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### **Abstract**

The establishment of the Foreign Investment Review Agency can be explained on the basis that such a "screening instrument" was the most efficient instrument to deal with the problem of foreign direct investment in Canada. However, Jacques Pauwels argues that FIRA was created not for the efficient regulation of foreign direct investment but for political purposes; that is, FIRA provided the Trudeau government with considerable vote-maximizing possibilities. Moreover, Pauwels suggests that Mulroney's introduction of the Investment Canada Act, replacing FIRA with Investment Canada, can similarly be explained.

# FIRA: INSTRUMENT OF REGULATION OR VOTE-MAXIMIZATION?

JACQUES R. PAUWELS\*

*The establishment of the Foreign Investment Review Agency can be explained on the basis that such a "screening instrument" was the most efficient instrument to deal with the problem of foreign direct investment in Canada. However, Jacques Pauwels argues that FIRA was created not for the efficient regulation of foreign direct investment but for political purposes; that is, FIRA provided the Trudeau government with considerable vote-maximizing possibilities. Moreover, Pauwels suggests that Mulroney's introduction of the Investment Canada Act, replacing FIRA with Investment Canada, can similarly be explained.*

## I. INTRODUCTION

The decision to regulate the flow of foreign direct investment (FDI) by means of the Foreign Investment Review Agency (FIRA) undoubtedly ranks among the more controversial policies initiated by the federal government since Pierre Elliott Trudeau became Prime Minister in 1968. On the one hand, proponents of laissez-faire ideas and continentalism opposed any form of FDI regulation from the start; and they continued to condemn FIRA as an obstacle to the free flow of international capital, which impeded Canada's economic growth. Economic nationalists, on the other hand, originally welcomed the decision to regulate FDI by means of a "screening agency", but FIRA was to disappoint their expectations and some nationalists eventually dismissed the Agency as a useless regulatory "paper tiger". The establishment of FIRA by the Trudeau Cabinet appears to have been a particularly unpopular decision. Why, then, was the decision made to regulate FDI in such a manner?

In trying to answer such questions, students of public policy primarily use two "models" (or "paradigms") of decision-making in government. The first is the "technical efficiency" or "comprehensive rationality" model, which postulates that governmental decision-makers select what they believe (not necessarily correctly) to be the most efficient "instrument" available to solve a policy problem (as they define it) and, thus, to serve the "public interest". Consequently, when a pol-

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icy instrument fails to achieve its objectives, it is either because imperfect information caused the government unwittingly to select an inefficient instrument or because a potentially efficient policy decision was not properly implemented.<sup>1</sup>

The case of FIRA appears to fit the "technical efficiency" paradigm of public policy making. It could be argued that the Liberal politicians perceived foreign ownership as a serious policy problem, that they genuinely believed that "Canadianization" was in the public interest, and that, having explored all other policy options, they decided that a screening agency was the most technically efficient instrument for regulating FDI and, thus, reducing foreign ownership. This scenario accounts for the unpopularity of FIRA as follows: the continentalists were dismayed and embittered by the government's commitment to what was clearly a policy of economic nationalism; the nationalists initially welcomed FIRA as a worthwhile "Canadianization" initiative and had high expectations for it, but were sadly disappointed when the Agency revealed itself to be a regulatory cipher instead of an efficient tool for the regulation of FDI. Viewed from this "technical efficiency" perspective, then, the *unsuccessful* pursuit of an *efficient* way to regulate FDI explains FIRA's popularity and credibility problems.

The second and competing paradigm of public policy making is the "Public Choice" approach, which holds that the selection of a governing instrument is determined not by considerations of efficiency but by "political rationality". Politicians are said to be "rational" in the sense that they are motivated by self-interest and, more specifically, by the desire to be re-elected.<sup>2</sup> The "Public Choice" model can undoubtedly be used to explain many cases of tax expenditure, regulation and other forms of public policy. However, the creation of FIRA, a policy decision which served to alienate, or so it seems, both the continentalists and the nationalists within the Canadian electorate, appears to be a case of federal regulation which defies analysis by means of this theory. FIRA seems to have been such a hopelessly dysfunctional instrument for the politicians' "rational" purpose of re-election that the "vote-maximizing calculus" of those same politicians cannot possibly be invoked to explain the Agency's origins.

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<sup>1</sup> For a summary of the "technical efficiency" model, see Doern & Phidd, *Canadian Public Policy: Ideas, Structure, Process* (1983) at 139-41; and Adie & Thomas, *Canadian Public Administration: Problematical Perspectives* (1982) at 96-97.

<sup>2</sup> The Public Choice model is summarized in Aucoin, "Public Policy Theory and Analysis" in Doern & Aucoin, eds., *Public Policy in Canada: Organization, Process and Management* (1979) at 7-9; and Doern & Phidd, *ibid.* at 143-45. For a more elaborate introduction to Public Choice theory, see Trebilcock *et al.*, *The Choice of Governing Instrument* (1982).

Yet, to analyze FIRA from a Public Choice perspective is the purpose of this essay. It will be argued that, contrary to what the seemingly plausible "technical efficiency" view suggests, the Trudeau Cabinet of the early 1970s had no desire to regulate FDI, a purpose for which much more efficient instruments were available; that FIRA was created as a symbol which was expected to mesmerize the nationalist masses and, therefore, to help harvest the nationalist vote at the next electoral opportunity; that the Agency was designed not to control FDI, but to enable the government to reap the political rewards of catering to interest groups, either by regulating or by not regulating, whichever happened to be more politically useful; that, in spite of appearances to the contrary, FIRA served this politically rational purpose admirably well until the end of Trudeau's career; and finally, that Brian Mulroney was too impressed with FIRA's "vote-maximizing" potential to bring himself to dissolving the Agency altogether — as many expected this avowed continentalist to do — but restricted himself merely to transforming it into "Investment Canada".

## II. WHY REGULATION OF FOREIGN DIRECT INVESTMENT?

### A. *FDI Regulation: For and Against*

It is tempting to interpret the establishment of FIRA on December 12, 1973, as a symptom of some hypothetical concern on the part of the Trudeau Cabinet about the extent of foreign ownership in this country and a corresponding desire to regulate FDI.<sup>3</sup> In reality, however, Trudeau and his colleagues were not motivated by such considerations. Trudeau was never a genuine nationalist,<sup>4</sup> and the Liberal Party was traditionally the home of free trade in general and continentalism in particular.<sup>5</sup> Moreover, most of those economists who were considered experts in the field of FDI<sup>6</sup> discounted the alleged dangers of foreign ownership; they warned instead of the risks associated with policies which interfered with the free flow of FDI to which Canadians were

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<sup>3</sup> In contrast to FDI, so-called portfolio investment from abroad is not held to entail foreign control; it has therefore been left untouched by regulatory efforts such as the creation of FIRA, which aimed at reducing the degree of foreign control over the Canadian economy.

<sup>4</sup> See, e.g., Gwyn, *The Northern Magus: Pierre Trudeau and Canadians* (1980) at 263; also Resnick, *The Land of Cain: Class and Nationalism in English Canada 1945-1975* (1977) at 147, who describes Trudeau as "no great admirer of nationalism".

<sup>5</sup> Meisel, "The Party System and the 1974 Election", in Penniman, ed., *Canada at the Polls: The General Election of 1974* (1975) 15-16; Laxer, *Canada's Economic Strategy* (1981) at 12.

<sup>6</sup> Notably A. E. Safarian, Harry Johnson and Albert Breton.

said to owe at least in part their high standard of living.<sup>7</sup> Ottawa was also aware that much displeasure would be aroused south of the border should Canada ever institute policies which might be perceived as a threat to existing or future American investment opportunities in this country. Finally, powerful Canadian interest groups, particularly in the business community, opposed all government interference with the free flow of international capital. Among these interest groups were the "finance sector", which was said to "profit handsomely by the expansion of American capital in Canada," and the "industrial bourgeoisie", especially Canadian managers of multinational enterprises and Canadian capitalists "whose enterprise depends on foreign-owned . . . operations in Canada for the greater part of [their] market."<sup>8</sup>

For all these reasons, then, the Trudeau Cabinet of the late 1960s and early 1970s was not eager to do anything at all about foreign ownership and investment; its preferred policy option with regard to FDI was inaction. Inaction, or at most a casual ad hoc approach, which had characterized the attitude of the Liberal government with respect to FDI under Lester B. Pearson, simply continued to do so under Trudeau. Looking back on the pre-FIRA years of Liberal rule, an observer was, thus, able to write that "few countries in the world have done so little about the level of foreign investment within their borders as Canada . . . [and] the emergence of a comprehensive government policy on foreign investment has been conspicuous by its absence."<sup>9</sup>

By the end of 1973, however, a "comprehensive government policy" with regard to FDI — the Foreign Investment Review Act — was in place. What were the reasons for this sudden break with the Liberal governments' tradition of inaction and "ad hocery" in the field of for-

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<sup>7</sup> See, e.g., Safarian, *Foreign Ownership of Canadian Industry* (1966) and *The Performance of Foreign-Owned Firms in Canada* (1969). Johnson's views on FDI are described in Watkins, "The Economics of Nationalism and the Nationality of Economics: A Critique of Neoclassical Theorizing" (1978) 11 C.J.E. S91. It is true that nationalist economists competed with Safarian *et al.* to influence the policy makers, but the views of the pro-FDI experts appear to have carried more weight in Ottawa; Trudeau himself was greatly impressed with Breton's unfavourable opinion of nationalist policies, according to Clarkson, "Anti-Nationalism in Canada: The Ideology of Mainstream Economics" (1977) C.R.S.N. at 61-62.

<sup>8</sup> Layton, "Nationalism and the Canadian Bourgeoisie: Contradictions of Dependence" in Grayson, ed., *Class, State, Ideology, and Change: Marxist Perspectives on Canada* (1980) at 223.

<sup>9</sup> McMillan, "After the Gray Report: The Tortuous Evolution of Foreign Investment Policy" (1974) 20 McGill L.J. at 213-14, 258. See also Stewart, *Divide and Conquer: Canadian Politics at Work* (1973), describing the record of FDI controls of Trudeau's early years in power as "a wasteland". The totally inadequate manner in which the government still recorded foreign takeovers as late as 1970, for example, was described as follows: "A black loose-leaf book full of newspaper clippings is a heck of a way to keep track of takeovers in the world's 'most taken-over country'." Dewey, "104 Canadian Companies taken over by U.S. in '70" in Innis, ed., *Issues for the Seventies: Americanization* (1972) 70.

eign investment policy? Why did Trudeau take responsibility for a policy which ran counter to his own better judgment and to the advice of authoritative economists and, moreover, which seemed certain to alienate powerful Canadian business interests as well as American investors and their government? The answer can be found by assembling the pieces of the puzzle of Trudeau's "vote-maximizing calculus" of the time. His decision to regulate FDI made sense (that is, it was "rational") from the viewpoint of a politician who, as Public Choice theorists insist, is motivated first and foremost by electoral considerations and the desire to win re-election.

