Irish Government has enacted no confiscatory or expropriation legislation.

In 1950 the United States and Ireland concluded a Treaty of Friendship, Commerce and Navigation (FCN Treaty).[21] The FCN Treaty accords national treatment to United States investors in Ireland[22] and expressly gives United States investors the right to organize, control, and manage companies in Ireland.[23] In addition, the FCN Treaty provides that the "property of nationals and companies of either party . . . shall not be taken without the prompt payment of just and effective compensation."[24] The compensation may be converted into foreign currency and repatriated.[25]

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19. BUNREACHT NA hÉIREANN arts. 40-44 (43-"Private Property"). *See generally* J. M. KELLY, THE IRISH CONSTITUTION (2d ed. 1984) [hereinafter cited as KELLY].

20. *See* KELLY, *supra* note 19, at 644-61. *See also*, Keane, *Land Use, Compensation and the Community,* 18 THE IRISH JURIST 23 (1983); McCormick, *Blake-Madigan and its Aftermath,* 1983 DUBLIN UNIV. L.J. 205. Rent control regulations were struck down in Blake v. Attorney General, (1982) Ir. Rep. 117, and Re Housing (Private Rented Dwellings) Bill, (1983) I.L.R.M. 246.

21. Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155.

22. *Id.* art. VI.

23. *Id.* para. 2.

24. *Id.* art. VIII, para. 2.

25. *Id.*

The Protocol to the FCN Treaty provides an example of Ireland's positive attitude toward United States investment. The Protocol grants Ireland the right to restrict the entry of aliens into Ireland and to require aliens to obtain employment permits when they seek employment.[26] These restrictions, however, "shall be applied in a liberal fashion with respect to persons occupying responsible positions in American undertakings carrying on trade between the two countries or possessing particular skills necessary for the effective operation of such undertakings."[27]

The Income Tax Treaty (Tax Treaty) between Ireland and the United States became effective on January 1, 1951.[28] The Tax Treaty changed several aspects of taxation relating to United States investments in Ireland. United States investors not carrying on business and not permanently established in Ireland are generally not subject to Irish taxation.[29] Most United States investors do not have permanent establishments in Ireland, but instead invest through a non-United States corporate entity. These entities are subject to Irish taxation. Because the Tax Treaty creates few tax benefits for funds repatriated to the United States, it

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26. *Id.* protocol, cl. 1.

27. *Id.*

28. Sept. 13, 1949, United States-Ireland, 2 U.S.T. 2303, T.I.A.S. No. 2306; Stat. Inst. No. 381 of 1951, 11 Stat. Inst. (1951), at 2173 [hereinafter cited as Income Tax Treaty]. In addition, an estate tax convention between Ireland and the United States was signed on the same day and became effective on December 20, 1951. Sept. 13, 1949, United States-Ireland, 2 U.S.T. 2294, T.I.A.S. No. 2355. This Convention is rarely of concern to foreign investors since investing individuals are not usually domiciled in Ireland and normally do not own the investments directly as individuals. Ireland and the United States are also contracting parties to the General Agreement on Tariffs and Trade (GATT). Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 188. Several articles of the GATT prohibit domestic restrictions on foreign investors.

It should be noted that the United States and Ireland recently concluded negotiations on a new income tax treaty that is intended to replace the Income Tax Treaty in the near future. Fogarasi, Venuti & Renfroe, *Status of U.S. Tax Treaties*, 13 TAX MGMT. INT'L J., 94, 94 (1984). Although the text of the proposed new treaty has yet to be released in Ireland or the United States, it is likely to resemble those treaties recently negotiated by the United States that were based on the current OECD and United States model income tax treaties. The new treaty must be ratified by the United States Senate and pursuant to article 29.5 of Ireland's Constitution and section 361 of the Income Tax Act, 1967, No. 6 of 1967, the Irish Government must make an order before the treaty can enter into effect.

29. Income Tax Treaty, *supra* note 28, art. II.

is of minor significance in tax-planning for operations in Ireland. In the typical corporate investment structure, funds generated in Ireland are reinvested outside the United States. Irish taxes paid on funds repatriated to the United States do, however, receive a United States tax credit.[30] The withholding tax paid on the interest, rents, royalties, and dividends received by a United States citizen or corporation from sources in Ireland are also reduced under certain circumstances.[31] Personal service income earned in Ireland is exempted from Irish income tax provided that the United States resident performed the services for a United States investor and was not present in Ireland for more than 183 days.[32]

Irish tax reliefs are found in the general tax legislation drawn by the Department of Finance, which is separate and independent of the IDA. The tax system is administered by the Revenue Commissioners. Appeals of decisions by the Revenue Commissioners are made to the Appeal Commissioners and, ultimately, to the Irish courts on disputed issues of law.[33] Separating the IDA's power to offer incentives to foreign investors from the Revenue Commissioner's responsibility for administering tax legislation, ensures that foreign investors receive privileged tax treatment only on the basis of their location in Ireland.

The courts in Ireland are a separate branch of the Irish Government. They provide impartial access to all parties who allege an infringement of, or seek to uphold, their rights. A United States investor in Ireland has access to Irish courts and may have access to United States courts under certain circumstances.[34] Furthermore, Ireland does not require foreign investors to agree to have their disputes with the IDA adjudicated under the laws of Ireland[35] because it has accepted[36] the Convention on the Settle-

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30. *Id.* art. XIII.

31. *Id.* arts. VI, VII, VIII, and IX.

32. *Id.* art. XI.

33. *See generally* McAteer & Reddin, *Income Tax,* (1981) INST. OF TAX'N IN IRELAND 272. The Appeal Commissioners are appointed by the Minister for Finance from the Revenue Commissioners and the legal profession.

34. *See* Gilson v. Republic of Ir., 682 F.2d 1022 (1982); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094 (1982). In both cases, the extensive activities of the IDA in the United States assisted in providing a constitutional basis for subject matter jurisdiction in the United States federal courts.

35. *Cf.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 (1965) (validating the use of the "Calvo Clause" in some circumstances).

ment of Investment Disputes Between States and Nationals of Other States[37] (Washington Convention). Under the Washington Convention, a United States investor and the IDA may consent to submit a dispute to the International Centre for the Settlement of Investment Disputes (ICSID) for either conciliation or arbitration. Ireland recognizes and enforces any award rendered by the ICSID pursuant to its jurisdiction under the Washington Convention as if it were the final judgment of an Irish court.[38]

III. Industrial Development Authority

The IDA was established in 1950 as an agency of Ireland's Department of Industry and Commerce.[39] At its inception, the functions of the IDA were primarily advisory without any actual grant-making powers.[40] The Undeveloped Areas Act of 1952,[41] established An Foras Tionscal, a government agency with the power to make financial grants to industries located in certain designated areas, which were principally located in the northwestern, western, and southwestern regions of Ireland.[42] An Foras Tionscal was empowered to provide grants to these industries for the purchase of machinery and equipment, the training of workers, and the construction or acquisition of various facilities.[43]

In 1959 the IDA was empowered to make grants "on such terms as they think proper" towards the cost of acquiring, constructing, or adapting a building or other works required for the purpose of the manufacturing undertaking, provided that the IDA believed the manufacture of a particular commodity would be in the interests of the economy and would provide either substantial employment or an opportunity for developing an export trade.[44] Al-

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36. Arbitration Act, 1980, No. 7 of 1980, § 13.

37. Washington Convention, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

38. *Id.* art. 54.

39. Industrial Development Authority Act, 1950, No. 29 of 1950, § 2. As of 1983 the IDA employed 728 persons who perform various functions. In 1982 it received a capital grant of £171 million and a grant towards current spending of £15.2 million from the Government. IDA Annual Report 1982, *supra* note 10, at 80.

40. *See* Industrial Development Authority Act, 1950, *supra* note 39, § 3.

41. Undeveloped Areas Act, No. 1 of 1952, 1952.

42. *Id.*

43. *Id.*

44. Industrial Grants Act, 1959, No. 26 of 1959.

though the IDA grant-making powers were initially temporary, they were extended and revised by several statutes in the late 1950s and 1960s.[45]

By 1969 it was obvious that the IDA, as a branch of the Irish Government, could not act with the decisiveness needed to accomplish industrial development in Ireland. In order to give the IDA the independence it required, the Irish Government reorganized the IDA as an autonomous, state-sponsored organization.[46] At the same time, An Foras Tionscal was dissolved and its functions were transferred to the reorganized IDA.

The revision of the IDA's functions resulted in a major consolidation of the government agencies that had previously been concerned with industrial development. The IDA was assigned full responsibility for industrial development throughout Ireland with the exception of the Shannon Customs Free Airport Zone (Shannon), which is served by the Shannon Free Airport Development Company (SFADCo), and Gaeltacht,[47] which is served by the agency Udaras na Gaeltachta (UnG).

In addition to sponsoring promotional and publicity programs in Ireland and abroad, the IDA is responsible for several other programs that promote the advancement of industrial development. These programs include providing grants and other financial aid to new and existing manufacturing and technical service industries;[48] awarding grants for the cost of training workers in conjunction with the Industrial Training Authority (AnCO);[49] acquiring industrial sites; constructing and administering industrial estates; constructing advance factories or custom designed factories for approved projects at regional locations; promoting joint ventures and licensing agreements with foreign investors; and providing financial and advisory services to meet the special

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45. Industrial Grants (Amendment) Act, 1964, No. 37 of 1964; Industrial Grants (Amendment) Act, 1966, No. 12 of 1966.

46. *See, e.g.,* Industrial Development Act, 1969, No. 32 of 1969 [hereinafter cited as 1969 Act]. The reorganization became effective in April 1970. The Minister for Industry, Trade, Commerce, and Tourism announced on Feb. 21, 1985, that he will introduce a new industrial development bill in 1985 to redefine the role of the IDA, implement White Paper recommendations, and consolidate the existing legislation. Irish Times, Feb. 22, 1985, at 1, cols. 5-6.

47. The Gaeltacht is comprised of Irish-speaking areas which are primarily located in the western regions of Ireland.

48. *See infra* text accompanying notes 93-100.

49. *See infra* text accompanying notes 77-81.

needs of both small industries and handcraft industries. The IDA is responsible for national and regional industrial planning, and evaluates the implications of EEC proposals and policies for industrial development in Ireland. It is important to remember, however, that the IDA may not grant investors any special exemptions from the normal corporate rate of taxation.

The IDA has nine regional offices throughout Ireland and twenty overseas offices that promote Ireland as an industrial location. Nine of these overseas offices are located within the United States and offer information on investing in Ireland, coordinate visits to Ireland, and conduct initial negotiations with potential United States investors.

The IDA Board is composed of nine members who are appointed by the Minister for Industry, Trade, Commerce and Tourism. The membership consists of five businessmen, two officials from government departments, an independent chairman, and a managing director who is the only full-time member. The IDA Board formulates and reviews IDA policy, reviews the suitability of grant-aid for direct investment projects, and, along with the Government, evaluates applications for grant-aid where the proposed cost of fixed assets of a particular investment exceeds £2.5 million. The executive board of the IDA meets weekly to consider grant-aid applications for new industries. The executive board also reviews decisions of the Small Industries Committee, the Domestic Industries Committee, the International Service Committee, the Research and Development Committee, and the Enterprise Development Committee—committees to which the IDA has delegated the power to award various grants.

The IDA is probably the most powerful governmental agency in Ireland. It acts as both coordinator and lobbyist for all matters relating to manufacturing and service industries as well as the industrial infrastructure. For example, it works with AnCO to facilitate investors' efforts to acquire grants for training workers. The IDA may make representations to the Revenue Commissioners on behalf of an investor seeking official confirmation that its proposed project would constitute a process of manufacture[50] or that its activities be subject to taxation on a "cost plus" basis because they were considered to have originated from a regional administrative or marketing headquarters.[51] In planning and pollution

50. *See infra* notes 134-49 and accompanying text.

51. *See infra* text accompanying and following notes 66-69; *see also* White

control matters, the IDA works with local planning authorities on behalf of the investor. In short, the IDA is a full-service investment agency. If the IDA supports a particular investment, other officials rarely withhold their approval or consent. Nor does the IDA's assistance cease after an investor has made the initial investment. The relationship between the IDA and an investor continues for the duration of the investment.

A. Qualifying for Grant-Aid

The Industrial Development Act of 1969 (1969 Act) greatly expanded the power of the IDA by giving it authority to provide grants to an industrial undertaking for the acquisition of fixed assets "on such terms and conditions as it thinks proper."[52] The level of these grants are the result of private negotiations between the investor and the IDA. The IDA cannot provide grants for more than sixty percent of the cost of fixed assets for industrial projects located in an area designated as "undeveloped" pursuant to the Undeveloped Areas Act of 1952,[53] or forty-five percent of the cost of fixed assets for industrial undertakings located in Ireland outside these undeveloped areas.[54] The IDA rarely, however, awards a grant equal to the statutory maximum.[55] To qualify for these grants, the IDA must be satisfied that the first three, and any one of the last four, of the following conditions apply to the proposed industrial undertaking:[56] (1) the undertaking would be likely to provide or maintain employment in Ireland; (2) financial assistance is necessary to ensure the establishment, maintenance, or development of the undertaking; (3) the undertaking is of a reasonably permanent nature and will be managed efficiently; (4) the significance and character of the employment that will be provided by the undertaking warrants the making of the grant;[57] (5)

Paper, *supra* note 5, ¶ 8.15, at 63.

52. 1969 Act, *supra* note 46, §§ 33-34. The term "fixed assets" comprises the site, site development, buildings, and new machinery and equipment, excluding office equipment and transport vehicles used outside the factory.

53. *See supra* notes 41-43 and accompanying text.

54. 1969 Act, *supra* note 46, §§ 33-34.

55. White Paper, *supra* note 5, ¶ 8.7, at 64.

56. *Id.*

57. The usual criteria which the IDA has applied to determine the adequacy of the significance and character of the proposed employment is that an investment should provide some employment and that the skills required of the employees should be reasonably sophisticated. The IDA considers the investment-

the undertaking will utilize agricultural or other natural resources, or will achieve significant ties to either existing firms or new enterprises in Ireland;[58] (6) the undertaking will have a high technological or scientific content; (7) the industry in which the undertaking is engaged has an exceptional growth potential.[59]

The Government White Paper on Industrial Policy states that in the future, the IDA will concentrate its efforts on securing overseas investments with certain characteristics. These investments should be projects which (1) are "stand alone" projects which can survive without significant reliance on the parent company; (2) form a significant market for potential subsupply linkages, particularly those in potentially traded-businesses and in businesses requiring highly skilled labour; (3) have a real commitment to skilled employment; and (4) can substitute for imports to Ireland where there is no possibility for Irish firms to enter the business.[60]

The term "industrial undertaking" has not been defined exhaustively in any of the industrial development statutes. The Industrial Development Authority Act of 1950 (1950 Act) provided that references to "industry" within a statute are not to be interpreted to include the banking, insurance, or agriculture industries.[61] Subsequent statutes stated that the definition of "industrial undertaking" includes "an undertaking ancillary to industry and an undertaking engaged in the provision of a service" a "service undertaking."[62] Prior to the enactment of the Industrial Development (No. 2) Act of 1981 (1981 Act), however, service under-

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to-employment ratio when making grants. The IDA does not generally seek labour intensive investment, but instead, looks for long-term viable enterprises that will provide stable employment.