In the late 1960s and early 1970s, a comet of nationalism, particularly economic nationalism, that featured a tail of ardent anti-Americanism, streaked through the firmament of Canadian politics.<sup>10</sup> With the precision of a thermometer, Gallup Polls recorded the rapid rise of this nationalistic fever. More specifically, they revealed that the Canadian public was becoming increasingly concerned about the issue of FDI:

[Between 1964 and 1972] the number of Canadians stating that there is enough U.S. capital invested in Canada had increased from 46 percent to 67 percent; while in the same period the number of those wanting more U.S. capital had fallen from 33 percent to 22 percent.<sup>11</sup>

The obvious anti-American bias of this eruption of economic xenophobia (as some perceived it) is said to have been caused by non-economic, "emotional" factors such as opposition to the U.S. role in the Vietnam War,<sup>12</sup> and President Richard Nixon's introduction of a ten percent import surcharge which reportedly signalled the end of a thirty year "special relationship" between the two countries.<sup>13</sup>

In any event, the precise causes of the explosion of Canadian nationalism in the late 1960s and early 1970s are less important in the context of this study than the fact that Trudeau realized only too well, as students of his career point out, "that Canadians [had] become a lot more nationalist economically than they were before."<sup>14</sup> Not only were the Gallup Polls teaching him this lesson, but the message of economic

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<sup>10</sup> See e.g., Resnick, *supra* note 4 at 145; Beigie & Hero, eds., *Natural Resources in U.S.-Canadian Relations*, vol. 2 (1980) 606; Dunn, "Canada and its Economic Discontents" (1973) 52 *For. Aff.* 1 at 124.

<sup>11</sup> Rugman, *Multinationals in Canada: Theory, Performance, and Economic Impact* (1980) at 127; see also Munton & Poel, "Electoral Accountability and Canadian Foreign Policy: the Case of Foreign Investment" (1977-78) 33 *Int'l J.* 1 at 222ff.

<sup>12</sup> Perry, "Canadians Waking up to Reality over Foreign Control", *The Financial Post* (8 Mar. 1980); Dunn, *supra* note 10 at 124.

<sup>13</sup> Resnick, *supra* note 4 at 147; Layton, *supra* note 8 at 229.

<sup>14</sup> Resnick, *ibid.* at 147; also Gwyn, *supra* note 4 at 263.

nationalism also resounded loud and clear on Parliament Hill as numerous politicians, the media and some influential interest groups embraced the cause of FDI regulation.

First, among the politicians, articulate nationalists could be found within the Liberal Party itself. Limited initially to a handful of mavericks — such as Walter Gordon, who preached the gospel of economic nationalism to a party traditionally committed to a continentalist version of free trade — the nationalists gradually conquered the Liberal Party and ultimately captured it for their cause. One analyst thus writes that during the early 1970s, the Liberal Party “was being led into the unfamiliar territory of economic nationalism.”<sup>16</sup> Furthermore, economic xenophobia had not only conquered the hearts of the Liberals (or at least of increasing numbers of them), it was even more firmly entrenched in the New Democratic Party, where the “Waffle Group” functioned as the left wing shocktroop of nationalism.<sup>16</sup> Lastly, within the framework of Confederation (as compared to that of party politics), economic nationalism appealed particularly to Ontario politicians. That province had long been saturated with foreign capital and was in economically buoyant times, so many of its politicians believed that it could afford the luxury of “Canadianization”.<sup>17</sup>

Second, the media and especially magazines like *MacLean's* which suffered from the competition of *Time* and other American publications, likewise embraced the cause of economic nationalism.<sup>18</sup> Since the media reflect and shape public opinion and are in a position to make or break a politician's career,<sup>19</sup> it is clear that the Trudeau Cabinet must have realized that it could not ignore their nationalist message with political impunity.

Last, a number of private interest groups added their voices to the chorus of economic nationalism. Among these “vested self-interests”, which found it opportune to “cloak [themselves] in articulate national-

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<sup>16</sup> Laxer, *supra* note 5 at 12; Schultz, Swedlove & Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act* (1980) at 12.

<sup>18</sup> Surich, “Purists and Pragmatists: Canadian Democratic Socialism at the Crossroads” in Penniman, *Canada at the Polls: The General Election of 1974* (1975) at 125-31. The “Waffle Manifesto” of October 1969 is reprinted in Fox, ed., *Politics Canada: Culture and Progress*, 3rd ed. (1970) at 242-45.

<sup>17</sup> See e.g., Calvet & Crener, “Foreign Business Control: the Canadian Experience 1973-1977” (1979) 22 C.P.P. 3 at 435; also Butler & Carrier, eds., *The Trudeau Decade* (1979) at 204-205.

<sup>18</sup> Audley, *Canada's Cultural Industries: Broadcasting, Publishing, Records and Film* (1983) at 60.

<sup>19</sup> Trebilcock *et al.*, *supra* note 2 at 15.



ism,"<sup>20</sup> were "indigenous Canadian capitalists [who] . . . serve a market in competition with American [or other foreign] branch plants or imports."<sup>21</sup> This especially included Canadian publishers, who did not benefit from the lower "unit costs for publication" enjoyed by their U.S. counterparts due to access to a gigantic domestic market.<sup>22</sup> Moreover, the politicians could hardly afford to disregard the interests of the perhaps not very numerous but certainly very influential nationalist publishers and of the many authors who tended to share the publishers' views. Nationalist agitation on the part of politicians, media personalities and publishers eventually spawned a formal lobby with the foundation in 1970 of the "Committee for an Independent Canada"(CIC), which attracted such nationalist luminaries as Walter Gordon and Peter Newman.<sup>23</sup>

With economic nationalism sweeping the land, the Trudeau Cabinet must have wondered whether it could afford the political costs of its favourite policy option with regard to FDI, namely inertia. For the leaders of the nation to be perceived as unconcerned about foreign ownership obviously became more and more risky as an increasingly large proportion of the Canadian electorate became sensitive to this issue and demanded controls on FDI. Political considerations in general, and electoral calculations in particular, thus made it progressively more difficult, and eventually virtually impossible, for Trudeau to ignore this demand.

### B. *The Decision to Regulate Foreign Direct Investment*

To avoid being politically obliterated by the explosion of nationalism, Trudeau had to do *something*. However, he had no desire to capitulate unconditionally to nationalist demands. Unconvinced, as he had always been, of the economic wisdom of nationalist policies, but finally awakened to their political indispensability, Trudeau merely sought to pacify the nationalists with what the American political scientist Murray Edelman has called "forms of symbolic reassurance".<sup>24</sup>

In *The Choice of Governing Instrument*, Trebilcock, Hartle, Prichard and Dewees point out that politicians often try to satisfy certain public demands symbolically by ordering an inquiry into the issues

<sup>20</sup> Reuber, *Canada's Political Economy: Current Issues* (1980) at 221.

<sup>21</sup> Layton, *supra* note 8 at 223, 227. See Martin, "An Act of Lunacy: Book Publishing in Canada" in Innis, ed., *Issues for the Seventies: Americanization* (1972) at 55ff.

<sup>22</sup> Migué, *Nationalistic Policies in Canada: An Economic Approach* (1979) at 10-11.

<sup>23</sup> Layton, *supra* note 8 at 229.

<sup>24</sup> Edelman, *The Symbolic Uses of Politics* (1964) at 153.

which inspired these demands, and they suggest that the efficiency of this course of action may be enhanced by "the appointment of high-profile individuals to head [such an] inquiry."<sup>25</sup> Thus, faced with the increasing concern of the Canadian public with regard to the problem of foreign ownership, the Trudeau Cabinet in 1969 ordered a study of that problem and appointed a "high-profile" nationalist, Herb Gray, to head the inquiry.<sup>26</sup>

The problem of foreign ownership had been studied before and studied rather thoroughly.<sup>27</sup> The inquiry which was to produce the Gray Report, however, may be said to have served a different purpose, namely to placate a Canadian public in a nationalist mood. Consequently, and not without some reason, it has been described as a "smokescreen" and a "diversion".<sup>28</sup> To use sociological language, studying the effects of FDI may have been the "manifest" function of the Gray inquiry, but pacifying a Canadian public in a nationalist mood was its "latent" or real function. However, from this viewpoint the Gray Report was hardly a success. The report was leaked to the nationalist press in December 1971 with the consequence that it had to be published shortly thereafter, much too early for the taste of the Cabinet. In political life, "the actual conclusion of an inquiry increases the pressures on politicians to implement the policy advocated by the inquiry."<sup>29</sup> The premature publication of the Gray Report, thus, defeated the Cabinet's real purpose in ordering the inquiry, namely to rid itself of the pressure to do anything at all for as long as possible (and hopefully until the day nationalism would cease to appeal to so many Canadians). Instead, publication increased the country's nationalist fever and emboldened those who demanded firm government action in place of the traditional Liberal "policies of hopeful sleep-walking."<sup>30</sup> The press, in particular, whipped up nationalist sentiment in the wake of the publication of the Gray Report and mercilessly castigated the Trudeau Cabinet's stand on foreign ownership as "feeble and half-baked", as a "timid effort", and so forth.<sup>31</sup>

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<sup>25</sup> Trebilcock *et al.*, *supra* note 2 at 47-49.

<sup>26</sup> *A Citizen's Guide to the Gray Report* (1971) at 6. The Gray Inquiry produced a report entitled *Foreign Direct Investment in Canada* (1972), commonly known as the "Gray Report".

<sup>27</sup> *E.g.*, in Can., *Foreign Ownership and the Structure of Canadian Industry* (the Watkins Report) (1968).

<sup>28</sup> Layton, *supra* note 8 at 228.

<sup>29</sup> Trebilcock *et al.*, *supra* note 2 at 48.

<sup>30</sup> McMillan, *supra* note 9 at 216; Layton, *supra* note 8 at 229; Munton & Poel, *supra* note 11 at 230; "sleepwalking" quote from *The Canadian Forum* (Dec. 1971) as reprinted in *A Citizen's Guide*, *supra* note 26 at 9.

<sup>31</sup> Quotes from *The Ottawa Citizen* (19 Oct. 1972) and *La Presse* (27 Oct. 1972), respec-

The event which finally forced Trudeau's hand was the election of October 30, 1972, which resulted in a Liberal minority government whose survival depended on the goodwill of the NDP, a bastion of economic nationalism. Shortly thereafter, Trudeau announced that he intended to present "foreign takeover legislation" formulated in such a way as to "gain majority [that is, NDP as well as Liberal] support in the House."<sup>32</sup> Consequently, the "Foreign Investment Review Bill,"<sup>33</sup> has been described as a "commitment" made by Trudeau to the NDP "in return for the latter's necessary support in a minority Parliament"<sup>34</sup> and as "a compromise measure forced upon the minority Liberal government of 1972-74 by its temporary Socialist partner."<sup>35</sup>

However, the desire for NDP support cannot fully explain FIRA. A shrewd politician like Trudeau would not have made the fateful (and not easily reversible) move of changing the course of his Liberal government's and Party's ship into the unfamiliar direction of economic nationalism for the sake of a temporary partnership alone. Moreover, he could not possibly have expected or wished to prolong the life of his minority government indefinitely. Rather, the election results most likely convinced him that nationalism was here to stay and that it was politically safe, if not imperative, for the Liberal leadership to embrace it.<sup>36</sup> Trudeau was probably already planning the next election and calculating that a commitment to economic nationalism would facilitate future electoral success.

A crucial factor in this "vote-maximizing calculus" was the Liberals' crushing defeat in Ontario, the heartland of economic nationalism,<sup>37</sup> which would have to be reconquered by the Liberals if they were again to form a majority government.<sup>38</sup> Ontarians were clearly the all-important marginal voters of whom Public Choice theory holds that their electoral favours may be harvested by those politicians who are able, first of all, to identify the "policy issues to which they attach the

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tively, cited in Butler & Carrier, *supra* note 18 at 236, 239. See also articles from *The Toronto Star*, *The Edmonton Journal*, etc., quoted in House of Commons debate (29 May 1972).

<sup>32</sup> "Trudeau announces he will stay on as PM", *The Globe & Mail* (3 Nov. 1972); also Munton & Poel, *supra* note 11 at 231.

<sup>33</sup> The Bill was introduced in the House of Commons a few months later (24 Jan. 1973) and enacted on 12 Dec. 1973.

<sup>34</sup> Cody, "Canada in 1990: What Kind of Federation?" in Armstrong, Armstrong & Wilcox, eds., *Canada and the United States: Dependence and Divergence* (1982) at 38.

<sup>35</sup> Rugman, *supra* note 11 at 129.

<sup>36</sup> It is probably no coincidence that it was shortly after the 1972 election that the Liberal Party adopted a red maple leaf (encased in a large "L") as its official emblem.

<sup>37</sup> See, e.g., the election results for that province in *The Globe & Mail* (31 Oct. 1972).

<sup>38</sup> Trebilcock *et al.*, *supra* note 2 at 28.

most importance" and, secondly, to produce "an election platform that is most likely to attract their support." With economic nationalism in general and FDI regulation in particular, then, Trudeau believed he could win the favours of the marginal voters of Ontario.

### III. WHY FIRA?

#### A. *Why a "Screening Mechanism"?*

Many policy instruments are available to regulate foreign direct investment. First, tax policy, and more specifically the introduction of a "foreign takeover tax", is regarded by many economists as the most efficient method to restrict the flow of international capital across its borders.<sup>39</sup> In the late 1960s and early 1970s, taxation was the instrument for the regulation of FDI which was most feared by free traders and most enthusiastically endorsed by economic nationalists.<sup>40</sup> Second, the "key sector" approach is similarly highly touted by experts. It had been used successfully by previous Canadian governments to prevent foreign control in such fields as banking, utilities, transportation and communications (the "commanding heights" of our economy).<sup>41</sup> Third, a "fixed rules" concept is allegedly also a potent regulatory response to the challenge of foreign control. A version promoted by Walter Gordon in the early 1970s called on the government to "announce clearly . . . that within a stated period of years . . . all large Canadian companies must become 51 percent owned by Canadians."<sup>42</sup> An even more drastic solution to the problem of foreign control is nationalization as effected by the governments of Québec and Saskatchewan in the asbestos and potash industries.<sup>43</sup>

Yet, despite the availability of these efficient policy options for dealing with FDI, the Trudeau Cabinet managed *not* to select any of them. Instead, a "screening mechanism" was adopted, a policy instru-

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<sup>39</sup> Rugman, *supra* note 11 at 3.

<sup>40</sup> Hufbauer & Samet, "Investment Relations between Canada and the United States" in Armstrong, Armstrong & Wilcox, *supra* note 34 at 117; Layton, *supra* note 8 at 225-27.

<sup>41</sup> Rugman, *supra* note 11 at 124-25; Reuber, *supra* note 20 at 225.

<sup>42</sup> Hayden & Burns, *The Regulation of Foreign Investment in Canada* (1976) at 6-9; Gordon, "A Choice for Canada" in Rotstein & Lax, eds., *Independence: The Canadian Challenge* (1972) at 74.

The Wahn Report of 1970 had even gone further by recommending the same "fixed rule" concept for all companies operating in Canada. See Clarkson, *Canada and the Reagan Challenge: Crisis in the Canadian-American Relationship* (1982) at 85; and Schultz, Swedlove & Swinton, *supra* note 15 at 11-12.

<sup>43</sup> Hufbauer & Samet, *supra* note 40 at 115. Reference is made to the essays on the nationalization of the Saskatchewan potash and Quebec asbestos industries, in Tupper & Doern, eds., *Public Corporations and Public Policy in Canada* (1981).

ment which ranks low on the experts' scale of regulatory potency.<sup>44</sup> Although the efficiency of such a mechanism will depend on how "screening" is interpreted and implemented by those who run (or control) it, "screening" as performed by FIRA was to be tantamount to rubber stamping, as a quick glance at its record of approvals indicates.<sup>45</sup> Moreover, unlike the policy instruments cited earlier (which can deal with both new and existing FDI), "screening" affects only *new* FDI. Therefore, even under the best of circumstances, Trudeau's "screening mechanism" could not have been expected to perform great regulatory deeds in the service of the "Canadianization" of the economy.<sup>46</sup>

The reason an efficient instrument for the regulation of FDI was not chosen is quite simply that efficient regulation — the kind of regulation which could be expected to reduce foreign investment levels — was unwanted. Revealing in this respect was Minister of Industry, Trade and Commerce, Alastair Gillespie's slip of the tongue during a parliamentary debate on March 30, 1973. The disadvantage of efficient instruments such as "mandatory Canadian ownership . . . across the board", he declared in a moment of disarming (but undoubtedly unintentional) frankness, was that "it could discourage needed foreign investment,"<sup>47</sup> or, in other words, that it might actually work! The Cabinet clearly continued to believe in the economic indispensability of FDI. Even as it was formulating policies which it wanted the nationalist public to support, it was determined to allow international investment capital to remain in and continue to enter the country. Paradoxically, a complex regulatory scheme thus served to prevent genuine, effective regulation because the government did not believe in the *economic* but only in the *political* need for FDI regulation (that is, in its usefulness for electoral purposes).

In the case of FIRA, regulatory efficiency was unwanted for many

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<sup>44</sup> See, e.g., Rugman, *supra* note 11 at 3.

<sup>45</sup> See *infra*, Appendix, "Proposals allowed by FIRA". FIRA itself made no secret of the fact that approximately 90% of all proposals received approval: "By March 31, 1982, the Government of Canada had rendered a decision on 4,013 investment proposals of which approximately 90% were judged to be of significant benefit to Canada and were, therefore, allowed" ("How FIRA Works" (1982) 6 For. Inv. Rev. 1).

In the case of new business ventures, for example, the percentage of approved cases was consistently in the high eighties; these (and other) statistics are given in Foreign Investment Review.

<sup>46</sup> As Mel Watkins cynically observed, FIRA "leaves untouched the existing activities of [foreign-owned] corporations when most of our industry just happens to be foreign owned." Watkins, "Contradictions and Alternatives in Canada's Future" in Laxer, ed., (*Canada Ltd: The Political Economy of Dependency* (1973) at 261.

<sup>47</sup> House of Commons Debates (30 March 1973).

reasons: Trudeau's personal conviction; Liberal Party traditions and laissez-faire ideology; and the advice of authoritative economists. As well, it was certain to provoke the wrath of American and other foreign investors. Since the majority of existing as well as new foreign capital in our country was (and is) of America origin, any *real* restriction of FDI in Canada was likely to antagonize the United States. The spectre of American economic reprisals thus reinforced what was already an instinctive determination on the part of the Trudeau Cabinet not to regulate FDI efficiently.<sup>48</sup>

Lastly, the threat of retaliation from Canada's own continentalist business and finance elite loomed just as formidably. Approximately ten years before FIRA was established, this powerful interest group had reacted in a most uncharitable manner when former Finance Minister Walter Gordon had called for the introduction of a thirty percent foreign takeover tax, which would have been a genuinely efficient restriction on FDI.

The reaction of the financial elite of the country was immediate and hard-hitting. . . . The coercive power of threats by leaders of the financial community . . . , when brought to bear on those politicians . . . was sufficient to produce a rapid retreat by the cabinet, and the offensive measures were withdrawn. . . .<sup>49</sup>

The lessons of this showdown (and of the subsequent forced resignation of Gordon) were unlikely to have been lost on Trudeau, who must have been determined not to suffer a similar humiliating setback for the sake of a regulatory measure in which he personally (in contrast to the nationalist Gordon) did not even believe.

Thus, because regulatory efficiency was unwanted for many compelling reasons, an efficient instrument was not chosen. Instead, the Trudeau Cabinet created FIRA, a move which has been condemned as "ineffective and misconceived"<sup>50</sup> and which has correctly been judged to be "unlikely to rouse the [American] eagle from its [Canadian investment] roost."<sup>51</sup> Since these commentators wrongly assumed that the decision to regulate FDI meant that the government intended to pursue regulatory *efficiency*, they were exasperated and bewildered by what they perceived to be the illogical choice of an *inefficient* instrument.<sup>52</sup> However, the choice is perfectly logical from the standpoint of

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<sup>48</sup> See, e.g., Globerman, *U.S. Ownership of Firms in Canada: Issues and Policy Approaches* (1979) at 89.

<sup>49</sup> Layton, *supra* note 8 at 225; also McMillan, *supra* note 9 at 237.

<sup>50</sup> Rugman, *supra* note 11 at 3.

<sup>51</sup> Clarkson, *supra* note 42 at 85.

<sup>52</sup> In all fairness, however, it must be said that later on in his book Rugman does come to the conclusion that the choice of regulatory instrument reflected a political decision. See *supra* note

governing politicians, who are motivated first and foremost by calculations of a political nature. In this respect, and only in this respect, was the choice of a "screening mechanism" not only perfectly logical but also very effective. In other words, the selection of a regulatory instrument, which as its critics claimed and its performance was to demonstrate, was intrinsically inefficient, was *politically rational*.