58. For example, the IDA has actively encouraged enterprises using local resources such as timber or fish as well as all sectors of the high technology industries. The IDA has been very successful in attracting high technology investments to Ireland.

59. In addition to satisfying these conditions, the IDA has identified the following product-oriented criteria: fast market growth; suitability to international markets; minimal risk of technological obsolescence; high added value in Ireland; high investment value per job created or, for capital-intensive projects, good potential for linkage or spin-off benefits for existing firms; and the inclusion of marketing strategies in the proposal.

60. White Paper, *supra* note 5, ¶ 8.8, at 64.

61. Industrial Development Authority Act, 1950, *supra* note 39, § 1.

62. Industrial Development (No. 2) Act, 1981, No. 14 of 1981, § 4 (amending 1969 Act, *supra* note 46, § 2) [hereinafter cited as 1981 (No. 2) Act].

takings were not considered industrial undertakings by the IDA, and thus were not eligible for industrial grants. The 1981 Act marked a significant departure in the area of industrial incentives in Ireland because it provided that the IDA could make an "employment grant" to those persons employed in a service undertaking. Only those services specified by the Minister for Industry, Trade, Commerce and Tourism, however, qualify for grant assistance.[63]

B. Available Grants

The IDA has made the following wide range of grants available to eligible industrial undertakings.[64]

1. *Capital Grants*

The IDA may award capital grants to industrial undertakings in amounts not to exceed either forty-five or sixty percent of a project's fixed assets cost. Because these grants are of a capital nature the investor is not subject to Ireland's corporation tax for the amount of the grants. The IDA rarely awards the statutory maximum for grants.[65] The project may qualify for the sixty percent grant only if it is located in a designated undeveloped area where the social need for industrial investment is the greatest.[66] Although designated undeveloped areas are most often found in isolated locations, large grants are also occasionally available for projects in some inner city areas. For example, the Minister for Industry, Trade, Commerce and Tourism recently announced that industrial undertakings in the Ringaskiddy area of the city of Cork would qualify for capital grants of up to fifty percent of the project's fixed assets costs and would be available for a period

63. 1981 (No. 2) Act, *supra* note 62, § 3. The Minister has specified the following service industries as eligible for grant assistance: data processing, software development, technical and consulting services, commercial laboratories, administrative headquarters, health care centers, research and development centers, recording services, training services, publishing houses, and international finance services.

64. In addition to the grants listed in the text, a number of other grants are available, some aimed at particular geographic areas or specific industry segments. These grants include grants for Gaelic speaking areas, export assistance, management consultancy grants, housing for workers, and energy conservation grants.

65. White Paper, *supra* note 5, ¶ 8.7, at 64.

66. 1969 Act, *supra* note 46, §§ 33-34.

of three years.[67] Locating industrial undertakings in these designated areas makes economic sense for high added-value and low-volume investments, but usually does not make economic sense if the decision to locate in these areas was made solely to obtain the additional grant.

The percentage of grant-aid that a foreign investor is able to obtain from the IDA is subject to negotiations between the foreign investor and the IDA.[68] For larger capital projects, the IDA awards grant-aid based on an evaluation of the location of the undertaking, the number of workers that the undertaking will employ, and the ratio of the size of the capital grant to the number of jobs provided. Potential foreign investors who visit Ireland are usually shown a number of locations and available advance factories within those locations. Each location may have a different grant-aid percentage level. It is advisable to keep all options open in the early stages of negotiations, if possible, and not to agree on any particular grant-aid percentage.

The IDA may not make a grant for any particular industrial undertaking that exceeds £2.5 million without the consent of the Government.[69] Because the Government rarely refuses to give its approval to projects that the IDA recommends, this statutory limit is frequently exceeded.

The IDA also provides capital grants for costs associated with leasing, rather than purchasing, fixed assets. Leasing assets is a financing mechanism used by most foreign investors in Ireland because of the unusually low cost of the funds required. Moreover, industrial investors can usually obtain very favorable financing terms if the assets are leased from an Irish bank. Irish banks can offer favorable terms because of certain capital allowance benefits to which they are entitled. First, Irish banks are able to take advantage of capital allowances that provide for a 100 percent write-off of the cost of an asset in the first year.[70] Second, capital allowances are calculated on the basis of the full value of

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67. Irish Times, May 12, 1984, at 1, col. 2.

68. There are no published statistics as to levels of percentages since they are considered to be confidential information between the IDA and the investor.

69. Industrial Development Act, 1981, No. 13 of 1981, § 3 [hereinafter cited as 1981 Act].

70. Corporation Tax Act, 1976, No. 7 of 1976, sched. 1, ¶¶ 15-16; Finance Act, 1984, No. 9 of 1984, § 35. The Minister for Finance in his 1985 Budget Speech on Jan. 30, 1985, announced that the 100% capital allowance would continue to be available until March 31, 1988. Irish Times, Jan. 31, 1985, at 1, col. 1.

the assets which the bank purchases, even though in a lease transaction, the bank advances to the investor a net amount after deducting the applicable IDA grant. The grant provided by the IDA for the leased machinery and equipment then becomes directly payable to the bank.

For example, assume a foreign investor leases machinery from a bank with a purchase value of £100,000, for which the IDA has contracted to give a forty-five percent grant. The investor, the IDA, and the bank would enter into an arrangement whereby the bank would purchase the machinery, as agent for the investor, and then lease the machinery to the investor. The bank can then deduct as capital allowances or depreciation expense the machinery's purchase price of £100,000 from its profits which would otherwise be taxed at the normal corporate tax rate of fifty percent. This transaction results in a savings of £50,000 to the bank. Within a few months, the IDA would pay the grant-aid of £45,000 to the bank. At this point in the transaction, the bank will have realized £95,000 in savings. The lease payments received by the bank over the customary primary term of five years also produces a stream of income.

Because fixed asset leasing is so attractive to banks, a wide range of Irish institutions make such leasing available. Leasing terms differ from bank to bank depending upon the attractiveness of a particular project and the period of time in which the lease is entered into. Banks typically consider those leases that are entered into late in their fiscal year to be the most attractive because the later in a bank's fiscal year the lease is entered into, the earlier the bank will be able to take advantage of the available capital allowances.

On January 25, 1983, the Minister for Finance announced in his 1984 budget speech that future leasing would be permitted only in conjunction with a grant-aid package from the IDA.[71] Although the Finance Act of 1984 restricts the lessors' use of capital allowances, it exempts completely the form of grant-aided leasing discussed above.[72]

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71. Irish Times, Jan. 26, 1984, at 1 and 11, col. 6.
72. Finance Act, 1984, *supra* note 70, § 40.

2. *Rent Subsidies*

The IDA may grant rent subsidies to investors for the cost of leasing a factory in Ireland. The IDA also may build "advance factories" for lease to investors after completion. Advance factories can be found in most locations in Ireland. The IDA often gives an investor who rents an advance factory an option to purchase the factory at a grant-aided price within the first several years of start-up. When an advance factory is leased to an investor, the lease term is usually thirty-five years. This long lease term is standard in Ireland.[73] The lease usually provides for a review of the rent every five years. The IDA may reduce the market rent by a percentage equal to the amount of the capital grant for the cost of the fixed assets. The value of the difference between the market rent and the actual rent paid by the investor is treated as a capital grant for IDA purposes.[74]

In recent years, the high inventory of advance factories has forced the IDA to reduce the number of such factories that are constructed, and while only a handful of advance factories are now under construction in Ireland,[75] a significant stock of advance factories are still available to foreign investors. Some years ago, the IDA pursued a policy of "privatization" under which it was determined that the private construction industry in Ireland should build factories primarily in the cities of Dublin and Cork for lease to foreign and domestic investors.[76] Rents for these privately constructed factories tended to be higher than rent for advance factories.

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73. Lease terms exceeding 35 years bear a higher rate of stamp duty. M. O'Conner & P. Cahill, *The Law of Stamp Duties,* (1984) INST. OF. TAX'N IN IRELAND.

74. *See* 1969 Act, *supra* note 46, § 35.

75. White Paper, *supra* note 5, at 42. The Irish Government projects that expenditures on factory construction in 1988 will be approximately one-half that in 1978.

76. The theory of privatization sought to include private developers in the provision of factories so far as possible. White Paper, *supra* note 5, ¶ 5.42, at 48, states that "while recognizing the fundamental difference between the IDA and private developers, the IDA will adopt as far as possible a commercial approach to their investment in land and buildings."

3. *Training Grants*

The IDA may award grants to investors for the total cost incurred in training new employees.[77] Because there is no percentage limitation on training grants, all actual training costs are fully reimbursable. The primary objective of AnCO, established under the Industrial Training Act of 1967,[78] is to elevate the skills of the work force in Ireland to the highest standards attainable for all industrial and commercial activities. AnCO may provide grants to foreign investors for up to fifty percent of the direct cost of special training programs that are designed to significantly alter the production facilities of an industrial undertaking or significantly upgrade the requisite skills of its workers. The IDA provides the remaining fifty percent of the direct training costs through funds made available by the European Social Fund. The EEC established the European Social Fund to provide financial assistance to member states in order to achieve a more efficient and more equitable use of human resources throughout the EEC.

To qualify for the European Social Fund and for AnCO assistance, an investor must establish a "significant" training program. A foreign investor who institutes a program that employs new staff is normally regarded as having established a significant training program because a net increase in employment has occurred and the skills of the new employees have been adapted to the specific industrial undertaking. If an industrial undertaking requires the skills of existing employees to be significantly upgraded as a result of material changes in production facilities or manufacturing processes, AnCO and the European Social Fund will probably provide grants for retraining the employees.

There is no requirement that employee training be conducted in Ireland and, in fact, it has become quite normal for investors to train new employees in the United States, often for extended periods of time, with AnCO paying all training-related costs. The training costs for which grants are given include salaries of both trainers and trainees during the training period, traveling expenses, living expenses, the cost of sending foreign training personnel to Ireland, and an array of different costs involved in approved training programs. The size of a training grant is subject to negotiation and is generally based upon a specified number of

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77. 1969 Act, *supra* note 46, § 39.
78. No. 5 of 1967.

trainees during an agreed period.[79]

Unlike other IDA grants that are funded entirely by the Irish Government, the sources of funding for training grants are a direct EEC subvention and a levy on Irish industry. The IDA may not award a training grant that exceeds £2 million in the aggregate without prior Government consent.[80] That consent is normally forthcoming. The Supreme Court recently upheld the Revenue Commissioner's treatment of training grants as taxable on the basis that they are revenue or income grants.[81] Training grants are subject to the normal corporation tax rates of forty to fifty percent. Since training grants are deductible in the computation of an investor's profits, however, there should be no increased exposure to tax.

4. *Research & Development Grants*

The IDA provides grants for the research and the development of new products and new industrial processes. While the adaptation of existing products to new markets is included within the scope of research and development grants, routine operations such as product quality or manufacturing process control are not included. To qualify for these grants the majority of a project's research and development must take place within Ireland. Although "project" is not defined in the statute, the statute does allow all or part of a project to be sub-contracted in Ireland. The amount of grant-aid that the IDA can provide to an investor is limited to fifty percent of the approved cost of a project or

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79. There is a wealth of experience and case studies for IDA and AnCO to confirm training time and costs in most industries.

80. 1981 Act, *supra* note 69, § 4.

81. Revenue Comm'rs v. Jacobs Int'l (Supreme Court, Mar. 23, 1985 (unreported) High Court Apr. 6, 1984, (unreported)); *see* The Independent, Mar. 24, 1985, at 4, col. 5; Irish Times, April 6, 1984, at 18, col. 7. In *Jacobs* the Revenue Commissioners assessed Jacobs for normal corporation tax, at that time 45% on a training grant of £245,000, claiming that the grant was a revenue or income receipt. The Revenue Commissioners argued that the grant was a subvention to defray business expenses because training expenses would be a proper expense or deduction from profits of a company's accounts and, hence, the grants should be viewed as a revenue or income receipt. In the High Court, Mr. Justice Keane held that the training grant was a capital grant and hence not subject to corporation tax. In the Supreme Court, Mr. Justice Hederman, with whom Justices Henchey and McCarthy agreed, held that training grants were revenue receipts and hence subject to corporation tax.

£250,000, whichever is the smaller. This amount can be exceeded only with government approval.[82]

Between 1979 and 1982 the number of companies engaged in research and development in Ireland increased from 228 to 410. A majority of this research and development was undertaken by companies in the electrical and electronics industries. The number of foreign-owned companies engaged in research and development that were operating in Ireland during this period was three times the number of domestic companies so engaged. Even in actual numbers, foreign companies had more formal research and development departments than domestic companies. These statistics can be partially explained by the fact that most domestic companies in Ireland are smaller and less likely to pursue research and new developments than foreign-owed companies in Ireland.[83] Some Irish-owned companies, however, spend substantial amounts on research and development.[84]

5. *Interest Subsidies*

In certain cases, the IDA reduces the interest rates on loans from financial institutions in Ireland by providing an interest subsidy.[85] Until recently, the subsidy allowed by the IDA was generally five percent of the interest paid on loans with a term of five years or more. The IDA recently increased this subsidy to ten percent.[86] This subsidy, like the rent subsidy, comes within the maximum limit of section 35 of the 1969 Act, unless otherwise sanctioned by the Irish Government. Interest subsidy grants, however, have not been very common in Ireland, probably due to the availability of low interest section 84 loans.[87]

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82. 1981 Act, *supra* note 69, § 8.

83. *See generally* National Board for Science and Technology (NBST), IRISH SCIENCE AND TECHNOLOGY STATISTICS (1984).

84. Neil Holman, Chairman of the NBST, has stated that some Irish-owned companies spend as much as 20% of their gross revenues on research and development.

85. 1969 Act, *supra* note 46, § 36.

86. SECOND REPORT OF THE COMMISSION ON TAXATION, DIRECT TAXATION: THE ROLE OF INCENTIVES, Pl. 1755, app. 3, para. 30, at 195 (1984) [hereinafter cited as THE ROLE OF INCENTIVES].

87. *See infra* text accompanying notes 171-84.

6. *Loan Guarantees*

The IDA may guarantee the repayment of the whole or any part of the principal and interest of an investor's debt provided that it was incurred to purchase fixed assets for an industrial undertaking,[88] and that the principal does not exceed £750,000 without prior consent of the Irish Government.[89] In addition, there is a £300,000 limit on the guarantee of loans for projects arising under the enterprise development program, an IDA program that provides incentives to small domestic industries and entrepreneurs.[90]

7. *Power to Purchase Shares*

The IDA may purchase shares in a company that owns, controls, or manages an industrial undertaking.[91] Unless the investments are very large or a company specifically requests it, the IDA rarely makes these purchases. The IDA may not purchase more than £1.5 million worth of shares unless the prior consent of the Government has been given.[92]

8. *Service Industry Employment Grants*

The IDA was first permitted to directly assist service industries in 1981.[93] The IDA had previously been restricted to providing grants to manufacturing industries. Although the IDA construed the definition of "manufacturing" quite liberally, it was very reluctant to assist service industries before 1981. In the rare instance where the IDA did treat a service industry as a manufacturing industry, the normal range of grants proved to be of little benefit because those grants were based on assisting a manufacturing industry in the purchase of fixed assets. The major expense of service industries typically is the personnel payroll, with a relatively minor share of expenditures applied towards the leasing of fixed assets. Examples of early investments that had service industry characteristics, but which were usually treated as manufacturing investments, were investments made by architectural,

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88. 1969 Act, *supra* note 46, § 37.
89. 1981 Act, *supra* note 69, § 5.
90. *Id.* § 7. The section 7 limit also applies to interest subsidies.
91. 1969 Act, *supra* note 46, § 44.
92. 1981 Act, *supra* note 69, § 9.
93. *See* 1981 (No. 2) Act, *supra* note 62.

engineering, and design firms. In fact, current Irish law applies the low ten percent corporate tax rate to architectural, engineering, and design firms that provide services to entities or individuals outside the EEC.[94]

Empowering the IDA to provide direct assistance to service industries reflects the Government's recognition that future economic development in Ireland should not be confined to traditional manufacturing industries. The IDA is authorized to make employment grants for the employment of persons in a service undertaking[95] where the IDA believes that the service undertaking is likely (1) to contribute significantly to regional and national development, (2) to be commercially viable, (3) to have good prospects for growth, and (4) not to be developed in the absence of an employment grant.[96] The IDA cannot, without the prior permission of the Government, make an employment grant or grants to a particular undertaking for more than £1.25 million.[97]

While no clear patterns for the maximum amount of employment grant-aid have been detected, the level of employment grants clearly varies a great deal from one service undertaking to another, depending to a large extent upon the caliber of the personnel involved. The tax position of service industries was made clear recently. The Government announced on April 13, 1984, that companies engaged in providing "computer services" would pay the ten percent corporation tax rate.[98] Section 45 of the Finance Act of 1984[99] defines computer services as data processing and/or software development services that are performed in Ireland and which benefit from an employment grant made by the IDA under section 2 of the 1981 (No. 2) Act.[100]

9. *International Services*

On April 8, 1981, the Minister for Industry and Commerce introduced the Industrial Development Authority (No. 2) Act (1981 (No. 2) Act) that permitted the IDA to grant-aid certain service industries. The amount of these new grants depends upon the

94. Finance Act 1981, No. 16 of 1981, § 17.
95. 1981 (No. 2) Act, *supra* note 62, § 2.
96. *Id.*
97. *Id.*
98. Irish Times, Apr. 14, 1984, at 10, col. 1.
99. Finance Act of 1984, *supra* note 70, § 45.
100. Irish Times, Apr. 14, 1984, at 10, col. 1.

employment aspect of the service industry investments rather than on the cost of fixed assets. The new international services employment grants supplement existing employment training grants, grants for fixed assets, rent subsidies, and other available grant-aid.

The 1981 (No. 2) Act does not, however, include a definition of "international service." The Minister for Industry, Trade, Commerce and Tourism promulgates regulations that list the services that are eligible for grant-aid. The current list of eligible services includes data processing, software development, technical and consulting services, commercial laboratories, administrative headquarters, health care services, research and development centers, recording services, training services, publishing houses, and international finance services.

To qualify for employment grant assistance, service industry investors must meet certain criteria. First, the service that the project offers must be able to penetrate international markets. Second, the project must contribute significantly to regional and national development. Last, the investor's decision to locate the project in Ireland must have been based upon the incentive package; but for the incentives, the investment would not be developed in Ireland.

The 1981 (No. 2) Act did not contain any special provisions on the corporation tax treatment of international service industries. Investments that qualify as international service industries must also independently qualify for the ten percent corporation tax rate under chapter VI of the Finance Act of 1980. In most cases, qualifying for the reduced corporation tax rate was easily accomplished because of the broad definition of "goods manufactured within the State."[101] The critical factor in that definition is the requirement that there be a process of manufacture with a resulting physical product. Investors in research and development projects and administrative headquarters, however, had some doubt whether their projects qualified even under such a broad definition. In some instances, the Revenue Commissioners have required an investment's administrative headquarters to be located in Shannon in order to qualify for the reduced corporation tax rate. In other instances, the Revenue Commissioners have negotiated a taxable profit for a project's administrative headquar-

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101. *See infra* notes 131-49 and accompanying text.

ters on the basis of a cost-plus percentage of the operating expenses incurred in Ireland. The rationale for the latter treatment is that expenses incurred in Ireland accurately reflect the actual level of economic activity and, thus, national trading income of the administrative headquarters. In practice, any national, taxable profit agreements between the Revenue Commissioners and an administrative headquarters were limited to a maximum of two years.

Section 45 of the Finance Act of 1984 removes any uncertainty as to the availability of the reduced corporation tax rate for one type of service industry, namely companies providing computer services.[102] In addition, the IDA recently established the National Software Centre Ltd., a wholly-owned, independent subsidiary designed to facilitate the development of Ireland's software resources and to support domestic and international software companies located in Ireland.[103]

While the effect of the international service industry program on the Irish economy has yet to be documented, Ireland's ability to attract service industries appears very promising. Service industries that located in Ireland under the old Export Sales Relief had produced about 2,000 jobs in Ireland by 1981.[104] In 1982, the first full year of operation, 300 new jobs were created in international services and 59 new projects with a total potential of over 2,500 jobs were approved by the IDA for grant assistance.[105] The introduction of new tax relief for computer-based services, the high level of education of the Irish work force, the improvement in the Irish telecommunications infrastructure, and the international demand for services appear to guarantee the success of the IDA's international services program in the immediate future.

10. *Small Industries Grants*

The small industries program of the IDA is designed to facilitate the establishment of smaller industries in Ireland. Higher levels of grants, as well as all the usual types of grants, are available to industries that employ less than fifty people, with a fixed

102. *See supra* notes 98-100 and accompanying text.

103. *See* Irish Times, May 17, 1984, at 15, col. 5; White Paper, *supra* note 5, ¶¶ 9.13-.16, at 69-70.

104. Irish Times, Apr. 9, 1981, at 12, col. 2.

105. White Paper, *supra* note 5, ¶ 9.4, at 67.

asset investment under £40,000.[106] Some joint ventures with foreign investors may also qualify for these grants.

11. *Proposed Technology Acquisition Grants*

The Government White Paper on Industrial Policy recommended that new grants be made available to enable Irish industry to acquire foreign technology.[107] Foreign technology is to be acquired through technology licensing of foreign patents and know-how. The purpose is to improve the technological status of Irish industry.

The White Paper envisages the introduction of future legislation that would empower the IDA to give grants, not exceeding fifty percent, towards the costs of acquiring new foreign product or process technology. The eligibility criteria of this scheme will be set forth in the legislation. In addition, it is anticipated that staff employees from the Irish Institute for Industrial Research and Standards will be assigned to the major IDA oversees offices to assist in the transfer of technology.

As a result of these proposed funds being available to Irish industry, United States investors may be able to sell their technology either as part of a joint venture or as a mere licensing of technology.[108] This latter option may be important to small United States companies that have valuable technology, but do not possess the financial resources to establish their own manufacturing facilities in Europe.

C. Negotiations and the Investment Process

1. *Negotiations with the IDA*

Investors participate in all aspects of the negotiation process with the IDA about decisions regarding potential investments; whether the investment will be undertaken; when it will commence; what goods will be produced; and how many stages will be established. Negotiations are critical to the investor because the parameters of an investment are generally determined at that point.

The establishment of a wholly-owned manufacturing subsidiary in Ireland presents many topics for negotiation. Negotiations usu-

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106. *Id.*, ¶¶ 10.1-.2, at 72-79.
107. *Id.*, ¶¶ 5.15-.20, at 40-41.
108. *Id.*, ¶ 5.19, at 41.

ally are much more complex when more than two parties are involved, such as the establishment of a joint-venture investment in Ireland or when a sole investor acquires an existing Irish company or its assets. What typically follows is a compendium of negotiation tactics designed to present some concept of practice in this area.

a. Assembling an investment team

When examining potential investments, the investor should assemble an investigative team that has the power to negotiate on his behalf. The composition of such a team will depend upon the nature of the potential investment and the resources of the investor. Because negotiations usually take place in both the United States and Ireland, the team should include two or more corporate officers or employees who will travel to Ireland to represent the investor in the negotiations. The team should also have a project manager who is generally familiar with all aspects of the undertaking, including the products to be manufactured in Ireland and the markets for those products. The project manager should also supervise the preparation of a written proposal and act as the chief negotiator for the investment team. A financial officer familiar with the financial aspects of a foreign investment also should be included on the team. One of the initial concerns of the financial officer will be to determine precisely how the company should be structured to establish the undertaking and to invest the funds generated by the undertaking. As discussions progress, the financial officer must become familiar with, among other things, the capitalization of the proposed company, sources of local and foreign loans, foreign and local taxes, the various costs of the project, and the project's pricing policies. A personnel officer or human resources director also should be included on the team. Before the negotiations begin, the personnel officer should become familiar with the availability, cost, and location of local labour; communicate with other foreign and domestic employers located in Ireland, especially those in the same industry; and review the process for establishing a training program with IDA and AnCO.

Usually one individual, such as the project manager, leads the negotiations for the entire investment team. The investing company typically gives this individual full authorization to pursue and conclude negotiations, as well as make offers, accept counteroffers, and work out compromises within the negotiation sessions.

The team should work closely with local counsel, accountants,

and other service professionals in Ireland. Local counsel, or solicitors as they are known in Ireland, should: (1) inform the foreign investor of the relevant legal and business considerations; (2) offer assistance and advice based on experience in local negotiations; and (3) be familiar with the political, economic, and social policies of Ireland and the IDA. The participation of local solicitors, even in preliminary negotiations, can be very useful because solicitors often will anticipate the positions local interests will take and will offer constructive solutions to potential or actual impasses.

b. Knowing the facts

In negotiations with the IDA it is important to strive for precision regarding the principal points of a proposed project. Accordingly, if a particular fact or IDA statement is unclear to the investor, questions should be asked to elicit precise responses. When the IDA is not able to immediately answer those questions, the team should follow up persistently until a satisfactory response is received. After the investment team has been assembled, the facts, strategies, and assumptions under which the team will operate should be the first topic for discussion. These facts, strategies, and assumptions should be constantly reviewed and reevaluated as negotiations proceed.

Keeping in mind that the more time spent in preparation for the negotiations the more satisfied an investor should be with the outcome, an investment team should collect and assimilate as much information as possible about the following: The industry sector in both Ireland and the EEC; the product and its competitors; and the existing market for the product as well as the market's potential for expansion. It is also essential that the investment team be familiar with exactly what financial assistance the IDA can provide to the investor and what the IDA expects from a project proposal. The team should present the particular facts of a potential investment to the IDA in a written proposal that sets forth how the project advances the policies and goals of the IDA. Examples might include the high added-value of the product or the relatively high level of skills that the project will require of its employees.

The investment team should generally concentrate its efforts on the negotiations with the IDA because the IDA will be able to either negotiate with the investor on most points or direct the potential investor to the person or organization who is able to ef-

fectively negotiate those points. All negotiations with the IDA should be pursued on a constructive basis because the relationship with the IDA is long-term. It is very likely that an investor will have future negotiations with the IDA on the particular project at hand, on an expansion of that project, or on subsequent investment projects in Ireland. The team should, however, also strive to obtain whatever structure is necessary to ensure the success of the proposed project. For example, if a potential investor proposes to establish a plant that will be developed in two stages stretching over a period of five years, the investment team should seek to obtain grant commitments from the IDA for both stages where the second stage is considered to be critical to maintaining a market advantage, even if the second stage is conditional on performance criteria of the first stage.

2. *The IDA Approval Process*

a. The site visit

An investor contemplating an undertaking in Ireland should initially have a member of his investment team visit one or more sites in Ireland. These site visits are normally made with an IDA representative who shows the investor various potential locations and advance factories available in those locations. An investor should remember that factories may be leased from the IDA on a temporary basis while a separate factory is being constructed for the applicant. The IDA can also modify existing buildings to suit the specific requirements of a proposed project.

b. The written proposal

At some point in negotiations with the IDA, an investment team must prepare a written proposal that describes the undertaking and projects its financial operations. The written proposal generally should describe the investor in detail, emphasizing its history, past growth, and performance. It should also provide information on the products or services to be manufactured or provided, and the proposed marketing techniques for the products or services. Because marketing techniques are of central importance in a written proposal, sales data for existing products in the EEC or elsewhere should be described. For new products or products not currently marketed in the EEC, the investment team should garner a reasonable amount of market knowledge before commencing negotiations with the IDA even though the IDA has its

own marketing research capability.

The written proposal also should describe the sales, if any, that are expected to be made in the Irish domestic market. If the same or similar products are manufactured, or services are provided in Ireland, the IDA may be reluctant to provide the foreign investor with grant-aid because of political considerations. In such cases, however, investors have formed joint ventures with domestic concerns in order to sidestep this sensitive issue with the IDA.

The written proposal should also describe the selected site and set forth the investor's expectations regarding the timely provision of services by the IDA. Services normally expected include water, electricity, road access, and sewage and waste disposal facilities.

The financial aspects of a project are of such major importance that an investor should supply the IDA with its financial reports for the previous three to five years. These reports establish a track record and provide financial credibility for the investor. The financial reports should also include projected income statements and balance sheets for at least the first three years of the project. Moreover, the income statements and balance sheets will facilitate negotiations with Irish banks and other financial institutions if the investor should seek financing for the project in Ireland. In addition, the written proposal should provide estimated requirements for fixed assets and an expected time-frame for their provision. The list of fixed assets usually includes the site itself, the development of the site, buildings, machinery, and equipment. Other items which must also be included in a proposal that are not fixed assets, and thus not eligible for grant-aid, include office equipment, external transport equipment, and working capital.