### B. *Symbolic Satisfaction for the Nationalist Public*

The decision to regulate FDI did not reflect a desire on the part of the Trudeau Cabinet to promote the "Canadianization" of our economy, but was dictated by the political need to placate a Canadian electorate in a nationalist mood. To impress what appeared to be the nationalist majority, and thus to regain their electoral favour, was the rationale behind the creation of FIRA. The true *raison d'être* of the screening Agency was to permit politicians, who had hitherto been perceived as hostile or at best indifferent to the cause of economic nationalism, to pose as champions of the ideal of Canadian economic independence. Thus, FIRA's establishment was merely "an exercise in symbolic politics."<sup>53</sup>

However, in contrast to the Gray inquiry, which had been launched by the Trudeau Cabinet for a similar purpose, FIRA was predestined to be a *successful* exercise in symbolic politics. This was because of a number of design features which might have been considered coincidental had they not proved so eminently functional for the purpose of what the French call "*épater les bourgeois*".<sup>54</sup> For one thing, the government probably did not mind if the nationalist burghers of Canada expected (or at least hoped) that the Agency's name alone would strike *fear* into the hearts of foreign investors. FIRA, moreover, stands for "Foreign Investment Review Agency", a fine title which, purposely or not, created the impression that the Agency enjoyed sweeping jurisdiction over *all* foreign investment. Yet, in reality, FIRA dealt only with FDI and not with so-called portfolio investment from abroad. Furthermore, much FDI was likewise outside FIRA's mandate, for example *existing* FDI and new FDI that could be shown to be *related* in some way to existing FDI (even though it was precisely this

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11 at 140-41.

<sup>53</sup> Schultz, *Canadian Regulation of Foreign Investment* (preliminary seminar notes, 17 Nov. 1981) at 3; also Schultz, Swedlove & Swinton, *supra* note 15 at 21; Molot & Williams, "A Political Economy of Continentalism" in Whittington & Williams, eds., *Canadian Politics into the 1980s* (1981) at 74.

<sup>54</sup> "Mesmerize the burghers" [author's trans.]

type which accounted for "a majority of the new direct investment recorded in official statistics of foreign control").<sup>55</sup> Clearly, FIRA's powers were never anywhere as great as its name may have led the public to believe.

FIRA's mandate, furthermore, was formulated in an extremely ambiguous manner. The Agency was created to "screen" new FDI proposals, whatever that may mean. This ambiguity clearly worked in Trudeau's favour since, as Edelman points out, wishful thinking tends to characterize the public's interpretation of the frequently equivocal language of politicians. Nationalists were thus encouraged to believe that "screening" FDI proposals meant what they wanted it to mean, namely obstructing such proposals. (To interpret "screening" in this manner is not entirely unrealistic: the Merriam-Webster Thesaurus lists "block out, obstruct, shut out" and similar terms as synonymous for "to screen".) In any event, the ambiguous language of the Foreign Investment Review Act undoubtedly led many nationalists to think that FIRA did have at least the potential to inhibit FDI,<sup>56</sup> particularly since the criterion which would legally guide those who would be doing the "screening" was proclaimed to be nothing less than "*significant* benefit to Canada".<sup>57</sup>

The nationalist public was in all likelihood also very impressed that a "screening mechanism" had been warmly recommended in the Gray Report as the most appropriate means for dealing with FDI. This further reinforced the general impression that the Trudeau Cabinet had the best nationalist interests at heart when it set up FIRA. Public attention was thus conveniently diverted from the fact that much more efficient policy instruments could have been chosen, for example the 51 percent "fixed rule" concept recommended in the 1970 Wahn Report. It is possible that the Gray inquiry had been commissioned, at least in part, for the purpose of recommending less efficient FDI remedies than those advocated in the Wahn Report, a report which was admittedly "by far the most radical of the studies [of FDI] in its recommendations".<sup>58</sup>

Lastly, the independence of regulatory agencies is often thought to increase the likelihood of effective regulatory action.<sup>59</sup> However, con-

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<sup>55</sup> Rugman, *supra* note 11 at 129-30; Calvet & Crener, *supra* note 17 at 437.

<sup>56</sup> Edelman, *supra* note 24 at 81.

<sup>57</sup> [Emphasis added.] See, e.g., Calvet & Crener, *supra* note 17 at 421-23.

<sup>58</sup> Schultz, Swedlove & Swinton, *supra* note 15 at 11.

<sup>59</sup> Sabatier, "Regulatory Policy-Making: Toward a Framework of Analysis" (1977) 17 Nat. Res. J. 429.



trary to what FIRA's name implied and what the public was encouraged (or at least permitted) to believe, the Foreign Investment Review Agency was never an independent regulatory body but served merely to "advise and assist" the Cabinet.<sup>60</sup> Experts are at a loss to explain FIRA's peculiar institutional arrangement in which impressive formal attributes of independent decision-making were combined with the status of mere "regulatory slave" of the Cabinet. In spite of FIRA's lack of independence, the Cabinet nevertheless invested the Agency with spurious attributes of regulatory independence because the *appearance* of regulatory independence was undoubtedly functional for FIRA's purpose of impressing the nationalist public.

The establishment of FIRA, then, was a dramatic, highly visible gesture, which served admirably to symbolize the government's commitment to economic nationalism, to steal the thunder even of those perspicacious nationalist critics (like Mel Watkins) who realized that the new Agency was merely a facade, and thus to achieve what Edelman calls the "symbolic satisfaction" of the restless nationalistic public. That Canada's nationalists were greatly impressed with Trudeau's apparent conversion to the popular cause of economic nationalism was evidenced by the results of the general election of July 8, 1974. Whereas Trudeau's inertia with regard to foreign ownership had cost him votes — particularly in nationalist Ontario — in 1972 when foreign ownership had been a crucial electoral theme, symbolic nationalist gestures (such as the establishment of FIRA) enabled him to defuse that issue so that, at the very least, votes were not lost on that account in 1974. Perhaps most importantly, the "marginal voters" of nationalist Ontario returned *en masse* to the Liberal fold.<sup>61</sup> An important ingredient in this success was the creation of FIRA, a gesture which had induced the hitherto antagonistic media to portray Trudeau as the proud standard-bearer of economic nationalism.<sup>62</sup>

FIRA was destined for a long career as a vote-maximizing tool. It was successfully manipulated again by Trudeau in order to mesmerize the nationalist general public, media and interest groups during the 1980 general election campaign. The Liberal leader expected — and apparently achieved — electoral gain from a promise to strengthen the Agency, *inter alia*, by giving FIRA control over established foreign

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<sup>60</sup> See, e.g., Schultz, Swedlove & Swinton, *supra* note 15 at 18ff.

<sup>61</sup> See, e.g., "Liberals Recover from 1972 Collapse, Add 19 Seats to Sweep Ontario Ridings", *The Globe & Mail* (9 July 1974).

<sup>62</sup> Fletcher, "The Mass Media and the 1974 Canadian Election" in Penniman, *Canada at the Polls: The General Election of 1974* (1975) at 252ff; Munton & Poel, *supra* note 11 at 242.

owned firms (in other words, over existing FDI).<sup>63</sup> However, in view of what was said earlier about the reason for excluding existing FDI in FIRA's original jurisdiction, it is not surprising that this particular campaign promise was later unceremoniously repudiated by Trudeau.<sup>64</sup>

Not all nationalists were as impressed with FIRA as the general public who could not be expected to investigate whether the Agency was indeed efficient for "Canadianization" purposes.<sup>65</sup> FIRA was subjected to merciless criticism by numerous nationalist politicians, academics and journalists and was ridiculed in nationalist quarters as a totally inadequate instrument for controlling FDI.<sup>66</sup> Such objections, however, do not invalidate the claim that the Agency was a highly efficient political symbol and a formidable vote-maximizing tool. The nationalist critics of FIRA were few in number in comparison to the many nationalists who took a more favourable view of the Agency, and it is the majority sentiment that matters to "vote-maximizers". Thus, although perspicacious nationalists continued to criticize the government's stand on FDI even after the creation of FIRA, they could not prevent Trudeau from reaping the electoral rewards of his ostensibly nationalist policy decision. Moreover, even those nationalists who were critical of FIRA could not help being mesmerized to some extent by the Agency. They may not have been impressed by either its establishment or its performance, but they liked its *potential*. In other words, they appeared to believe that, with the necessary changes, FIRA could yet become an efficient instrument for "Canadianization" objectives. Lastly, few, if any, nationalists — even among those who were highly critical of FIRA — would have liked to see the Agency dissolved,<sup>67</sup> which indicated that they, too, were to a certain degree seduced by the charm of that political symbol.

Finally, it can be argued that the fact that some nationalists consistently criticized FIRA actually corroborates the claim that the Agency served as a potent political symbol. Edelman, the theoretician of "symbolic politics", suggests that "political discontent" cannot be effectively silenced by "fulfilling its claims". "Achievement of an aspi-

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<sup>63</sup> "We Broke Election Vow: PM", *The Toronto Star* (9 Dec. 1982); Clarkson, *supra* note 42 at 20, 83, 87-88.

<sup>64</sup> *Ibid.*; "PM Links FIRA Stand to Slump", *The Globe & Mail* (9 Dec. 1982).

<sup>65</sup> On the theme of "rational ignorance", which postulates that most voters do not find it worthwhile to check the efficiency of specific policy programmes, see, e.g., Trebilcock *et al.*, *supra* note 2 at 30-31.

<sup>66</sup> See, e.g., Desbarats, *Canada Lost — Canada Found: The Search for a New Nation* (1981) at 53-54.

<sup>67</sup> See, e.g., "FIRA's Work is Vital", *The Sunday Star* (27 Feb. 1983).

ration level", he says, "leads to a higher aspiration level." The use of "forms of symbolic reassurance", on the other hand, effectively prevents escalation to "higher aspiration levels", according to Edelman.<sup>68</sup> Thus, it can be argued that had real FDI restrictions been introduced, it would have generated new and more ambitious nationalist demands and, conversely, that creating inefficient (that is, merely symbolic) barriers against FDI prevented such an escalation. The establishment of FIRA achieved the latter result, since criticism of the Agency tended to take up the time and energies of precisely those pugnacious nationalists who would have been most likely to formulate new demands had their original objectives in the field of FDI controls been achieved. Viewed in this light, FIRA appears to have performed remarkably well in the fulfillment of its role as a political symbol created for the purpose of appeasing the nationalist public.

#### IV. FIRA, "SCREEN" OR "FUNNEL" FOR FDI?

##### A. *FIRA: Designed for Regulatory Inefficiency*

The establishment of FIRA was a dramatic, highly visible gesture which served primarily to satisfy the nationalist public in a symbolic way. Moreover, the choice of a "screening mechanism" as instrument for the regulation of FDI also enabled the Trudeau Cabinet to avoid losing the favour of Canada's continentalist interest groups because it was *merely* a symbolic gesture, a stratagem enabling the Agency's political sponsors to harvest the nationalist vote without really hurting the interests of the powerful continentalists.<sup>69</sup> By means of FIRA, the Trudeau Cabinet managed not only to impress those who favoured foreign investment regulation but also to remain in the good graces of those who opposed such regulation.