In addition, the written proposal must indicate the sources of financing for the project. As a rough "rule of thumb," an investor must provide one-third of the total cost of a project through direct funding, while the IDA provides one-third of the funding through grant-aid, and financial institutions in Ireland usually finance the remaining one-third.

If the investor's project is likely to produce any form of pollution, available environmental controls should be discussed in the written proposal. Because Ireland has extensive planning and development control, local planning authorities grant permission for the construction or modification of industrial buildings only if certain standards relating to atmospheric and water pollution have been met. The IDA provides technical advice to new inves-

tors with potential pollution problems and works closely with both investors and local planning authorities to facilitate a solution to any potential hazards. The estimated cost of pollution control equipment should be included in the written proposal as a separate item in the building costs.

A written proposal must necessarily make various assumptions. To assist in subsequent negotiations, these assumptions should be expressly mentioned in the written proposal. For example, if an investor's subsidiaries usually pay royalties of ten percent for the use of patents or other technical know-how, and the investor expects the proposed Irish project to make similar royalty payments, a clear statement of these royalty payments should be included in the written proposal. The IDA generally restricts the payment of royalties to related entities to no more than five percent of an Irish company's annual net sales. An assumption that has been clearly expressed in the written proposal, however, may convince the IDA to relax this type of general restriction in the capital grant agreement. An investor should also include assumptions about inflation rates and currency exchange rates in the written proposals, and in particular, any assumptions about the exchange rate between the United States dollar and the Irish pound. Because a project will usually operate over an extended period of time in which fluctuations in these rates may be anticipated, an investor should expect the IDA to index any grants to the actual cost and currency exchange levels that will be required to complete the full program.

A written proposal should also assume that the investor will obtain maximum exchange control flexibility under whatever company structure is selected; that the investor will obtain suitable customs duties for imported components that are based upon their generic designation; and, that the investor will obtain, if necessary, confirmation from the Revenue Commissioners that its processes constitute the manufacture of goods.

All of the above considerations may not be applicable in every instance. Moreover, in any particular investment the specific facts and circumstances may warrant the inclusion of other assumptions or exceptions in the written proposal. Each investment proposal poses unique facts and problems that require the careful consideration of the investment team when formulating its negotiation strategy.

Before the written proposal is submitted to the IDA Board, members of the IDA knowledgeable in the particular industry

sector will examine the written proposal. These IDA members will present any questions resulting from this examination to the investor for response and comments. Before the written proposal is submitted to the IDA Board, the IDA will also conduct its own studies to verify the accuracy of the information contained in the written proposal, occasionally employing outside consultants to supplement the extensive internal resources of the IDA. A written proposal may still be modified during this examination process. When the IDA is finally satisfied with the written proposal, it will submit the proposal to the IDA Board for consideration.

c. The letter of offer

If the IDA Board approves the written proposal, it issues a letter of offer to the investor. This letter of offer essentially outlines the basic terms upon which the IDA will agree to grant financial assistance to the proposed project. These basic terms include the percentage of fixed assets that the IDA will fund and the maximum capital grant that the IDA will make available to the investor for that particular project.

If the investor is satisfied that the letter of offer reflects the terms of its agreement with the IDA, the investor will indicate its acceptance. If the letter of offer is accepted, the IDA will prepare the necessary legal documents for grant-aid agreements and other aspects of the transaction. The documents will typically consist of a capital grant agreement, a lease for an advance factory, a rent subsidy agreement, and possibly an option to purchase the factory. The capital grant agreement is the most important of these documents.

d. The capital grant agreement

The IDA has a form capital grant agreement (Agreement) that is structured to reflect the particular details of a specific project. For analytical purposes, a standard form Agreement will be assumed. In reality, however, there is no standard form. Depending on the specific facts of an investment, an investor may negotiate, or have imposed, conditions in the capital grant agreement that are substantially different from those contained in the IDA Agreement. The two parties to an Agreement are the IDA and the company that will direct the operation of the project in Ireland (Company). The Agreement also invariably discusses the Company's parent entity (Promoter), even though it is not a party to

the Agreement. The Company usually enters into an undertaking with the Promoter owning all of its shares.

For the IDA to draft contract documents correctly, it must know the nationality of the Promoter and the corporate structure within which the investor has chosen to operate in Ireland. The investor will make this decision based upon the most favorable tax advantages available. A United States investor rarely invests in Ireland through the branch of a United States Promoter. Although the initial start-up costs could offset the Promoter's United States income, the profits from the Irish project would be subject to United States corporation tax. Invariably, a corporation formed outside the United States will make the investment. Nevertheless, certain aspects of an investment may be conducted through the branch of a United States corporation. For example, expatriate United States employees may be employed by a corporation incorporated in the United States.

A Promoter may establish an investment in Ireland through either a domestic private limited company or the branch of an overseas company established in Ireland pursuant to the Irish Companies Acts of 1963-1983. While the Irish Government, including the IDA, does not treat branches and domestic companies differently,[109] structuring the project so as to incorporate outside Ireland and establishing manufacturing operations in Ireland through a branch of an external company may offer some advantages.

Three different types of company structures are commonly used for establishing an investment in Ireland. Although there are in fact several types of investment, and many variations on those types, a brief description of these three methods is useful. First, an investment may be established in Ireland through a subsidiary incorporated in Ireland and wholly-owned directly or indirectly by the Promoter. Because a company that is managed and con-

109. KLUWER & HARRAP, BRANCHES AND SUBSIDIARIES IN THE EUROPEAN COMMON MARKET: LEGAL AND TAX ASPECTS, 171-204 (2d ed. 1976). It is rumoured that new companies legislation being prepared by the Irish Government implementing the EEC Fourth Directive on Company Law, 21 O.J. EUR. COMM. (No. L 222) (1978), may exempt branches of United States multinational corporations from the disclosure requirements of the Fourth Directive. Given Ireland's attitude toward United States investment, this seems likely. The text of the proposed legislation has not yet been released. *See, Fourth Directive Hits Ireland . . . At Last*, SUCCESS, Feb. 1, 1985, 23, 25.

trolled[110] in Ireland is considered a resident company for Irish income tax purposes, it will be subject to a fifty percent corporation tax on its total world-wide income, including passive income earned on profits accumulated in Ireland.[111] Profits earned in Ireland from a manufacturing process, however, are taxed at a maximum corporation tax rate of ten percent.

Conversely, a company that is managed and controlled from outside Ireland is considered a nonresident company for income tax purposes irrespective of where it was incorporated. A company that is managed and controlled from outside Ireland will not be taxed on income earned from sources outside Ireland. Investment income earned outside Ireland on profits from the company's manufacturing operations in Ireland will be taxed only in the company's country of incorporation or residence, provided that those profits are not held for future use in Ireland. There is no Irish withholding tax on dividends. By structuring an investment with companies incorporated in Ireland (including nonresident companies), the investor benefits from the ability to have either a nonresident holding company with a resident or nonresident wholly-owned operating company as its subsidiary, or a company that is incorporated in Ireland but resident in a "tax haven" state and operating in Ireland through a branch.

Second, the investment may be established in Ireland through the Irish branch of a company incorporated in a "tax haven" state. Many investors incorporate companies in a "tax haven" country such as Bermuda or the Cayman Islands where there is no corporate income tax and, thereby, avoid tax on investment income. An investment company's use of funds from an Irish project accumulated in a "tax haven" country such as Bermuda to finance operations for subsidiaries incorporated in other countries entails its own costs. Bermuda's lack of tax treaties with other countries usually makes the interest paid by the foreign subsidiary to a Bermuda company subject to the unreduced withholding tax of its country of incorporation.

Third, the investment in manufacturing operations in Ireland may be established by incorporating a company in the Netherlands and establishing either a branch or all operations in Ireland. Because of the Netherlands many tax treaties, it is very likely

110. A. G. WILLIAMS, PRINCIPLES OF CORPORATION TAX IN THE REPUBLIC OF IRELAND, 15-18 (1981) [hereinafter cited as WILLIAMS].

111. Corporation Tax Act, 1976, *supra* note 70, § 6(1).

that any interest paid to a Netherlands company by one of its subsidiaries incorporated elsewhere will be subject to substantially reduced withholding taxes. In addition, income earned in Ireland by the Irish subsidiary would not be taxed by the Netherlands[112] and Irish withholding taxes are reduced under the double taxation treaty.[113] Because the income was once "subject to tax" it is not taxed again in the Netherlands.[114] Because accumulated passive interest income is subject to tax in the Netherlands, however, the Netherlands is not the most advantageous place to accumulate funds.[115]

The term of an Agreement is normally ten years. If a written proposal is divided into various stages, the IDA may allow an Agreement to cover more than one of those stages and extend ten years for each stage or create a separate Agreement for each stage. Under an Agreement, the IDA promises to provide grant-aid to the Company for a stated percentage of the Company's total expenditures for fixed assets. In administering the Agreement, the auditors of the Company[116] will initiate a grant-aid request to the IDA when the Company has expended funds in an amount equal to the level stated in the Agreement. This request is checked by the IDA and, if approved, payment is authorized and made directly to the Company shortly thereafter.

The IDA conditions its approval of grant-aid on the Company having an "equity equivalent"—equity equal to the amount of the requested grant. For every £1.00 of grant-aid requested from the IDA, the Company must have £1.00 of equity. A Company's equity equivalent can be comprised of one or more of the following:

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112. The Netherlands Unilateral Decree for the Prevention of Double Taxation, Apr. 7, 1965, art. 2(2). *See generally* van Raad, *Business Operations in the Netherlands,* 150-4th TAX MGMT. FOREIGN INCOME PORTFOLIOS (BNA), A49-A52 (1982); F. ROSENDAAL & B. WESTENDORP, CORPORATE AND TAX LAW IN THE NETHERLANDS, pts. I & II, INT'L LAW. 693-729, 105-129 (1980-81).

113. Stat. Inst. No. 22 of 1970, Double Taxation Relief (Taxes on Income and Capital) (Kingdom of the Netherlands) Order 1970, prl. 523.

114. *See supra* note 112.

115. A Netherlands company must withhold a 25% dividend tax on any profit distributed to shareholders. Netherlands Dividend Tax Act of 1965. The tax treaty between the Netherlands and the United States, however, reduces this withholding tax to 5%. Although dividends received in the United States would be liable to the United States corporation tax, that tax may be reduced by a credit for the payment of any foreign tax.

116. Every company in Ireland must have a statutory auditor. Companies Act, 1963, No. 33 of 1963, § 160.

cash received from the Promoter for fully paid-up, ordinary shares of the Company valued at par; retained earnings converted into fully paid-up, ordinary shares of the Company valued at par; or, intercompany, subordinated loans. Furthermore, a certain portion of the total equity equivalent must be cash received from the sale of fully paid-up shares of the Company.

Because a company incorporated in Ireland is prohibited from reducing its share capital without the consent of the Irish courts,[117] and the fact that United States investors seek to minimize equity and maximize debt when investing in Ireland for United States tax reasons, the IDA often allows subordinated, intercompany debt to constitute "equity equivalent." This subordinated intercompany debt is subject to extensive regulation in an Agreement. For example, the payment of interest or principal on the debt is prohibited unless the interest or principal is paid from the profits of the Company that are otherwise available for distribution as dividends. If the intercompany debt is reduced through this procedure, an equal amount of profits must be transferred to a capital reserve fund, which must be maintained for the term of the Agreement. In the event the Company ceases to operate, any intercompany debt outstanding is subordinated to the claims of unsecured creditors. Under an Agreement, the IDA is an unsecured creditor and, therefore, the IDA would have a preference over any intercompany debt in the event the Company ceased to operate. Because of these extensive restrictions, it is possible that the United States Internal Revenue Service (IRS) could classify intercompany debt as equity even though the IRS has not at this time published debt/equity regulations for the capitalization of foreign subsidiaries of United States corporations.

These grants generally do not have to be repaid to the IDA unless there is a contravention by the Company of the terms and conditions attached to the grant. An Agreement generally provides for the cancellation, revocation, or abatement of grants at any time during the term of the Agreement in certain instances. First, if the Promoters cease to hold, directly or indirectly, a controlling interest in the Company, unless otherwise agreed to in writing by the IDA, the IDA may revoke, cancel, or abate the grant.[118] Second, if the Company should "to a material extent be

117. *Id.* § 73.

118. Usual form of IDA Grant Agreement [hereinafter cited as Agreement] [copy available from author].

in breach of any of the terms and conditions of [the Agreement]," is unable to reasonably satisfy the IDA that the breach was due to *force majeure,* and is unable to rectify the breach within thirty days of a written notice from the IDA, the IDA may revoke, cancel, or abate the grant.[119] This clause occasionally causes concern among potential investors because some investors do not believe that they can predict markets in advance. Several years after a Company begins operations, a product may become obsolete or business conditions may adversely affect operations. The IDA also recognizes these possibilities, however, and, in practice, exercises its rights under this sub-clause only when an investor has not made a good-faith effort to effectively manage the investment. Third, if an order is given or an effective resolution is passed to cease operation of the Company, the IDA may revoke, cancel or abate the grant.[120] Fourth, if a receiver is appointed over any property of the Company, or if a distress or execution is levied or served upon any property of the Company and is not paid off within thirty days, the IDA may revoke, cancel, or abate the grant.[121] Last, if the Company should cease operations without the written consent of the IDA, the IDA may revoke, cancel or abate the grant.[122]

Upon revocation of the grant, an Agreement provides that the Company shall repay to the IDA upon demand, all sums received from the IDA grant (contingent grant liability). If the IDA abates the grant, the Company is required to repay the IDA on demand for all sums received, or deemed to have been received, in excess of the amount of the abated grant. In either case, if the Company defaults on repayment, the IDA may recover the appropriate sums from the Company.[123] In certain cases, a company has been able to negotiate reductions in its contingent grant liability. The reduction might become effective when the Company appears to be progressing satisfactorily some years after the initial investment in Ireland. At this point, the Company may be entitled to a reduction in the percentage of the contingent grant liability, up to a specified amount, over a period of years. When an Agreement is

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. After a default, the amount due the IDA is "recoverable . . . as a simple contract debt." 1969 Act, *supra* note 46, § 45.

divided into various stages, separate contingent grant liability may be allowed in respect to the different stages of the investment. Transactions in which the issue of contingent grant liability assumes importance are asset acquisition transactions and certain forms of company reorganizations. For example, in an asset acquisition, the IDA must give its consent for one Company to sell its assets to another Company and either the selling Company must repay the contingent grant liability to the IDA or the purchasing Company must assume the contingent grant liability on the specific assets that it has acquired. In these transactions, the purchasing Company usually wishes to assume as little of the contingent grant liability as possible. In some cases the selling Company may not be able to repay the balance of the contingent grant liability. A subsidiary, but related issue that is often encountered is whether the purchasing Company, upon assumption of the contingent grant liability, should be required to provide new equity equivalent to match the contingent grant liability that it has assumed. The resolution of these issues depends upon many factors, including the relative negotiating strengths of the parties and the amount of equity that the purchasing Company is able to invest in its venture.

Certain other restrictions normally apply to a Company. The IDA has the power to release a Company from the restrictions of an Agreement at any time. For example, a Company is prohibited from transferring any grant-aided assets out of the Company. If the Company is a branch of an external company, the establishment of a branch outside Ireland by the external company is also prohibited. The reason for this prohibition is the IDA's concern that operations outside might be unsuccessful and that failure would adversely affect the Irish Company. A Company is not permitted to distribute by dividend or otherwise, any sum received through a grant. Without the consent of the IDA, a Company is generally prohibited from paying royalties or other similar distributions in amounts that exceed a fixed percentage of annual net sales. Permitted percentages may be determined by negotiations between the parties under certain circumstances. When placing contracts, a Company must provide local Irish firms with the opportunity to offer competitive bids. A Company must accept the lowest quoted bid unless the IDA consents otherwise.[124] These re-

124. For a general discussion on local content and the IDA's response to the present situation, see White Paper, *supra* note 5, ¶¶ 10.5-.11, at 73-76.

strictions, however, are negotiable and can be modified by special arrangement between the IDA and the Company.[125] A Company also is restricted from entering into contracts for the direct construction of factory buildings or the provision of services and facilities without the written consent of the IDA.[126] A Company must insure all eligible assets for their total replacement cost against loss or damage resulting from fire and explosion. Once production has commenced, a Company must also obtain insurance sufficient to adequately indemnify itself against the losses and costs of business interruption. If a Company's assets are insured at a value below their replacement cost, the Company generally is liable for any deficiency that results from the loss of those assets.[127]

An Agreement generally provides that the IDA will not unreasonably withhold consent where it is required.[128] An Agreement typically specifies that the project must be established and operational by certain dates. Because time is usually not of the essence, however, the IDA typically grants reasonable extensions of time for delays that were not caused directly by the Company or its Promoter.

Another restriction sometimes found in an Agreement is a requirement that the Company export from Ireland all goods produced and, therefore, is prohibited from selling those goods on the domestic market. This restriction is especially prevalent in Agreements where there are existing Irish suppliers for the product in question. The reason behind this restriction is that the IDA's role is to assist in industrial development, not to grant financial assistance to competitors within domestic industries. One way to overcome this restriction is to structure the investment as a joint venture with a domestic manufacturer as a partner. For certain industries with an established United States base in Ireland such as pharmaceuticals and electronics, this restriction on domestic sales is rarely included in an Agreement because many

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125. Compare the heavy restrictions regarding local content requirements of contracts in Mexico. Note, *Mexico's Computer Decree: The Problem of Performance Requirements and a U.S. Response*, 14 LAW & POL'Y INT'L BUS. 1159 (1983).

126. Written consent of the IDA in this case is based solely on structural considerations.

127. Agreement, *supra* note 118.

128. This provision, however, does not apply to restrictions on the control of the Company and the transfer of grant-aided assets.

potential United States investors expect to sell their products in Ireland, and specifically to United States industries located in Ireland.[129]

These few restrictions are insubstantial in comparison to the benefits granted under an Agreement. From a legal point of view, the most remarkable aspect of an Agreement is the lack of more onerous restrictions. For example, Agreements do not contain any performance criteria. Although a projection of the number of jobs required for the project must be included in the written proposal, this projection does not play a role in the Company's subsequent responsibilities under an Agreement. Payment of the grants is not tied to achieving target job levels. This lack of restriction would enable an investor who promises to create 150 jobs over a five-year period, and in fact provides only 20 jobs per year over the five years, to still receive all capital grants within the first two years. The total absence of a requirement for equity participation by domestic concerns or the IDA, the lack of restrictions on the transfer of technology or other know-how to domestic entities, and the lack of any established arbitration procedure for disputes arising between the IDA and the Company are all obvious omissions in an Agreement's list of restrictions.[130]

An Agreement also contains several schedules, the majority of which involve various financial data on the specifics of the investment. Two items appearing in these financial schedules deserve mention. First, some Companies have successfully negotiated for an increase in grant-aid based upon the projected, inflation-adjusted increased cost of fixed assets at the inflation rate specified in the Agreement. These inflation-adjusted costs are generally grant-aided only for an amount exceeding a yearly percentage of the estimated costs of the item, calculated from the date of the written proposal to the date that the item was invoiced. Second, to provide the investor with some protection against fluctuating

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129. *See generally* TELESIS REPORT, *supra* note 3, at 118. The confederation of Irish Industry recently estimated that only 16% of the £500 million in raw materials and components required by high technology companies in Ireland were purchased domestically. IRISH INTEREST, Mar. 1984, at 5.

130. *See* Agreement, *supra* note 118. In addition, although the Agreement is governed by Irish law, it does not state how disputes are to be handled. The parties could refer their dispute to the International Centre for Settlement of Investment Disputes under the Washington Convention. *See supra* notes 37-38 and accompanying text. In practice, disputes usually are handled through informal discussions between the IDA and the investor.

currency exchange rates, the IDA normally indexes the amounts of grant-aid to the currency exchange rate between the United States dollar and the Irish pound. In some cases, a grant will be adjusted to reflect the actual exchange rate prevailing on the date the machinery is invoiced.

IV. Manufacturing Industry

A. Manufacturing Relief

Companies carrying on a trade that consists of, or includes, the manufacture of goods within Ireland are taxed at a maximum corporate tax rate of ten percent (manufacturing relief).[131] The manufacturing relief is available to Companies that have either export or domestic sales in Ireland. This ten percent corporate tax rate was retained when the normal corporation tax rate was increased to fifty percent in 1982,[132] and will be available until December 31, 2000.[133] To qualify for the manufacturing relief, a Company must be involved in the manufacture of goods, a requirement that was also included in the Finance Act of 1956 for Export Sales Relief. Since 1956 "goods manufactured" have been defined as products "manufactured within the State, in the course of a trade by the company."[134]

Prior to 1980, the Irish Revenue Commissioners interpreted the term "goods manufactured" very broadly. The minimum requirement appeared to be the production of physical goods through a process of manufacture. Thus, merely breaking bulk product and repackaging it, or rendering services to another[135] did not produce "goods manufactured." Under Export Sales Relief, the following activities qualified as goods manufactured: some assembly work, depending upon the degree of assembly and the skill involved; physical data processing activities including printed output, discs,

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131. Finance Act, 1980, No. 14 of 1980, ch. VI, § 4(2). This new manufacturing relief replaced the export sales relief introduced by the Finance (Miscellaneous Provisions) Act of 1956. This replacement was due to pressure on the Irish Government arising from the EEC Commission's decision that the provision of export sales relief was contrary to the Treaty of Rome.

132. Finance Act, 1982, No. 14 of 1982, pt. 2, sched. 2.

133. The Role of Incentives, *supra* note 86, para. 6.12, at 73, app. 5, at 184.

134. Finance Act, 1980, *supra* note 131, § 39(1). *See generally* Williams, *supra* note 110, at 57, A7 (1st Supp. 1982).

135. Rendering services may qualify as manufacturing services. *See infra* note 140 and accompanying text.

and tapes; computer software production; quarrying, breaking, screening, and washing of stones that resulted in "chips"; printing books and newspapers; freezing strawberries with the addition of preservatives; dressing meat and chickens; curing fish by salting or smoking; deep freezing fish and meat; mincing, cooking, and canning meat; processing eggs by the injection of preservatives; certain blanching processes; cubing sugar; sterilizing drugs; and mixing liquid gases with additives.[136] Before 1980 it was generally assumed that the above categories could be safely used to interpret the meaning of "goods manufactured" under the new manufacturing relief. This may no longer be a valid assumption.[137]

The Finance Act of 1980 contains the following statutory inclusions to the previous definition of "goods manufactured": (1) When a Company that qualifies for manufacturing relief owns ninety percent of a subsidiary, the products sold by one company but manufactured by the other are considered to be "goods manufactured."[138] (2) The products sold by one company but manufactured by another, where both companies are ninety percent owned by a holding Company, also qualify as "goods manufactured."[139] (3) When a Company renders manufacturing services on commodities or materials belonging to another person, those products may also be deemed to be "goods manufactured."[140] For example, manufacturing relief could be claimed for motor car assembly or engine reconditioning if a nonclaiming company owns the engine parts. "[T]he degree of manufacturing which must be carried out in order to claim relief for manufacturing services need not be as substantive as the level of manufacturing which must be performed by a company which sells the goods which it has processed."[141]

The Finance Act of 1981 added three new statutory inclusions to the Finance Act of 1980 that expanded the meaning of "goods

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136. ERNST & WHINNEY, THE NEW 10% CORPORATION TAX (1981).

137. F. Brennan & P. Moore, *Corporation Tax*, INST. OF TAX'N IN IRELAND, ¶ 6.12, at 117 (1982).

138. Finance Act, 1980, *supra* note 131, § 39(1).

139. *Id.*

140. *Id.* § 39(2).

141. WILLIAMS, *supra* note 110, at A11 (1st Supp. 1982). The Inspector of Taxes may require a Company claiming manufacturing relief for rendered services to supply information that the claim is valid. Finance Act, 1980, *supra* note 131, § 39(2).

manufactured" to include:[142] (1) fish production and mushroom cultivation in Ireland;[143] (2) repairing ships in Ireland;[144] and (3) the provision of engineering services for projects outside EEC territories.[145] The allowance of engineering services was an important inclusion because many engineering service companies have been attracted to Ireland as a location from which engineering services can be provided to construction projects in the Arab states. Engineering service companies in Ireland could provide qualifying services to projects located in other member countries of the EEC and qualified under the Export Sales Relief, but do not qualify under the new manufacturing relief. The Finance Act of 1981 also amended the Finance Act of 1980 by granting the benefit of the maximum ten percent corporate tax rate to certain industries located in Shannon.[146]

The Finance Act of 1980 also provides certain technical exclusions from the definition of "goods manufactured." For example, sales to an EEC intervention agency,[147] retail sales,[148] and the products of mining and construction operations[149] are not eligible for the new manufacturing relief.

In order to prevent abuse of the new manufacturing relief, the Finance Act of 1980 contains transfer pricing rules. These rules ensure that arms-length prices will be used in transactions between a Company qualifying for the new manufacturing relief and certain connected persons defined in the Act. The Inspector of

142. Finance Act, 1981, *supra* note 94, § 17 (amending Finance Act, 1980, *supra* note 131, § 39).

143. Finance Act, 1980, *supra* note 131, § 39(1A).

144. *Id.* § 39(1B).

145. *Id.* § 39(1C). Engineering services are defined as design and planning services performed in connection with chemical, civil, electrical, or mechanical works.

146. Finance Act, 1981, *supra* note 94, § 17 (adding section 39A to the Finance Act, 1980). Because these industries essentially are providing services rather than manufacturing goods, section 39A is analyzed below in the discussion of international service industries. *See supra* text accompanying and following note 101. Companies that qualify for manufacturing relief, however, may also locate in Shannon. Many such industries have done so because of the proximity of Shannon airport and its flight service to the United States and the EEC. SFADCo, *see supra* text accompanying note 47, has all the grant making powers of the IDA and the full range of grant-aids is available in Shannon.

147. Finance Act, 1980, *supra* note 131, § 39(3).

148. *Id.* § 39(4).

149. *Id.* § 50.

Taxes has the power to obtain whatever information is necessary to determine whether adequate arms-length prices are being charged.[150]

The Export Sales Relief provided a complete corporation tax exemption to many Companies until December 31, 1990. Occasionally, new investors will seek to acquire a Company that is entitled to export sales relief. To accomplish this acquisition, an investor must succeed to the qualifying trade. This succession is typically a question of fact, but a written confirmation of the succession is normally sought from the Revenue Commissioners. Sellers of these exempt Companies usually expect large premiums for the corporation tax exemption. As December 31, 1990, draws closer, the value of these exemptions will certainly decrease.

B. Shannon Relief

Shannon is a large industrial area in southwest Ireland centered around the city of Limerick and its adjacent international airport.[151] Section 39A of the Finance Act of 1980,[152] allows certain investors in Shannon to utilize the ten percent corporation tax rate even though their activities do not qualify as the production of "goods manufactured" (Shannon relief).[153] The Minister for Finance may issue a certificate to a qualified company that trades in Shannon entitling that company to utilize the maximum ten percent corporation tax rate through December 31, 2000.[154] Although the "trading operations" are in fact the provision of services, the certificate issued by the Minister qualifies them as "goods manufactured" and, thus, eligible for Shannon relief. A company will receive a certificate if the Minister for Finance and the Minister for Communications believe that the company's activities contribute to the growth and development of Shannon and the airport.[155] Activities related to the operation of an airport or air service such as fueling aircraft or providing services to airline passengers, however, cannot be certified.

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150. *Id.* § 44.

151. SFADCo. announced in January 1985, that it had approved 184 projects for grant assistance in 1984.

152. *See supra* note 146.

153. Finance Act, 1980, *supra* note 131, § 39A.

154. *Id.*; *see* THE ROLE OF INCENTIVES, *supra* note 86, Pl. 1755, app. 5, para. 11, at 185.

155. Finance Act, 1980, *supra* note 131, § 39A(6).

The Revenue Commissioners also have the power to make regulations that determine the effect Shannon relief has on a company that employs more than forty-nine individuals,[156] although the Revenue Commissioners have not made any such regulations to date. If a qualified Shannon company employs more than forty-nine individuals on a full-time basis, the aggregate of all grant-aid relief to which that company is entitled under the Shannon relief may not exceed an amount determined under the current principles of the EEC Commission.[157] The Shannon relief that benefits service companies is deemed to be state-aid that is subject to EEC Commission review even though the manufacturing relief that is available in Shannon and throughout Ireland, and its corresponding ten percent corporation tax rate, is not deemed to be state-aid. If the Shannon relief exceeds the amount of grant-aid permitted by the EEC Commission, additional assessments or adjustments to existing assessments will be applied to effect a clawback.[158]

V. Joint Ventures

The establishment of joint venture investments in Ireland is increasingly common. Joint ventures may take the form of an agreement between a United States investor and an Irish-owned company, between two United States investors or, more rarely, between a United States investor and a foreign investor. For large investments, either the IDA or a venture capital firm often becomes a minority shareholder of the investing company. A joint venture is typically established between a United States investor and a domestic, private, limited liability company owned by partners whose shares represent their respective interests in the joint venture. It is the policy of the IDA to strongly promote and develop joint ventures in all industry sectors. The IDA employs individuals specifically to respond to inquiries regarding potential joint ventures and assists foreign and domestic companies seeking

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156. *Id.* § 39A(9).