Foreign investors, the American government, Canadian continentalist interest groups and other proponents of the free flow of international investment capital across Canada's borders probably responded to the establishment of FIRA with a collective sigh of relief; if they did not, they certainly should have, for they knew that, in view of so much nationalist pressure Ottawa was forced to do *something* about foreign ownership. Many of them had feared much worse than the screening agency which confronted them<sup>70</sup> and were undoubtedly

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<sup>68</sup> Edelman, *supra* note 24 at 153-55.

<sup>69</sup> Resnick, *supra* note 4 at 152.

<sup>70</sup> See, e.g., Canadian Chamber of Commerce, *Submission on Foreign Investment in the Context of a Canadian Industrial Strategy (to Minister of Industry, Trade & Commerce)* (1973) at 17.

pleased that the establishment of FIRA neatly eliminated taxation schemes, the "key sector" approach, the "fixed rules" concept, nationalization and other efficient instruments of FDI regulation. In contrast to those schemes, which could have been expected drastically to affect all (or most) foreign ownership in Canada, FIRA was given authority to deal only with certain types of new FDI. The Agency's jurisdiction or "substantive rule-making authority" was thus extremely restricted from the start. Since "limitations on an agency's authority render aggressive regulation more difficult if not impossible",<sup>71</sup> it is clear that foreign investors and continentalist Canadians must have been greatly relieved when it was decided that FDI would be regulated by a screening agency instead of another instrument. Many foreign investments were safely out of FIRA's reach, and those which were not faced "unaggressive regulation" instead of the regulatory rigours of, say, a "fixed rules" concept. Finally, there is reason to believe that some foreign investors may actually have been delighted when FIRA was created — owners (and managers) of existing foreign-owned enterprises presumably expected to benefit from the restrictions FIRA was to impose on new FDI.

Existing [foreign direct] investments would be perpetuated in certain areas for lack of new firms entering. The tariff shelter would compound the protection from competition and tend to increase the oligopolistic structure of Canadian industry.<sup>72</sup>

Although the restrictions FIRA was destined to impose on new FDI were never serious enough to fulfill this optimistic expectation, a deep sense of relief, at the very least, characterized the initial reaction of foreign investors and of Canadian continentalists to the creation of FIRA, even though they were sufficiently astute not to express this relief in public.

Yet, the "vote-maximizing calculus" of the politicians who had created FIRA demanded that the beneficiaries of the political scheme — in this case the powerful continentalist business interest — be aware of the favour they received for "from a politician's perspective a benefit unperceived . . . is no benefit at all."<sup>73</sup> This consideration called for the careful management (or manipulation) of *information*, which had to be dispensed selectively so that the "right" kind of information reached the "right" party. While the Canadian mass media were rhapsodizing about the nationalist merit of the government's regulatory pol-

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<sup>71</sup> Sabatier, *supra* note 59 at 426-27.

<sup>72</sup> Calvet & Crener, *supra* note 17 at 430; similar views in Migué, *supra* note 22 at 48.

<sup>73</sup> Trebilcock *et al.*, *supra* note 2 at 34.

icy, that same government discreetly commissioned or inspired articles to be written for certain professional publications and speeches to be made to selected gatherings. These articles and speeches were aimed at convincing free traders and continentalists, both in Canada and abroad, that FIRA procedures constituted a harmless regulatory formality. For example, in a 1975 article in *The Canadian Banker*, a FIRA official eulogized the “gradualism and pragmatism” cultivated by his Agency, the “flexibility” of its criteria and its “mostly permissive” application of the relevant legislation. Last, but not least, the same official proudly emphasized FIRA’s limited jurisdiction, stating that “many kinds of expansion and diversification remain open to established foreign-controlled firms without passing through the Agency at all.”<sup>74</sup> Moreover, in a pamphlet expressly commissioned by the Canadian government for the purpose of enlightening and reassuring foreign investors, it was stressed

. . . that Canadians are not banana republic revolutionaries and will, therefore, probably apply this new law in a manner far less destructive to reasonable commercial purposes than would be possible under the wide powers given.<sup>75</sup>

To the uninitiated, this euphemistic code language may have sounded cryptic or strangely irrelevant; but insiders, keenly attuned to this sort of communication, received the government’s signal perfectly clearly and brought it to the attention of their peers in similarly veiled professional jargon. For example, the message that “significant benefit to Canada” — FIRA’s ostensibly tough condition for the acceptance of a proposal — was in reality not a formidable hurdle at all was advertised in *The Canadian Bar Review* of May 1975 by two legal commentators who by means of a subtle hint drew the attention of their fellow lawyers to the government’s remarkably flexible guidelines defining “significant benefit”. “The[se] guidelines”, they wrote, “may in certain circumstances be of assistance to non-eligible persons required to consider them.”<sup>76</sup>

In addition, even the pattern of reporting on FIRA seemed to reflect the government’s efforts to dispense information selectively. For example, from a quick perusal of the headlines of *The Globe and Mail*, the nationalist public may well have concluded that FIRA performed like a merciless regulatory guillotine. Yet, small articles in the *Globe*’s business section, which targets the predominantly continentalist Cana-

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<sup>74</sup> Byleveld, “Foreign Investment Review Act: Now Fully Hatched” (1975) 82 *Can. Banker* 6; see also Rugman, *supra* note 11 at 140.

<sup>75</sup> Langford, *Canadian Foreign Investment Controls* (1974), at 29.

<sup>76</sup> Donaldson & Jackson, *infra* note 91 at 234.

dian business community, clearly tended to report FIRA *approvals* and consistently emphasized the goodwill of the Agency's officials, the flexibility of its rules and so on.<sup>77</sup> To avoid attracting the attention of outsiders, who may not have valued these success stories, FIRA was sometimes not even mentioned in the titles of these articles.<sup>78</sup>

This strange pattern of reporting — of which the *Globe's* editors were probably not even aware — may not have made much sense journalistically, but it did serve the government's purpose of channeling certain types of information to certain types of people. It is not unreasonable to speculate, therefore, that this kind of reporting was the result of deliberate but subtle efforts of government politicians or FIRA officials (or both) to "feed" certain stories to certain reporters. Although it cannot be known with certainty if this was really the case, it would come as no surprise to Public Choice theorists who believe that, even here in Canada, such practices are very much part and parcel of what they view as the "real world" of politics.<sup>79</sup>

#### B. *More Safeguards for the Continentalist Interests*

Via such channels, then, foreign investors and Canadian continentalists were discreetly informed and effectively convinced that, under the circumstances, FIRA was not a bad deal and that, in spite of all the nationalist fanfare which accompanied its appearance on the Canadian regulatory scene (and which was intended for the public gallery), the Agency was definitely not destined to achieve great regulatory deeds. Canada's continentalist elite of finance and business was duly impressed by the benevolence and shrewdness displayed by the Trudeau Cabinet; some of its more prominent representatives, such as

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<sup>77</sup> A good example of a "FIRA is tough" article is Godfrey's feature, "FIRA Closes Door to US Managers", *The Globe & Mail* (24 Sept. 1983); for a typical "FIRA is easy" article, see "Only 8% of Proposals Turned Down by FIRA", *Globe's* "Report on Business" section (14 Apr. 1983).

<sup>78</sup> A striking example is an article which was published on May 26, 1983, under the inconspicuous title, "Campbell [Soup Co. Ltd.] pays parent \$232 million dividend". It actually described how a foreign-owned company had dodged FIRA rules and flagrantly violated perhaps not the letter but certainly the spirit of FDI legislation. The heartwarming message conveyed to the readers of the *Globe's* "Report on Business" was that with a modicum of imagination managers could devise all sorts of stratagems to circumvent FIRA. It is fascinating to contrast the discreet format of this article, buried deep in *The Globe and Mail's* business section, with the illustrated full-page feature which had appeared in the regular section of the same paper six months earlier in order to trumpet FIRA's regulatory achievements in the field of book publishing. Johnson, "A Big Break for Bookmen?", *The Globe & Mail* (27 Nov. 1982).

<sup>79</sup> Reference is to the treatment of the "media game" in Trebilcock *et al.*, *supra* note 2 esp. at 15: "On occasion . . . senior bureaucrats do provide inside information on a 'not for attribution' basis to 'reliable' journalists", and at 17: ". . . the mass media can be exploited at times by politicians".

David Kinnear of the T. Eaton Company, expressed their satisfaction, stating that they were gratified that FIRA incorporated the "reasonable guidelines on foreign ownership" and the "constructive nationalism" which they themselves claimed to favour.<sup>80</sup>

Nevertheless, some continentalists were less confident. They accepted the government's unspoken assurance that it did not intend FIRA to be an efficient regulatory instrument, but wondered if the government could also guarantee that its regulatory show would never degenerate into real regulation. What they feared above all was that, like a regulatory Frankenstein, FIRA might some day escape the control of its creator and commit real regulatory massacres instead of the simulated ones for which it had been brought to life.<sup>81</sup> In this respect, too, the Trudeau Cabinet proved to be extremely understanding and co-operative. As a safeguard against the fearsome possibility that FIRA might ever be "captured" by the nationalist interest and thus be used for truly xenophobic regulatory purposes, it was decided not to make FIRA an independent regulatory agency.<sup>82</sup> This eliminated any chance of regulatory efficiency (or, as Sabatier puts it, "aggressiveness"), and kept FIRA closely under the wings of the Cabinet itself. Consequently, FIRA was never a real regulatory agency — as one commentator has it, "to describe the Agency's work as regulatory may be to overstate its role."<sup>83</sup> In reality, FIRA performed the rather modest function of "advising and assisting" the Cabinet, which reserved the final decisions and thus the actual regulating for itself.<sup>84</sup> The possibility that fanatical nationalists or other overly eager regulators might "capture" the Agency was thus neatly eliminated.<sup>85</sup> The decision to have FIRA's commissioners serve "at pleasure" rather than to grant the customary security of tenure<sup>86</sup> must be viewed in the same light.

An expert on regulation in Canada points out that the desire for impartiality in regulation is the rationale behind independent regula-

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<sup>80</sup> Cited in Resnick, *supra* note 4 at 156.

<sup>81</sup> See, e.g., "Submission", *supra* note 70 at 26; also Clement, "The Corporate Elite, the Capitalist Class, and the Canadian State" in Panitch, ed., *The Canadian State: Political Economy and Political Power* (1977) at 238: "[Canadian capitalists] were concerned how the [FDI] controls would be used and by whom."

<sup>82</sup> As had been advised by those who believed that regulatory efficiency was wanted, see, e.g., McMillan, *supra* note 9 at 255 ff., who cited the successful example of Japan's independent "foreign investment council" but admitted that the latter was actually "too successful in the eyes of some critics"; that, of course, is precisely why Trudeau was not interested in such a scheme.

<sup>83</sup> Trebilcock *et.al*, *supra* note 2 at 37.

<sup>84</sup> Schultz, *Federalism and the Regulatory Process* (1979) at 44-45; Hayden & Burns, *supra* note 42 at 31; see also Schultz, Swedlove & Swinton, *supra* note 15 at 3-4.

<sup>85</sup> Rugman, *supra* note 11 at 130.

<sup>86</sup> Schultz, *supra* note 84 at 44.

tory agencies.<sup>87</sup> Thus, it is likely that FIRA's lack of independence was inspired by the government's desire *not* to have the Agency regulate impartially. The general public with its nationalist proclivities, however, had to be kept in the dark about the real reasons for turning FIRA into a mere regulatory maid-servant of the Cabinet. This was not an easy task. In the early stages of the Agency's career, in particular, government officials experienced great difficulty in justifying the decision to the inquisitive media. Minister of Industry, Trade and Commerce Jean-Luc Pépin, for instance, described it awkwardly as "a compromise" — without specifying, of course, why a compromise was needed — and offered the lame excuse that the government had wanted to avoid "creating another centre of competence, bringing about costly and unnecessary duplication."<sup>88</sup> Fortunately for the government, however, inspired students of regulation soon invented fine hypothetical rationales for FIRA's lack of autonomy. One observer was to eulogize this "dynamic monitoring" of the Agency by the Cabinet and to lionize it as the hallmark of "a new [and supposedly superior] breed" of regulation.<sup>89</sup> Such statements served admirably to obfuscate the real reasons for the Cabinet's control over FIRA and to keep the nationalist public happy.<sup>90</sup>

Similarly, the lack of openness of FIRA procedures contributed to regulatory inefficiency. Critics in general and lawyers in particular resented the notorious inscrutability of the Agency's *modus operandi*. They castigated the lack of "due process" and the confusion and uncertainty which stemmed, in their opinion, from an overdose of ministerial discretion and bureaucratic secrecy, and they argued in favour of a review process which would be more open and therefore, as they saw it, legitimate and democratic, regardless of its results.<sup>91</sup> The crux of the matter was, as one critic said, that "as it stands, FIRA wields arbitrary authority."<sup>92</sup>

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<sup>87</sup> *Ibid.* at 18.

<sup>88</sup> Cited in Blanchette, ed., *Canadian Foreign Policy 1966-76: Selected Speeches and Documents* (1980) at 92.

<sup>89</sup> Paquet, "The Regulatory Process and Economic Performance" in Doern, ed., *The Regulatory Process in Canada* (1978) at 56-57.

<sup>90</sup> More realistic students of Canadian Public Administration, on the other hand, rightly point out that the Cabinet should never have burdened itself with the time-consuming and relatively trivial task of monitoring literally hundreds of new FDI applications. For a critical (and more elaborate) evaluation of FIRA's role as a regulatory "slave" of the Cabinet, refer to the study of Schultz, Swedlove & Swinton, *supra* note 15.

<sup>91</sup> See, e.g., Donaldson & Jackson, *The Foreign Investment Review Act: An Analysis of the Legislation* (1975) 53 Can. Bar Rev. 2 at 234; Reuber, *supra* note 20 at 249; Calvet & Crener, *supra* note 17 at 422.

<sup>92</sup> Reuber, *ibid.* at 249.



The crucial questions, however, are: who were the beneficiaries and who were the “losers” in this exercise of arbitrary power? Moreover, did the secrecy serve to cover up regulatory activities which were so harsh as to be unfair to the continentalist interests, or did it becloud the kind of regulatory futility which, if known to the general public, would have cost the politicians the goodwill, and therefore ultimately the vote, of the nationalist public? It was often said that the former was the case and that behind FIRA’s closed doors ruthless regulators committed unspeakable regulatory atrocities. Nothing, however, could have been further from the truth. The degree of regulatory efficiency of an agency is directly related to the openness of its administrative structure and the opportunities it creates for public participation.<sup>93</sup> Since openness is believed to lead to regulatory action in the public interest,<sup>94</sup> and since the public interest at the time of FIRA’s inception was perceived as the nationalist interest, it is very likely that the government opted for a closed process precisely because it did *not* intend to serve the public interest. Moreover, the desire to cultivate its ties with the continentalist interest groups logically inspired the government’s determination to keep the public’s nose out of FIRA’s affairs. FIRA was thus an ideal tool for catering to special interests rather than to the public interest, as one economist explained:

FIRA is essentially a political agency, with final accountability to cabinet. Given its minimal public-reporting obligation (or opportunities), FIRA is susceptible to being used to foster political objectives or “special interests”.<sup>95</sup>

Had the Cabinet wanted to regulate efficiently (in order to serve the public interest), then procedural secrecy was clearly dysfunctional. But if the Cabinet wanted to avoid regulating efficiently (in order to cater to private interests), then the lack of procedural openness was perfectly functional. Assuming that the Cabinet’s decision to opt for a closed process was not purely coincidental, we can conclude that the “veil of secrecy”, which was used to shroud the Agency’s operations, did in fact serve the interests of those powerful groups which the Trudeau government knew to be adamantly opposed to the efficient regulation of FDI. In the name of confidentiality, FDI regulation thus became a matter which could be settled discreetly *entre amis*, between the reasonable investor and an understanding government, far from the madding crowd, so to speak, of economic nationalists.<sup>96</sup>

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<sup>93</sup> Sabatier, *supra* note 59 at 430-31.

<sup>94</sup> *Ibid.* at 430.

<sup>95</sup> Globberman, *supra* note 48 at 74.

<sup>96</sup> Schultz, Swedlove & Swinton, *supra* note 15 at 120-21, likewise argue that investors bene-

That some proponents of continentalism and free trade failed to understand the rationale of *in camera* regulation and wrongly suspected that their interests were being sacrificed behind FIRA's closed doors was naturally a source of great disappointment to the politicians and to the Agency's personnel. A former FIRA commissioner, for example, was to lament frequently that the Agency's good intentions were not "understood" by "individual businessmen" (the commissioner clearly took for granted that most businesspeople did understand them) and that "the issue of confidentiality versus disclosure of information" needlessly remained "a particularly vexing issue" for which unfortunately there was no "easy, painless solution."<sup>97</sup> Indeed, the obvious solution for this particular problem would have been to open FIRA's doors and to reveal the Agency as the regulatory masquerade it had been from the start. However, since that would have invited electoral retribution from the nationalist public, it was politically more rational for FIRA's political sovereigns to ignore the ignorant complaints of a handful of businesspeople who failed to understand the true function of FIRA's secrecy.

### C. *FIRA's Benevolent Regulators*

When FIRA embarked on its regulatory career, it did so under auspices which were particularly favourable not for the nationalist interest but for the forces of continentalism and free trade. The latter realized only too well that a much more efficient instrument could have been chosen. They also valued FIRA's extremely limited range of action and were reassured by the Agency's dependence on a Cabinet which they knew to be responsive to their needs. As well, most of them soon sensed that FIRA's procedural secrecy served not to promote but to inhibit efficient FDI regulation. In the FIRA administrators, moreover, they discovered benevolent and reasonable officials, like-minded colleagues who proved to be keenly attuned to the needs and even wants of foreign visitors and Canadian businesspeople alike.

The lack of regulatory fervour of the Agency's staff struck many observers. According to Rugman, for example, FIRA officials "operate[d] in a very favourable manner towards proposed foreign direct investments." They did not administer the Act in a restrictive manner ". . . [nor] offer a substantial barrier to trade in capital", and they

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fit from "the confidentiality that surrounds both the assessment and negotiating process and the outcomes [of FIRA procedures]"

<sup>97</sup> Howarth, "Personal Notes on the Review Process" (1977) 1 For. Inv. Rev. 1.

were "willing to approve the great majority of [proposed] takeovers."<sup>98</sup> FIRA officials were particularly notorious for their generosity in interpreting "significant benefit to Canada"; as well, they seemed overly eager to restrict their Agency's already very limited jurisdiction by a broad interpretation of "relatedness".<sup>99</sup> The "significant benefit [to Canada]" test is thus said to have functioned in reality as a mere "no detriment" test.<sup>100</sup> "*Surtout pas trop de zèle*" — above all not too much (regulatory) zeal — might well have been the motto of the administrators of the Foreign Investment Review Act.

Among the factors which shape the attitude of officials of any regulatory agency and thus help to determine its level of regulatory "aggressiveness", is the administrators' "orientation" towards the regulated parties; by "actively soliciting the input" of the latter, regulatory futility is allegedly promoted.<sup>101</sup> But a former FIRA commissioner, Gorse Howarth, went on record as "*very much*" welcoming

. . . a tendency . . . for [foreign] investors to contact the Agency at an earlier stage, in a preliminary and less formal way [. . . to discuss their plans and the manner in which their plans can be most advantageously explained and described in a formal notice. . . .<sup>102</sup>

He made it clear that it was an integral part of the officials' duties "to assist investors . . . to make the best possible case for allowance."<sup>103</sup> In addition, since FIRA had to operate in what an economist described as "an environment of imperfect information", the Agency had to "often go to outside experts for technical guidance."<sup>104</sup> This "information gap" created opportunities for the regulated parties to provide their own input into the screening process, which was, of course, to their own advantage. It played a particularly important role in the negotiation sessions during which FIRA officials were supposed to wrest concessions and commitments from the foreign investors but actually depended on the latter for much vital information.<sup>105</sup> Thus, foreign investors and Canadian continentalist businesspeople openly scoffed at the "commitments" which were supposedly obtained by FIRA and which,

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<sup>98</sup> Rugman, *supra* note 11 at 134, 145.

<sup>99</sup> The legal stipulation that new foreign investments which could be shown to be "related" in some way to existing ones were exempted from screening by FIRA.

<sup>100</sup> Schultz, Swedlove & Swinton, *supra* note 15 at 60; see also Abdel-Malek & Sarkar, *An Analysis of the Effects of Phase II Guidelines of the Foreign Investment Review Act* (1977) C.P.P.

<sup>101</sup> Sabatier, *supra* note 59 at 439.

<sup>102</sup> Howarth, *supra* note 97 [emphasis added].

<sup>103</sup> *Ibid.*

<sup>104</sup> Globerman, *supra* note 48 at 73-74.