157. The EEC Commission determines this amount under the powers vested in it by the Treaty of Rome, Mar. 25, 1957, arts. 92-94, 298 U.N.T.S. 167, and the EEC Commission Rules, *Communication of the Commission on Regional Aid Systems*, 22 O.J. Eur. Comm. (No. (31) 9-15 (1979)). *See generally* D. Wyatt & A. Dashwood, The Substantive Law of the EEC 330 (1980); The Role of Incentives, *supra* note 86, app. 4 & annex 1, at 176-80.

158. Finance Act, 1980, *supra* note 131, § 39(B)(a).

joint venture partners.

Potential United States investors are generally apprehensive about overseas joint ventures in general. The creation of a successful joint venture usually requires the expenditure of substantial amounts of time in planning and constant monitoring to maintain the terms of the initial structure. The benefits of operating under a joint venture structure, however, are many and varied. The following benefits tend to predominate when an investor is considering the joint venture structure in Ireland. First, a potential United States investor who is relatively small but has a good product or idea, may not have or be willing to commit sufficient financial, technical, or managerial resources to establish and operate a wholly-owned manufacturing subsidiary several thousand miles from its main United States facility. Second, a United States investor may desire the assistance of a domestic partner for marketing reasons. A domestic partner may have an established market in Ireland, the EEC, or elsewhere. Several joint venture agreements between very large companies in recent years testify to the advantages of this form of undertaking.[159] Many industries in Ireland have extensive production capacity, operational experience, and access to markets that may be available to a United States joint venture partner. Last, because a joint venture limits the contribution of, as well as the risk to the United States partner in the event of a project's failure, it is generally considered safer than a wholly-owned direct investment.

Because each joint venture is structured according to the individual circumstances and desires of the partners, there is no standard joint venture agreement; instead, joint venture partners tend to enter several separate agreements, many of which are tailored to the specific transaction. These agreements generally include a joint venture agreement, a memorandum of association, the articles of association, a shareholder's agreement, a management agreement, an employment agreement, a technical service agreement, a patent trademark and/or "know-how" licensing agreement, a financing agreement, and a supply agreement. In addition, joint venture investors must submit a written proposal to the IDA and then negotiate in order to obtain the requisite Agreement with the IDA. This application process should proceed simultaneously with the discussions between the potential joint

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159. Examples might include Union Camp and Kerry Co-op, SIFCO and Aerlingus, and General Electric and Guinness Peat Aviation.

venture partners.

The form of a joint venture company is far less significant than the way in which the joint venture apportions the control, management, marketing, and financial benefits between the partners. The charter documents of a private limited liability company, the memorandum and articles of association, together with any of the documents mentioned above typically provide the structure for this apportionment.

A. Shareholder Control

Every domestic company in Ireland has both a memorandum of association and articles of association. A memorandum of association is analogous to the certificate of incorporation of a United States corporation. The articles of association set forth rules regulating the internal affairs of a company and are similar to the bylaws of a United States corporation. Unless it indicates otherwise, a private limited liability company uses the Model Articles of Association.[160] A company may of course adopt its own form of articles of association, but in practice companies generally follow the Model Articles of Association. Both the memorandum of association and the articles of association are public documents and must be registered with the Registrar of Companies.

The memorandum of association and the articles of association are in effect a contract between the shareholders which shall "when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member [shareholder] and contained covenants by each member [shareholder] to observe all provisions of the memorandum and of the articles."[161] The contract exists not only between the shareholders and the company but also among shareholders themselves.[162]

Majority shareholders of a private, limited liability company generally are able to ensure that management of the company is vested in a board of directors that is controlled by nominees of the majority shareholders. In Ireland, if decisions affecting a company are made on the basis of what is genuinely perceived to be in the best interests of the company, minority shareholders have

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160. *See* Model Articles of Association, Companies Act, 1963, *supra* note 116, sched. 1, table A.

161. *Id.* § 25.

162. *See* Clarke v. Workman, 1920 Ir. R. 107.

very little opportunity to influence the direction of the company. Statutory protections for minority shareholders are of practical use only in extreme and flagrant cases, such as where minority shareholders can demonstrate that the company's affairs are being conducted, or that the powers of the board of directors are being exercised, in an oppressive manner or in disregard of their interests as shareholders.[163] This statutory shareholder protection is rarely used and there is scant authority on the scope of protection that is actually afforded to minority shareholders.[164]

The ultimate control of a company is vested in the shareholders present at a shareholders meeting. A majority vote by the shareholders present and voting at a shareholders meeting will usually suffice for approving matters. Certain matters that are brought before a general meeting of the shareholders require approval by a special resolution, an endorsement by at least seventy-five percent of those shareholders present and voting. Although such matters are the exception rather than the rule, major matters such as proposals to amend a company's memorandum of association, amend its articles of association, or to cease operation of the company require shareholder approval by special resolution.[165] Accordingly, while there is a certain advantage in holding more than twenty-five percent of the voting shares in a company, a shareholder who holds twenty-six percent of the voting shares is in the same position as that of a shareholder holding forty-nine percent of the shares for most company matters. As a result of this vulnerable position, shareholders with a significant minority interest in a company will usually seek other legally enforceable ways to protect their interests and to control the management of the company. Minority shareholders may attempt to establish management control of a company by including restrictions on the powers of the majority shareholder in the company's articles of association. Minority shareholders may also attempt to include specific restrictions beyond those normally found in the articles of association. Arrangements to cast shareholder votes in a certain manner, on certain occasions, or for specified periods of time are examples of restrictions that are typically included in a company's articles of association. Another relatively common restriction is to divide share capital into various classes, grant certain

163. Companies Act, 1963, *supra* note 116, § 205.
164. For a recent case, see *In re* Clubman Shirts, (1983) I.L.R.M. 323.
165. Companies Act, 1963, *supra* note 116, §§ 9, 15, 251.

rights to each class, and not allow the rights of a class to be varied without the consent of that class. Because they are public documents, the articles of association rarely include many detailed restrictions.

The shareholders agreement is commonly used in Ireland to restrict the rights of the majority shareholders.[166] A shareholders agreement is essentially a contract between shareholders governing their rights. Most shareholders agreements set forth a number of actions that require the unanimous consent of the board of directors, including the affirmative vote of one of the directors who is a designate of the minority shareholders. It is fundamental that every shareholders agreement restrict the power of the board of directors to amend a company's memorandum of association and articles of association, and to prohibit them from deriving any financial benefits from a joint venture. Furthermore, a shareholders agreement must restrict the transfer of shares, give shareholders the ability to maintain their proportionate share in the company by granting them the option to purchase a commensurate number of newly issued shares, and limit the power of the board of directors to increase its membership or alter the business of the joint venture.

In addition to the above fundamental restrictions, the shareholders agreement usually contains several additional limitations, including restrictions on the selection of auditors and banks, on the amount and methods of corporate borrowing as well as other specified financial activities, and on the disposal of corporate assets including encumbering assets through mortgaging. A shareholders agreement may also place restrictions on the appointment of a managing director and on the procedure for determining the remuneration of corporate officers. In addition, a shareholders agreement may circumscribe the pursuit or settlement of any material and substantial litigation initiated by or against the joint venture company. Restrictions may also be placed on the power of the board of directors to pursue or invest in other businesses or to create subsidiaries, and restraints placed on the power of the joint venture partners to compete with the business of the joint venture.[167]

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166. *See generally* H. FRY, *Shareholders Agreements— Ireland* 7 INT'L BUS. LAW. 99-103 (1979).

167. The enforceability of these latter restrictions would be subject to the Restrictive Practices Act, 1972, No. 11 of 1972, and articles 85 and 86 of the

If each joint venture partner owns fifty percent of the outstanding shares, the shareholders agreement should provide a means for resolving disputes in the event of a deadlock. Disputes typically are resolved through arbitration, negotiations with an independent third party, or contractual arrangements such as a buy and sell agreement in which one of the parties would be allowed to exit from the joint venture company or force a sale by the other party. In the event of a forced sale, the shareholders agreement should provide an effective means for valuing the selling shareholder's stock. From both a legal and a business point of view, joint venture partners should seriously consider all the restrictions discussed above when initially drafting the terms of a shareholders agreement. The unattractive alternative is for these issues to arise in a piecemeal fashion and risk heated and protracted discussions that may cause ill will among the joint venture partners.

B. Management

The daily management of a joint venture company is conducted by the board of directors, with each director owing certain fiduciary duties to the company. These duties include the duty to act in the bona fide best interest of the company and not for the benefit of the person who appointed the director to the board or any other interested third party.[168]

Management rules may cause particular difficulties in a joint venture company. The directors of a joint venture company may also be directors of a company owned by one or more of the joint venture partners. If a conflict arises between the joint venture company and one of the joint venture partners, or a company owned by one of the joint venture partners, the directors of both boards may be placed in an extremely difficult situation and be forced to abstain from voting or, in an extreme situation, to resign one of the directorships.

C. Marketing

The marketing strategy of a joint venture company is often the subject of much discussion and uncertainty. For example, in a joint venture where a United States company and an Irish com-

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Treaty of Rome, *supra* note 157.

168. Clarke v. Workman, 1920 Ir. R. 107.

pany are partners, the United States company may jealously guard its absolute right to determine market strategy by restricting the activities of both the joint venture company and the Irish joint venture partner to the extent that the Irish operation becomes no more than a satellite manufacturing plant. It would not be unusual, however, for the Irish joint venture partner to seek to broaden the scope of the joint venture company's activities. Marketing rights occasionally are assigned to the joint venture company itself, especially when new markets become available and the granting of marketing rights can be tied to the attainment of certain performance criteria by the joint venture company.

D. Financial Return

Under the Model Articles of Association, directors are given wide discretion with regard to the payment of interim dividends.[169] The declaration of a final dividend is reserved for the general meeting of shareholders, but most articles of association provide that a dividend declaration shall not exceed the amount recommended by the directors. In a joint venture company the discretion to determine the maximum amount of a dividend declaration should be restricted.

The articles of association and the shareholders agreement should also contain guidelines on the financial return to the joint venture partners. If one joint venture partner considers the project to be an investment, that joint venture partner probably will require a guaranteed return from any profits available for distribution as dividends. The issuance of preferred shares to an investment-oriented joint venture partner usually will satisfy the investor's demand for a guaranteed return. On the other hand, a joint venture partner who considers the project to be a business venture probably will require assurances that the company will retain sufficient reserves to pay for any future expansion of the project and to fund any future projects. The business venture-oriented joint venture partner may also require the company to maintain certain reserves and to attain a specified level of profitability before distributing any dividends. Conflicts also occasionally arise when a joint venture company distributes profits to

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169. Model Articles of Association, *supra* note 160. This discretion has been somewhat curtailed recently by the Companies (Amendment) Act, 1983, No. 13 of 1983, § 45. *See* Forde, *The Companies (Amendment) Act, 1983,* 18 THE IRISH JURIST 289, 306-09 (1983).

shareholders in amounts other than in proportion to their percentage share ownership. Detailed provisions governing the method of determining such profits and the proportions in which those profits will be distributed to the shareholders are usually included in the shareholders agreement.

The number of joint ventures in Ireland is likely to increase in the future. First, the IDA is expected to encourage more joint ventures between United States investors and domestic industries and recently has stepped up its search for United States joint venture partners. Second, the likelihood of a joint venture is enhanced when a potential United States investor seeks to locate in Ireland and sell in a domestic market where Irish domestic manufacturers are marketing the same product. Potential United States investors should seriously explore the possibility of creating joint ventures for products in which the domestic market is large, especially in areas such as electronics. Last, even if the United States investor is not interested in tapping a small domestic market, a joint venture may still be feasible where a domestic manufacturer is able to contribute to the joint venture. In such a case, the United States joint venture partner initially could own one hundred percent of the joint venture and provide the domestic manufacturer with buy-in options. This structure should provide the United States joint venture partner with total control while offering the domestic manufacturer access to a joint venture partnership.

VI. Tax-Advantaged Financing

Several types of financing are available in Ireland through either private lending institutions or the Irish Government. Financing provided by financial institutions, however, often is designed to obtain tax advantages for the financial institutions. Consequently, financial institutions often are able to provide financing at below market interest rates. The two principal types of tax-advantaged bank financing are lease financing and section 84 loans.

A. Lease Financing

Lease financing is a financing mechanism used by most foreign investors because of its low cost. By leasing machinery from a financial institution, the investor can obtain favorable financing terms for two reasons. First, the financial institution is able to

take advantage of accelerated capital allowances that accrue during the equipment's first year.[170] At present, accelerated capital allowances represent a one hundred percent write-off in the equipment's first year. Second, capital allowances are calculated on the full value of the equipment purchased, even though the bank advances funds to the company by way of a lease in an amount equal to the net value of the equipment after deducting the applicable IDA grant. That portion of the IDA grant which represents the leased machinery and equipment becomes payable to the bank within a few months after installation of the machinery and equipment. Because of the quick return on its investment, the financial institution is able to offer the investor very competitive interest rates.

A primary lease period typically runs for five years. To avoid having to reduce by means of an adjustment the capital allowance taken on the purchase of machinery or equipment at the time of its disposal, a financial institution must retain ownership of the asset. The financial institution normally does so by creating a secondary lease period during which the investor is charged a nominal rental fee. A financial institution usually insists on security for lease financing in the form of a letter of credit from a bank or a parent company guarantee. Furthermore, it should be noted that lease rentals may be deducted in the computation of a company's income for corporation tax purposes.

B. Section 84 Term Loans

Section 84[171] term loans were made available by the Corporation Tax Act of 1976. The Act provides that corporation tax shall not be assessed on dividends or other distributions in the hands of a recipient company that is resident in Ireland, because a distributing company is not allowed to deduct dividends or "distributions" from profits when computing its income for corporation tax purposes.[172]

Section 84 is an "anti-avoidance section" because it is designed to prevent the distribution of a company's profits through artificially high interest rates or interest rates that vary with the level of profits earned in order to increase a company's deductions and,

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170. *See supra* note 70 and accompanying text.
171. Corporation Tax Act, 1976, *supra* note 70, § 84.
172. *Id.* § 2.

correspondingly, decrease its corporate tax liability. Section 84 accomplishes this by categorizing certain interest payments as distributions, which are, therefore, not deductible by the payor and not taxable in the hands of the payee. Thus, financial institutions in Ireland that offer financing through loans structured to qualify under the terms of section 84, receive interest payments from the borrowing company that are not subject to corporation tax.