<sup>105</sup> McMillan, *supra* note 9 at 251-52; Calvet & Crener, *supra* note 17 at 422.

incidentally, were frequently cited to demonstrate the alleged regulatory efficiency of the Agency.<sup>106</sup> For example, a German guidebook on investing in Canada stated flatly that "those commitments are usually such that the applicant would have made them even without FIRA's intervention."<sup>107</sup> As a Canadian executive, following a sale of real estate which was supposed to create Canadian job opportunities, commented:

It was a straight real estate deal. . . . What do they think is going to happen after a deal of this sort? Do they really believe two more cleaners or janitors will be hired just to comply with their need for commitments?<sup>108</sup>

That the traditional laws of business, and not some hypothetical commitments or regulatory requirements, would continue to determine the role of FDI in Canada was approvingly affirmed in *The Financial Post*, which quoted an unnamed "Ontario official" as follows:

You can have all the undertakings you want, but market conditions will dictate the [foreign] company's action in Canada.<sup>109</sup>

The benevolence of FIRA officials towards foreign investors and Canadian continentalists was likewise reflected in their unimpressive performance of their compliance duties. Even when certain "commitments" were wrested from foreign investors, the Agency seldom bothered to follow up on its decisions in order to ensure that the promised benefits did indeed accrue to Canada.<sup>110</sup> The fact that FIRA claimed to send forms to the concerned companies each year, asking for their "comments" on specific commitments, was unimpressive, as the regulators were relying exclusively on information provided by the regulated party. In any event, it was only when non-compliance with original promises was actually *admitted* that the Agency proceeded to "verify the reasons submitted."<sup>111</sup> This "verification" was hardly a terrifying ordeal for the foreign investor who was subjected to it. Whatever else it may have involved, it did not even include such an elementary step as "question[ing] the accuracy of information provided by the companies", as the Agency's own director of compliance acknowledged on one occasion.<sup>112</sup> Moreover, the foreign-owned firm was obviously able to

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<sup>106</sup> See, e.g. Calvet & Crener, *supra* note 17 at 431.

<sup>107</sup> Jansen & Matern, *Kapitalanlagen in Kanada: Land mit Zukunft* (1980) at 44.

<sup>108</sup> Cited in Saywell, ed., *Canadian Annual Review of Politics & Public Affairs* (1976) at 415.

<sup>109</sup> Best, "FIRA and Renault in Tough Scrap", *The Financial Post* (9 May 1981).

<sup>110</sup> See, e.g., Saywell, *supra* note 108 at 415.

<sup>111</sup> Calvet & Crener, *supra* note 17 at 430.

<sup>112</sup> *Ibid.* at 430-31; also Lukasiewics, "FIRA: Damned often, Praised seldom", *The Globe &*

draw on a vast repertoire of excuses and alibis.

Clearly, such "compliance" procedures virtually ensured that no foreign investment proposal would ever retroactively be disallowed for non-fulfillment of the commitments it was supposed to involve. Indeed, it was a public secret that "no company has ever been convicted for failure to comply with undertakings under the Act."<sup>113</sup>

If FIRA officials ever displayed any zeal at all, it appears to have been in the *promotion* rather than in the restriction of FDI. Anyone who has read the articles in the Agency's glossy magazine, *Foreign Investment Review*, knows that it might easily be mistaken — or, as some would argue, correctly identified — as a periodical advocating investment in Canada and advising foreigners how to go about it. As one commentator has remarked, "under the guidance of some of its more anti-nationalist ministers . . . [FIRA] even became an agency to solicit rather than screen new foreign direct investment."<sup>114</sup> It is not unreasonable, therefore, to conclude that FIRA revealed itself to be a "funnel" rather than a "screen" for FDI.<sup>115</sup>

Some representatives of the continentalist interest were astute enough — or sufficiently well-informed — to realize from the start that FIRA was a harmless, and in some ways even a useful, regulatory creature. Others failed to see through the FIRA facade and to recognize the Agency's officials as the genuine friends of foreign investment which they undoubtedly were. As far as the majority of Canadian continentalists and foreign investors were concerned, however, although

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*Mail* (11 Aug. 1979).

<sup>113</sup> Lukasiewicz, *ibid.* Even when faced with the hard evidence of unfulfilled commitments, FIRA has allegedly tended to be "too ready to forgive broken promises", see Saunders, "Continentalism and Economic Nationalism in the Manufacturing Sector: Seeking Middle Ground" (1982) 8 C.P.P. at 466. Former FIRA Commissioner Richardson has recently confirmed that no foreign investor has ever been prosecuted, let alone punished, by FIRA, for failure to fulfill its commitments: "Mr. Richardson said a defaulting company could be taken to court, but he could not recall it ever happening", see "FIRA head warms Tone in Pitch to Executives", *The Globe & Mail* 6 Feb. 1984. Some spectacular cases of (unpunished) non-fulfillment of commitments made to FIRA are described in "Case Histories lift FIRA's Veil of Secrecy", *The Globe & Mail* (11 Aug. 1979).

<sup>114</sup> Clarkson, *supra* note 42 at 86.

<sup>115</sup> See Clement, *supra* note 81 at 238: "Rather than a 'screen' [FIRA] has become a 'funnel' for foreign direct investment"; undoubtedly inspired by Miliband's observations about the class origins of civil servants in the "capitalist state", Clement, a neo-Marxist sociologist, seeks to explain the benevolence of FIRA officials towards their corporate "constituents" in terms of their social origins and connections, and he suggests (admittedly on the basis of only one example) that FIRA has been staffed — or at least managed — by people who are "perceived as 'safe' by . . . [the] corporate elite", see Clement, *ibid.* at 238-39. Information made available about Richardson, a former FIRA commissioner, and statements made by him, appear to confirm Clement's thesis; see, e.g., Goar, "FIRA Heir is used to taking care of Business", *The Sunday Star* (3 Oct. 1982); Lewington, "FIRA's Chief will soften Investor Rules", *The Globe & Mail* (29 Nov. 1982).

they were originally rather perturbed by the creation of FIRA, they eventually recognized the Agency as a regulatory "paper tiger" from which they had nothing to fear. This took a "breaking-in" period of a few years, during which they were discreetly enlightened by the government about the Agency's true function and effectively reassured by its actual performance.

Members of the Canadian real estate industry, for example, who were initially convinced that they would lose many foreign customers, quickly learned that such pessimism was totally unwarranted.<sup>116</sup> Premier William Davis of Ontario in September 1977 probably accurately reflected the opinion of the Canadian business community in general with regard to FIRA when he stated that "[he did not] think that FIRA now represents the inhibitions that it did two years ago [and that] businessmen [he had] talked to don't find it a problem."<sup>117</sup> As for foreign investors, particularly Americans, the influential American business weekly *Barron's*, a tenor in the original chorus of protest and indignation, was soon to write with a mixture of satisfaction and contempt that "the only foreign company that wouldn't be welcomed in Canada is Murder Inc."<sup>118</sup> American government officials had also expressed great misgivings at the time of FIRA's creation; they too were to change their tune drastically after a few years.<sup>119</sup> German investors likewise expressed relief and satisfaction with FIRA's performance at an early stage.<sup>120</sup> The reason why Canadian and international proponents of free trade achieved a comfortable *modus vivendi* with FIRA so quickly was that one or two years of experience with the Agency were more than sufficient to demonstrate that FIRA was a regulatory body which did precious little regulating.

That foreign investors viewed FIRA procedures as a mere formality of which the outcome was not normally in doubt is illustrated rather effectively by the following event. Having convinced itself that its plans were "of substantial benefit to Canada . . . [and having been] advised by its [legal] counsel [that] it had a good application and would not have any trouble getting approval," an American clothing store started operations throughout Ontario without awaiting FIRA's decision. In doing so, the company's president stated that he "really did not think

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<sup>116</sup> See, e.g., McFadyen, "The Control of Foreign Ownership of Canadian Real Estate" (1976) 1 C.P.P.

<sup>117</sup> From *The Globe & Mail* (27 Sept. 1977), as cited in Globerman, *supra* note 42 at 84.

<sup>118</sup> Cited in Gwyn, *supra* note 4 at 304.

<sup>119</sup> See, e.g., the comments of the Deputy Assistant Secretary of State and of the U.S. Ambassador to Canada, cited in Clarkson, *supra* note 42 at 86-87.

<sup>120</sup> Saywell, *supra* note 108 at 316.

the company was taking much of a risk," that he was "not into gambling". FIRA officials admittedly disallowed the proposal, but they hastened to declare that the company's actions, although somewhat "unusual", were not illegal, and they graciously permitted the clothing store to submit a second application. Its Ontario subsidiaries, meanwhile, were allowed to continue their operations. (The company's second application, incidentally, received FIRA's customary approval a few weeks later.)<sup>121</sup> This event is by no means unique<sup>122</sup> and illustrates the magnitude of the confidence foreign investors could afford to display, and display with impunity, in their dealings with an agency which was supposed to be the stern guardian angel of Canada's economic autonomy.

## V. STRENGTHS AND SHORTCOMINGS OF A VOTE-MAXIMIZING INSTRUMENT

### A. FIRA's Flexibility

It would not be an exaggeration to say that Trudeau lived up to the unspoken commitment he had made at the time of FIRA's establishment to the Canadian forces of free trade in general and to the continentalist faction in business and finance in particular. In spite of all the nationalist rhetoric, FIRA regulated minimally; the little it did was done very ineffectively. Existing and "related" FDI — the heavy artillery of foreign capital in Canada — was (and remained) safely out of the Agency's reach and, since the creation of FIRA had silenced the earlier talk of taxation and other efficient instruments, found itself actually more securely entrenched than ever before. Only new FDI above a certain "threshold" of assets was subjected to a "screening" process which hardly proved to be a regulatory baptism of fire. The judgment of observers who believed that efficient (that is, restrictive) regulation was intended from the start, or who would personally have preferred to have seen efficient regulatory activities carried out, was devastating. "It is questionable whether FIRA is operating as a barrier to foreign investment at all," wrote Rugman.<sup>123</sup> Referring to the fact that Canada

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<sup>121</sup> "Health-Tex gambles on FIRA, ends up in Bureaucratic Limbo", *The Globe & Mail* (28 Sept. 1983). Predictably, Health-Tex did not remain in "bureaucratic limbo" very long; its second application to FIRA received the seal of approval as early as 13 Oct. 1983, as a FIRA information officer confirmed by telephone on 14 Nov. 1984.

<sup>122</sup> See, e.g., the case of a "U.S. based computer company [which] set up shop in Canada 18 months before it gained FIRA approval to do so; the first application was disallowed by the Cabinet . . . but a second application was accepted after six months", see "Case Histories lift FIRA's Veil of Secrecy", *The Globe & Mail* (11 July 1979).