To qualify for section 84 loans, a financial institution must make loans to companies resident in Ireland. If the company is a branch of an overseas or external company, however, a financing mechanism is available that permits domestic branches to take advantage of section 84 term loans. This financing mechanism requires the resident branch company to undertake certain activities and to comply with certain conditions in order to qualify for the favorable loans.

An essential feature of a section 84 loan is that the lending institution must have the right to convert its loan into capital shares. Whether this right to convert can exist only with respect to a portion of the loan or whether it must attach to the entire loan is unclear. If the latter interpretation is correct, the conversion requirement renders the entire loan convertible. An additional feature of section 84 term loans is the inclusion of a profit participation fee in the interest formula to ensure that the loan qualifies under the technical definition of a term loan contained in section 84.[173]

The interest rates for section 84 term loans are often much lower than current market interest rates in Ireland. The following example illustrates the advantage of section 84 loans over ordinary lending.

	Section 84 Lending	Ordinary Lending
Loan amount	100,000	100,000
Dublin Inter Bank Rate at 13%	13,000	13,000
Reserve Assets costs at 1%	1,000	1,000
Margin for delay in tax credit	500	—
Bank margin at 2%	2,000	2,000
	16,500	16,000

173. Corporation Tax Act, 1976, *supra* note 70.

Less Section 84 relief (16,500 at 50%)	8,250	—
Cost to borrower	8,250	16,000

Under the assumptions in the example above, the effective interest rate for the section 84 loan is 8.25 percent as compared to the ordinary lending rate of 16 percent.

Reserve asset costs arise from liquidity rules established by the Central Bank of Ireland. These liquidity regulations require the Associated Banks in Ireland to maintain thirty-five percent of their total deposits in designated reserve asset accounts with the Central Bank of Ireland and in government gilts.[174] To lend £100, an Associated Bank utilizes £154, thirty-five percent of which will be invested in "reserve assets." The shortfall between the cost and earnings of these funds is passed on to the borrower through an additional interest charge. The amount by which the bank reduces the level of the tax credit to recognize the timing difference between the cash benefit and the tax advantage can vary between one-half and one percent.

Section 84 loans can be made available in Irish pounds, most foreign currencies, or a combination of currencies. Section 84 loans usually are extended in the form of a term loan with an agreed repayment schedule. Security generally is required in the form of a bank letter of credit, a parent company guarantee, or a letter of comfort, depending upon the particular bank's level of confidence in both the project and its promoters. It should also be emphasized that the interest incurred on section 84 loans cannot be offset against a company's assessable profits. Unlike the interest charges on lease financing, the interest incurred on section 84 loans is not deductible by the borrowing company when computing its income for corporation tax purposes.

The transition from Export Sales Relief to the new ten percent corporation tax rate on manufacturing profits[175] has reduced somewhat the availability of section 84 loans. This decline in the availability of section 84 loans is due to the fact that unlike distributions from export-sales relieved funds, distributions from a

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174. *See generally* FIRST REPORT OF THE COMMISSION ON TAXATION, DIRECT TAXATION, Pl. 617 G.P.O., at 384-86 (1982) [hereinafter cited as DIRECT TAXATION].

175. This transition occurred on January 31, 1980, and June 30, 1981, for companies that obtained a letter of assurance. *See* WILLIAMS, *supra* note 110, at A3-A4 (1st Supp. 1981).

borrowing manufacturing company entitled to the ten percent tax rate are not taxed in the hands of the lender, but instead, are taxed in the hands of the lender's individual shareholders. Some banks have circumvented this problem by segregating such funds and not making distributions from those funds, or by routing section 84 loans through subsidiaries and not making distributions from those subsidiaries.

Another effect on the efficacy of section 84 loans has been the introduction of an advanced corporation tax (ACT) into Ireland's corporation tax law.[176] Under ACT provisions, if a company makes a distribution, it incurs a liability to pay the ACT at the time the company pays its corporation tax for that accounting period, in an amount equal to the distribution's tax credit.[177] Interest earned under a section 84 loan is considered to be a distribution and, hence, is subject to ACT. A distribution from a company eligible for the ten percent tax rate, carries a tax credit of 1/18th of any distribution. A company, therefore, must pay 1/18th of any distributions made under a section 84 loan to the Revenue Commissioners within six months after the close of its accounting periods. For a profitable company, this ACT liability does not represent an increased financial burden because ACT can reduce a corporation's tax liability on income earned in that accounting period. Moreover, ACT liability was reduced by fifty percent in 1983.[178] This reduction was originally extended to January 1, 1985,[179] and was subsequently continued until December 31, 1985.[180]

The First Report of the Commission on Taxation examined limited aspects of section 84 loans and other tax-advantaged lending and concluded that Irish banks engaged in this type of lending could pass on nearly all of their tax savings to the borrowers.[181] The Second Report of the Commission on Taxation recommended that section 84 lending be prohibited.[182] This recommendation was based, in part, on the increased expense of section 84 loans to the Irish Government. The Department of Finance

176. Finance Act, 1983, No. 15 of 1983, §§ 38-53.
177. *Id.* § 38.
178. *Id.* § 52.
179. Finance Act, 1984, *supra* note 70, § 44.
180. January 1985 Budget Speech, Alan Dukes, Minister for Finance.
181. DIRECT TAXATION, *supra* note 174, para. 30.32, at 389.
182. THE ROLE OF INCENTIVES, *supra* note 86, para. 9.33.3, at 109.

recently estimated that the total tax expenditure for section 84 loans in 1980 was £55-60 million.[183] Despite earlier indications to the contrary, the Minister for Finance has provided by statute for the continuation of section 84 lending for grant-aided companies.[184] The Minister's proposal should enshrine the availability of section 84 lending for the immediate future.

VII. Currency Exchange Control and Repatriation of Profits

The primary purpose of the existing currency exchange control regulations in Ireland is to protect the foreign currency reserves of Ireland[185] and to regulate the effects of capital movement on the exchange rate of the Irish pound.[186] Ireland's currency exchange control regulations apply to all transactions between residents of Ireland and residents of all other countries, who are referred to as "nonresidents" in the regulations. The currency exchange control regulations on direct investment in Ireland[187] define direct investments as investments in which the investor establishes, expands, or consolidates an enterprise in Ireland with the intention of participating in its management or operation.[188] The Central Bank of Ireland (CBI) must grant permission for all "inward" direct investments in Ireland. The CBI requires the following information before it will consider granting permission for any new inward investment: (1) the name of the entity and the address of its registered or principal office in Ireland; (2) the location of the project; (3) the primary activity of the company, branch, or business (for example, manufacturing, assembly, sales, or service) and its expected contribution to the economy (for example, employment capacity or foreign earnings); (4) the name and address of the nonresident parent company or investor; (5) the proposed capital structure of the entity and details of the

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183. Irish Times, Mar. 27, 1984, at 1, col. 3.

184. *See* Finance Act, 1984, *supra* note 70, § 41.

185. Ireland's official external reserves as of September 1984, were £1,875 million. Central Bank of Ireland, Quarterly Bulletin, Autumn 1984, sec. 3, table A-1.

186. Irish exchange control regulations are contained in the Exchange Control Acts 1954 through 1978 and the Notices issued thereunder by the Central Bank of Ireland (CBI).

187. Exchange Control Notice No. 13, 3d issue (Dec. 1, 1979).

188. *Id.* para. 8.

type and source of financing.[189]

Once established, currency exchange control regulations require a Company to obtain the permission of the CBI before accepting loans from any nonresident, including its parent company, irrespective of the currency of such loans, and before accepting foreign denominated loans[190] from any source, including residents. The CBI will normally grant a Company permission to accept loans from nonresidents at reasonable rates of interest if the loan is for a productive purpose and is to be repaid in accordance with a fixed repayment schedule. Exchange control regulations require the prior permission of the CBI before banks in Ireland may extend credit denominated in Irish pounds to a company owned or controlled by nonresidents. The CBI will normally grant its permission if the funds are to be used for working capital purposes. Fixed asset financing, however, is usually obtained in the form of equity or loan capital from outside Ireland. These general rules also apply to United States investors.

Nonresident investors that have received CBI exchange control approval are readily granted permission to transfer dividends or profits earned from an investment out of Ireland. In order to obtain this permission, nonresident investors must submit an application to the CBI that is accompanied by (1) a certificate from auditors in Ireland confirming that there are sufficient undistributed profits from which to make the transfer; (2) the names and addresses of the shareholders to whom dividends and/or profits are to be transferred; (3) details of the number and type of shares to which the dividends are to be paid; and (4) the exchange control permission reference number for the original investment.

A report by the Central Statistics Office on Ireland's recent balance of payment figures for the period 1979 to 1983, revealed that repatriations of profits by overseas manufacturing companies have become increasingly and alarmingly large. Between 1979 and 1983, the total outflow of "trading and investment income" increased from £629.3 million to £161,744 million.[191] In response to a parlimentary question, the Central Statistics Office calculated

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189. *Id.* para. 12.

190. All currencies other than the Irish pound are regarded as foreign currencies for exchange control purposes.

191. CENTRAL STATISTICS OFFICE, REVISIONS TO THE BALANCE OF INTERNATIONAL PAYMENTS AND THE NATIONAL ACCOUNTS, pl. 2376, table 1, at 5 (Irish Stationery Office) (May 1984).

that the outflow of interest, dividends, profits, and royalties to foreign investors increased from £220 million to £660 million for that same period.[192] These outflows should increase in the years ahead. Various opinions exist as to why this repatriation outflow is so high.[193] The IDA has stressed that profits generated by foreign investments in Ireland have always been freely transferable and are not subject to any disclosure requirements in Ireland.[194] The repatriation outflow figure alone does not give an indication of the profitability of foreign investments in Ireland because a large percentage of those profits are typically used to expand the investments. Because repatriation of profits is expected in Ireland, there is little the Government can or should do to counter the outflow, other than to make Ireland a more attractive investment haven. If the income tax relief for investments contained in the Finance Act of 1984[195] prove successful, something similar to the reduced corporation tax rate for manufacturers might be introduced for other forms of investment income in Ireland. The Government White Paper on Industrial Policy states that overall repatriated profits from foreign investments are a relatively small percentage of the value added by these investors.[196] The White Paper points out that wages and salaries paid by foreign-owned firms amount to at least £800 million annually. Furthermore, a total of £1 billion worth of raw materials and services are purchased by foreign-owned firms in Ireland each year.[197]

VIII. RECENT INDUSTRIAL DEBATE

In July 1980 the Government of Ireland, through the National Economic and Social Council, asked the Telesis Consultancy Group, a consulting group based in Boston, Massachusetts, to review Ireland's industrial strategy. The object of the policy review was "to ensure that the Irish [G]overnment's industrial policy is appropriate to the creation of an internationally competitive industrial base in Ireland which will support increased employment

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192. 352 [1984] Dail Debates 3, at cols. 495-97.
193. *See* Crowley, *U.S. Investigators Peer Into the Black Hole,* The Sunday Tribune, Feb. 24, 1985, at 24, cols. 1-6.
194. *See supra* note 109 and accompanying text.
195. Finance Act, 1984, *supra* note 70, §§ 11-27.
196. White Paper, *supra* note 5, ¶ 3.13, at 19-20.
197. *Id.* at 19.

and higher living standards."[198] The Telesis Consulting Group completed its Report in the seven months between September 1980 and March 1981, a period so short that the resulting Report was very superficial and lacked original research. The Report reviewed the structure of both domestic and foreign industry in Ireland and critiqued the various industries and industry sectors. The Report examined Ireland's industrial policy in the context of its historical and current goals, the cost of industrial policy, the methods used to develop industry, and the overall impact on resource allocations. While generally endorsing the structural means used to foster and promote industrial development in Ireland, the Report recommended some minor changes in Ireland's industrial policy.

The immediate effects of the Report were extensive. Although rumors about the Report's conclusions began to circulate in 1981, both the Government and the IDA failed to make an official response to those rumors.[199] The lack of response caused undue speculation and rumors by the press and ultimately resulted in far too much importance being assigned to this weak and inconclusive Report. In addition, the Report appeared at a time of deepening recession in Ireland. In 1980 twenty-one IDA-sponsored foreign investments ceased operations in Ireland, resulting in the loss of 1300 jobs.[200] It was widely reported that there were large numbers of additional business failures, including many involving domestic companies in 1982 and 1983.[201] Furthermore, many of the business failures occurred in isolated parts of the country where there was a much greater economic impact on the local population. The resulting political reaction was far greater than that which would normally accompany business failures in urban areas.

The Report contributed to even greater skepticism in an already pessimistic scenario. As a result, the Report's minor and conservative recommendations were largely ignored, and attention was primarily focused on the three main recommendations.

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198. TELESIS REPORT, *supra* note 3, at 3.

199. Because the IDA had not commissioned the Report, it may have been unable to respond as soon as it would have wished.

200. The press began to publish accounts of these failures in early 1981. *See* Irish Times, Mar. 9, 1981, at 9, and Mar. 10, 1981, at 9.

201. A comprehensive review of 1983 can be found in Irish Times, Dec. 29, 1983, Business Review of 1983. For reviews of 1982 see Irish Times, Dec. 30, 1982, Annual Review 1982; BUSINESS AND FINANCE, Nov. 25, 1982, at 10.

The Report first recommended that capital grant levels be reduced to an average of twenty-two percent for all but exceptional projects.[202] The Report concluded that the IDA was being overly generous to foreign projects and that foreign investment could be attracted at less cost to the Irish Government.

The Report's conclusion that the IDA was being overly generous appears to have been based on inaccurate facts. Between September 1980 and March 1981, the period in which the survey was carried out, there was an artificial increase in the number of new investments in Ireland, caused in part by the replacement of the Export Sales Relief with the new manufacturing relief program. The deadline for establishing new investments to qualify for the outgoing Export Sales Relief was June 30, 1981, only three months after the Report was concluded. Had the increased investment activity been sustained, it might have been sensible to argue for a reduction in the average grant-aid percentage. Even at the time the Report was being conducted, however, there were wide regional and intraregional fluctuations of grant-aid percentages. By the time the Report appeared in 1982, new investments in Ireland had declined drastically. The economies of many EEC countries were also suffering escalating unemployment rates, resulting in increased competition from the grant-aid programs offered by other EEC countries. It was not surprising, therefore, that the IDA and the Irish Government rejected the Report's conclusion that the IDA was being overly generous to foreign investors.[203] A reduction in grant-aid levels clearly is not a recommendation that the Government of Ireland will follow in the near term. In fact, the IDA continues to provide high percentage grants to attractive foreign investors.

The Report's second recommendation was to provide additional types of grants to investors.[204] The Report recommended creating new grants to encourage sub-supply networks and other symbiotic relationships between domestic firms and foreign investments. Accordingly, the Report recommended that local sub-supply

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202. TELESIS REPORT, *supra* note 3, at 226.

203. *See* Interview with Padraig White, Managing Director of the IDA, Irish Times, Mar. 15, 1982, at 1. White Paper, *supra* note 5, ¶ 2.6(i), at 12. The TELESIS REPORT also concluded that the IDA was overly generous to foreign industry at the expense of indigenous firms. The accuracy of this conclusion depends on whether the figures for the grant-aid approved or the grant-aid actually paid are being examined.

204. TELESIS REPORT, *supra* note 3, at 236.

purchases be encouraged by increasing the availability of technological licenses and end-user grants with limited time phase-outs. The Irish Government accepted this recommendation.[205] The Report also recommended an increase in the number of prototype and field test grants available to producers and users, and in the availability of grants for overseas marketing. The Report strongly recommended increasing export marketing aid to companies, especially domestic companies, as well as expanding the size of the grants available for training skilled employees to between 150 and 200 percent of actual cost. The Government has also accepted the former recommendation.[206] The Report reasoned that these new types of grants would encourage "income statement investments" as opposed to fixed asset investments. The higher training grant levels were expected to compensate for the proposed lower grant-aid level for fixed assets. The Government, however, has not indicated a willingness to increase training grants.

The Report's last recommendation was for the industrial development agencies in Ireland to concentrate more effort on domestic trade industries.[207] Since the Report was published, the IDA has increased its efforts to encourage first time entrepreneurs and small industries in Ireland.[208]

When the Report was published in 1982, the IDA indicated that it was prepared to accept the bulk of its recommendations[209] and, as indicated above, the only recommendations that the Government has not adopted were the reduction in grant-aid levels and the increased training grants.

In an effort to combat the increasing levels of unemployment in Ireland, the IDA has developed a concept of wealth creation that is distinct from job creation. In late 1983, a strategic plan "leaked" to the public stated that the IDA was revising its previous goal of creating 10,000 net new manufacturing jobs per year to no more than 1,000 net new manufacturing jobs per year. It appears that the IDA believes the focus on automation and modernization of technology, not direct employment growth, will in-

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205. *See supra* text accompanying notes 107-08. White Paper, *supra* note 5, ¶¶ 5.15-.20, at 40-41.

206. The Irish Government is introducing new grants for exporters in addition to the wide array of grants and other financial assistance currently available. White Paper, *supra* note 5, ¶¶ 6.1-.21, at 50-56.

207. TELESIS REPORT, *supra* note 3, at 230-35, *et seq.*

208. Irish Times, Mar. 15, 1982, at 15, col. 1.

209. Irish Times, Mar. 15, 1982, at 14.

crease manufacturing output. New manufacturing jobs, while not producing net increases in the total employment in Ireland by themselves, should create additional jobs in international services and other service industries needed to support those manufacturing jobs. The wealth created by an increase in manufacturing output should create new jobs in such service industries as banking, insurance, entertainment, information, and health care.

The Government also appears to emphasize the creation of wealth in the private sector as a legitimate goal for the foreseeable future. In the White Paper on Industrial Policy, and in an unofficial early draft[210] authored by the Minister for Industry and Energy in late 1983, the Government states that wealth created in private industry would generate jobs elsewhere in the economy. It is clear that in the foreseeable future, the Irish Government will rely on private enterprise to generate wealth and employment. The White Paper merely streamlines and refocuses the Government's traditional approach to industry and foreign investment.

In April 1984, the Economic and Social Research Institute (ESRI) produced a national plan for employment which challenged the position set forth in the 1983 draft of The White Paper on wealth creation. The ESRI preferred a plan that would increase employment and investment through the public sector, and finance the resulting increased costs through public sector wage restraints. The public reaction to the ESRI plan has generally been negative in that it was seen as unrealistic.[211] The White Paper rejected the views expressed by the ESRI plan.

IX. FINANCE ACT OF 1984

The Finance Act of 1984 (the Act), introduced changes in two principal areas that affect industrial development. First, the Act enshrines section 84 lending and lease financing for grant-aided investors, but restricts these financing techniques otherwise. The Act somewhat restricts the availability of section 84 loans by limiting the meaning of "distribution" so as to exclude interest paid on a section 84 loan.[212] As a result of this exclusion, the interest charged on a section 84 loan is the same as that for a normal term

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210. Irish Times, Apr. 26, 1984, at 1, col. 1.

211. Irish Times, Apr. 10, 1984, at 17, col. 4.

212. Section 41 of the Finance Act of 1984 inserted a new section 84A into the Corporation Tax Act, 1976. Section 84A(1) changed the definition of distribution.

loan. The Act, however, exempted from this exclusion borrowing companies whose business consisted "wholly or mainly"[213] of (1) the manufacture of goods entitled to relief under chapter VI of part 1 of the Finance Act of 1980; (2) the trading operations in Shannon; (3) the provision of services where an employment grant has been made by the IDA under section 2 of the 1981 (No. 2) Act; or (4) the wholesale selling of agricultural products or fish, or the manufacture of goods, provided that the Company is seventy-five percent owned by an agricultural or fishery society.[214] Most foreign investments in Ireland fit within one of the first three exempted categories and, thus, continue to be eligible for section 84 financing.

It is interesting to note that the Second Report of the Commission on Taxation,[215] published three days after publication of the Act, recommended that section 84 lending be abolished. Because this recommendation is clearly contrary to section 41 of the Act, the Government has rejected the Commission's recommendation. In fact, the Government continues to ignore many of the substantial recommendations made by the Commission on Taxation.

The Act also provides that capital allowances on machinery acquired for leasing on or after January 25, 1984, be applied only against income earned from the leased machinery and not from any other income of the lessor.[216] It was further stated that capital allowances on machinery purchased with grant-aid from the IDA, SFADCo, or Udaras na Gaeltachta be offset against income of the lessor from any source.

Second, the Act introduced an investment relief for income taxpayers in Ireland who invest in qualifying companies.[217] Taxpayers qualifying for this relief could invest up to £25,000 per year in any number of qualified companies and deduct that amount from their taxable income. This is a new concept in Ireland, but it is based on a similar measure introduced in the United Kingdom in 1983.[218] While the major effect of this investment relief may be to

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213. Subsection 84A(5) would define "wholly or mainly" as the receipt of seventy-five percent of total revenue from one of the businesses listed in the text.

214. Finance Act, 1984, *supra* note 70, § 41 (adding § 84A(2)-(3)).

215. THE ROLE OF INCENTIVES, *supra* note 86.

216. Finance Act, 1984, *supra* note 70, § 40.

217. *Id.* §§ 11-27; *see generally* N. BALE & S. HOWLEY, *Finance Act 1984*, INST. OF TAX'N IN IRELAND, 27-54 (1984).

218. *See* Wiggin, *The U.K. Business Expansion Scheme,* TAX PLANNING

benefit domestic companies,[219] foreign investors may also be able to use this form of financing.

Taxpayer credit financing has several advantages for companies in Ireland. First, scrutiny by an individual investor or by a fund that is investing risk capital on the investors' behalf, will probably not be as conservative as the scrutiny of the typical conservative Irish financial institution. Second, a company receives long-term financing because an investor normally must hold the shares for five years. Third, because investors are usually more interested in capital growth than high dividends, there may be little current cost to the company associated with the taxpayer's investment.

Companies in which a taxpayer can invest to receive the tax credit must be resident and incorporated in Ireland and must not be quoted on a stock exchange or unlisted securities market.[220] The company also must not be controlled by another company.[221] In defining the term "control," the Act[222] refers to the Corporation Tax Act of 1976 in which "fifty-one percent subsidiary" is exhaustively defined to include all forms of direct and indirect control whether through nominees or other companies and whether existing or in the future.[223] Thus, if a foreign company plans to invest in a qualifying company, it must be willing to hold less than a controlling interest in that company for the first five years.

Despite the restrictions on control in the Act, a shareholder could carry out its own policies owning only a minority of a company's shares. While a foreign investor would be restricted to fifty percent ownership of a qualified company, individual investors would be prohibited from holding more than thirty percent of the

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INT'L REV., Feb. 1984, at 3.

219. Experience to date is that only a handful of Irish-owned companies are utilizing this scheme. Examples are the Matrix Group (computer company) and the current offering by Strongbow Film and Television Productions. Because of the complexity of the provisions, few companies have taken advantage of this relief.

220. Finance Act, 1984, *supra* note 70, § 15(2).

221. *Id.* § 15. Section 15(7) provides that the qualifying company must not be "under the control of another company . . . and no arrangements must be in existence at any time . . . [during the five years] by which the company could fall within [such control]."

222. *Id.* § 11(10).

223. Corporation Tax Act, 1976, *supra* note 70, §§ 102(2)-(6), 156.

shares and loan capital of, or the voting power in, the qualified company.[224] Accordingly, to be eligible for the tax credit, a minority foreign investor would be required to deal with at least two investors or a designated investment fund operating on their behalf. The investors or investment fund would probably be more concerned with capital growth than with the management, technology, know-how, or markets of the foreign investor. The long-term nature of either the investment fund or domestic investors also places the foreign investor in a strong position.

A qualifying company must carry on one or more qualifying businesses "wholly or mainly in the State" or wholly own a subsidiary that does so.[225] The absence of a definition for "wholly or mainly in the State" may present a problem for a company that exports all its products out of Ireland. As long as a majority of its assets and asset turnover are located in Ireland, the export company should qualify, but neither legislators nor the Revenue Commissioners have yet made an official interpretation. The Act defines a qualifying trade as (1) the manufacture of goods within the meaning of chapter VI of part 1 of the Finance Act of 1980, or (2) the provision of services which have been grant-aided by the IDA under section 2 of the 1981 (No. 2) Act.[226] If a company is engaged in both qualifying and nonqualifying trades, the company will qualify if at least seventy-five percent of its trade receipts originate from the qualifying trading companies.[227] Before taxpayers receive the relief, the qualifying company must satisfy the Revenue Commissioners that the investment funds will only be used for the "creation or maintenance of employment in the company" through (1) undertaking or enlarging qualifying operations; (2) engaging in research and development, acquisition of technological information, or the development or provision of new or existing products or services; (3) identifying and developing new or existing markets for the company's products or services; or (4) enabling the company to increase either its sales of products or provision of services.[228] An investor will qualify for the relief as long as new ordinary shares are purchased on his own account or through an investment fund designated by the Revenue Commis-

224. Finance Act, 1984, *supra* note 70, § 14(4)-(5).
225. *Id.* § 15(2).
226. *Id.* § 16.
227. *Id.* § 16(2).
228. *Id.* § 12(1).

sioners.[229] The investor must neither be "connected" with the company[230] nor receive dividends from the company for a period of five years if the company carries Export Sales Relief or Shannon relief.[231] If the investor disposes of qualifying shares within five years of purchase, the relief will be "clawed back" by the amount of consideration or value received from the disposition of such shares.[232]

The capital gains rate in Ireland is currently forty percent for assets disposed of more than three years after acquisition.[233] The capital gains tax position of an individual investor will not be affected by any investment relief. For capital gains tax purposes, the purchase cost of investment shares would not be reduced by the investment relief.[234] Capital losses are not available to investors for capital gains tax purposes.

The effect of the new investment relief is currently unclear, although it is likely to have an impact on the Government's revenue. While no estimate as to the tax expenditure effect of this relief is available, the high rate of personal income tax in Ireland makes it very likely that this relief will produce a large amount of financing for both large and small investors. Financial institutions will probably establish designated investment funds to give smaller investors access to the qualifying company relief and, thus, spread the investment risk.

Because the investment does not have to be in new companies, a certain amount of risk may be avoided by investing in existing companies. How much financing will be attracted to new companies is unclear, but funds will likely be attracted to both established and new companies. Another uncertainty is the method by which investors will dispose of their investments in new ordinary shares. It is not possible to issue qualifying redeemable preference shares. Because the Companies Act of 1963 prohibits a company from purchasing its own ordinary shares without the consent of the courts,[235] only two likely options exist for an investor to dispose of its shares. After the five-year holding period has elapsed,

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229. *Id.* §§ 12(2), 27.
230. *Id.* § 14.
231. *Id.* § 14(1)(a).
232. *Id.* §§ 17-18.
233. *Id.* § 30.
234. *Id.* § 25.
235. Companies Act, 1963, *supra* note 116, § 72.

a stock exchange listing or a quotation on the unlisted securities market might be obtained. The shares could also be sold to a third party or another investor. In the latter scenario, a minority foreign investor could purchase a fellow investor's shares at the conclusion of the five-year holding period. Indeed, there seems to be no reason why put and call options, exercisable after the five year holding period, could not be attached to the original shares.

The new investment relief should provide foreign investors with attractive sources of financing. Joint venture investors may also benefit. Foreign investors who wish to retain control of a qualifying company may accept two or more individual investors who have a maximum of thirty percent ownership each, or a fund whose principal interest would be capital appreciation and not acquisition of technology or market-sharing. These foreign investors could also attach call options on the individual investor's shares that would be exercisable by the foreign investor only after the five-year holding period.

X. Future Trends

In particular, the IDA will probably assess future projects in terms of an investment's content rather than the actual number of jobs created. Investments with key business functions such as research and development, marketing, and regional administrative functions will be sought by the IDA. Large projects will be more carefully scrutinized unless their products and/or prospects are exceptional. The present trend of generous capital grants will continue for the foreseeable future, especially for attractive investments. The Government will continue to place an increasing emphasis on the formation of joint ventures with, and the grant of technological licenses to, Irish-owned industries. The IDA will place emphasis on the international services program and its expansion, with the possible imposition of performance criteria such as the level of sales or the number of jobs created. Performance criteria may be imposed on certain other forms of investment such as research and development. New investment vehicles that offer a tax-free return may be introduced to retain some of the foreign capital generated in Ireland that is currently being repatriated.

Any changes in foreign investment regulation will probably occur in incremental stages. The experience of recent years has not produced any radical or innovative rethinking of foreign investment policies. It is unlikely that any significant revisions will oc-

cur in the immediate future. The Irish Government will continue to encourage and profit from United States investment in a public environment of private enterprise suitable for a small, open economy.