<sup>123</sup> Rugman, *supra* note 11 at 140.

continued to have "the highest level of foreign control of any industrialized country in the world," a political pundit remarked cynically:

Nothing that we attempted has altered this pattern. The establishment of the Foreign Investment Review Agency in 1974 has done little but enable bureaucrats to place their official stamp of approval on the process. It has not significantly changed the picture of foreign ownership in our country.<sup>124</sup>

Furthermore, a *Sunday Star* editorial dismissed allegations that FIRA discouraged FDI, stating emphatically that "the contrary can be shown".<sup>125</sup>

Although these remarks were all basically quite correct, the unheroic FIRA saga is not yet complete. The overriding reason why FIRA was selected as the instrument for the regulation of FDI was that the Agency could be relied on not to regulate, or at least not to regulate effectively, while creating the appearance of regulation. In doing so, Trudeau achieved the dream of every rational politician to satisfy both public opinion and powerful interest groups. With one regulatory stroke of genius he had satisfied the nationalists as well as the continentalists. Moreover, FIRA offered Trudeau opportunities for subsequent and more extravagant "vote-maximizing" achievements. The Agency's format as that of a regulatory "slave" of the Cabinet opened up unlimited prospects for "discretionary enforcement" of the FDI legislation. Thus, the Trudeau Cabinet created for itself the means to engage, according to the needs of the place and the time, in the "high-visibility enforcement" of the regulatory legislation or in the "low-visibility moderation" of its effects,<sup>126</sup> that is, to regulate when and where it was politically rational to do so and not to regulate in converse situations.<sup>127</sup>

The picture painted here, presenting FIRA as an inefficient regulatory scarecrow, must therefore be modified somewhat, since it is clear that, under certain circumstances, the Agency was quite capable of efficient regulation. A good example is the publishing industry. This sector of Canadian capitalism, which plays an important role in the formation of public opinion, had found a home in the nationalist camp and had clamoured loudly for FDI controls. The flexibility built into the screen-

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<sup>124</sup> Desbarats, *supra* note 66 at 53-54.

<sup>125</sup> "FIRA's Work is Vital", *supra* note 67.

<sup>126</sup> Trebilcock *et al.*, *supra* note 2 at 88-89; see also Schultz, Swedlove & Swinton, *supra* note 15 at 112-13.

<sup>127</sup> Trudeau may have learned this lesson from a careful reading of the Gray Report which, at 336, had suggested that a screening agency would allow dealing with FDI "on a case-by-case basis" and that "the vigour with which a review process is applied can be made to vary over time".



ing Agency permitted Trudeau to have FIRA take energetic action in this politically sensitive field. The results, according to a detailed *Globe and Mail* report, were highly beneficial to Canadian authors and publishers, who were even said to have gained a more solid foothold in the U.S. market as a result of the Agency's efforts on their behalf.<sup>128</sup> What the *Globe* did not say, of course, was that FIRA managed to regulate efficiently in this case because it was to Trudeau's political advantage that it did so.

This example also illustrates, incidentally, how FIRA's "high-visibility enforcement" capabilities enabled the Liberal government to impress the nationalist public from time to time with real regulatory achievements in the FDI field and thus to sustain its image of commitment to economic nationalism and "Canadianization". Most of the time, however, the flexibility of the screening instrument was manipulated for the purpose of "low-visibility moderation" of the FDI legislation, primarily to preserve the peace between the government and the powerful continentalist interest groups. FIRA's "discretionary enforcement" achievements in the various provinces strikingly illustrates this point. Efficient FDI regulation was not unwelcome in Ontario, a fully developed province widely thought to be saturated with foreign capital<sup>129</sup> and the heartland of economic nationalism, so that FIRA could regularly be given the green light for a few disallowances of foreign investments proposed for that member of confederation. However, most if not all other provinces needed and wanted whatever capital they could raise in the international money market in order to develop their industries and were originally very suspicious about FIRA's intentions.<sup>130</sup> To ensure, therefore, that FIRA would not offend regional sensibilities, provincial governments were allowed to participate actively in the Agency's business. An expert in the field explained:

The Agency must take into consideration, *inter alia*, industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected [by the proposed investment].<sup>131</sup>

For all intents and purposes, then, provincial wishes were FIRA's command,<sup>132</sup> with the result that the Agency's administrative practice

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<sup>128</sup> Johnson, *supra* note 7. See also Godfrey, *supra* note 77 for a typical FIRA decision which "delighted" Canadian book publishers.

<sup>129</sup> See, e.g., the statistics in "Indicators of Foreign Control of Non-Financial Industries by Province" in *FIRA Paper No. 3* (1978) at 112.

<sup>130</sup> Schultz, *Federalism*, *supra* note 83 at 59-61; Hayden & Burns, *supra* note 42 at 422; House of Commons Debates (4 July 1972).

<sup>131</sup> Schultz, *supra* note 84 at 60; see also Schultz, Swedlove & Swinton, *supra* note 15 at 24.

<sup>132</sup> See, e.g., the statements of the former FIRA commissioner in Howarth, *supra* note 97;

served virtually to repeal the FDI legislation in the many provinces which favoured unrestricted access to international investment capital. Consequently, it is hardly surprising that, after an uneasy but short "breaking-in period . . . [FIRA's] performance seem[ed] to have disarmed its [provincial] critics."<sup>133</sup> In due course, in fact, provincial suspicion of FIRA is said to have given way to appreciation and even affection for this federal regulatory "ugly duckling". As one authoritative commentator put it:

From the provincial perspective, both in its composition and its operation, . . . [FIRA] is in many ways one face of a model intergovernmental regulatory relationship. The level of trust and mutual cooperation that has been generated . . . is, to say the least, highly encouraging.<sup>134</sup>

This provincial goodwill, of course, was bought at a price — the "undermining of the Agency's [regulatory] responsibilities."<sup>135</sup> However, this was a price the Trudeau government considered a bargain and paid gladly in order to avoid politically costly conflict with the provinces. In any event, FIRA's accommodating attitude vis-à-vis provincial governments clearly shows that this admirably flexible screening agency could be — and often was — used very effectively for the purpose of "low-visibility moderation" of the relevant FDI legislation wherever or whenever Ottawa was confronted with powerful interests opposed to real restrictions on FDI.

### B. *An Affront to Continentalist Feelings*

Although the continentalists were undoubtedly very relieved that a mere "screening agency" had resulted from the national debate over FDI and that FIRA's performance had made it possible for them to achieve a *modus vivendi* with the Agency at an early stage, they were not entirely *happy* with FIRA. The Agency's existence may not have hurt their basic *interests*, but it certainly hurt their *feelings*. Many investors thus felt that the Foreign Investment Review Act made a take-over suspicious per se and stigmatized the foreign acquirer with "a presumption of wrongdoing".<sup>136</sup> To advocates of unfettered laissez-faire capitalism, FIRA also symbolized statism, *dirigisme* and even social-

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according to Schultz, Swedlove & Swinton, *supra* note 15 at 55, "in over 97% of resolved cases the final decision to allow or disallow a particular transaction was in agreement with the opinion expressed by the province or provinces consulted".

<sup>133</sup> Schultz, *Federalism*, *supra* note 84 at 59.

<sup>134</sup> *Ibid.* at 61.

<sup>135</sup> Calvet & Crener, *supra* note 17 at 422.

<sup>136</sup> *Ibid.* at 423.

ism. The fact that the NDP was one of FIRA's earliest proponents unquestionably reinforced the Agency's image as a symbol of "socialistic" policy. *The Financial Post* and other advocates of Canadian capitalism thus loudly condemned the Trudeau government's "socialistic" manipulation of the flow of international capital;<sup>137</sup> the Canadian Manufacturers' Association and the Canadian Bar Association protested what they perceived to be a violation of the basic right to hold property, of "the right of Canadians to dispose of their holdings as they see fit."<sup>138</sup> One right-wing commentator actually described FIRA as a cog in the machinery of Trudeau's alleged "grand design of a Socialist Canada."<sup>139</sup> Similarly, although FIRA did not prevent American capital from continuing to take full advantage of investment opportunities in Canada, it did serve as a symbolic warning that Americans did not enjoy an unlimited right to invest in this country. Consequently, although American investors (and their government) learned to live with FIRA, they never ceased to resent the Agency's existence, not for what it did, but for what it *symbolized*, namely the desire for greater Canadian economic independence.<sup>140</sup> Among Canadian continentalists and foreign investors, then, FIRA unquestionably caused a great deal of alienation or, in the language of Public Choice, the Agency saddled them with "disaffection costs".<sup>141</sup>

Secondly, Canadian proponents of laissez-faire, as well as foreign investors, believed that the creation of FIRA was responsible for more tangible costs, such as the "transition costs" involved in learning to deal with a new actor on the regulatory scene.<sup>142</sup> FIRA's cumbersome and lengthy procedures were another major source of complaint in this respect, as was the alleged (but largely mythical) uncertainty of the outcome.<sup>143</sup> Business interests (and many economists) thus argued that the alleged costs, risks and frustrations of dealing with FIRA resulted in serious economic distortions. Potential foreign investors were said to

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<sup>137</sup> See, e.g. Resnick, *supra* note 4 at 167.

<sup>138</sup> McMillan, *supra* note 9 at 246; Resnick, *supra* note 4 at 167; see also Clement, *supra* note 81 at 237-38, for a neo-Marxist comment on the reaction of "the dominant capitalists in Canada".

<sup>139</sup> McCready, *Profile Canada: Social and Economic Projections* (1977) at 244.

<sup>140</sup> A *Globe & Mail* reporter thus emphasizes that FIRA served "as a symbolic warning [to the Americans] that Canada isn't open season for all, no matter what the conditions", see Martin, "Cozying-up to Reagan full of Pitfalls for Mulroney", *The Globe & Mail* (25 Sept. 1984).

<sup>141</sup> Terminology from Quinn & Trebilcock, *Compensation, Transition Costs, and Regulatory Change* [1982] U.T.L.J. at 152.

<sup>142</sup> *Ibid.* at 117.

<sup>143</sup> See, e.g., Donaldson & Jackson, *supra* note 90 at 234, Calvet & Crener, *supra* note 17 at 422; Lukasiewics, *supra* note 112; Langford, *supra* note 75 at 18.

be discouraged from pursuing their plans, and "Canadian holders of wealth" were allegedly forced "to sell their assets at a reduced price" on account of the perceived diminished demand for these assets.<sup>144</sup> The point was even made that these distortions produced higher costs of production and therefore, in the end, higher prices for Canadian consumers.<sup>145</sup>

Summarizing these grievances, it might be said that, as a policy instrument chosen by rational politicians, FIRA undeniably had certain disadvantages. However, these were far outweighed by the Agency's many advantages. Moreover, the importance — from the viewpoint of political rationality — of these disadvantages should not be overestimated. If it is true, for example, as some economists claim, that FIRA's byzantine procedures resulted in higher prices for consumers, it is also true that such costs were so dispersed that they were unlikely to be perceived by these same consumers. As for the "disaffection" and "transition costs", they too were quite dispersed and, in the case of foreign investors at least, they hit the pocketbooks of foreigners who were unable to retaliate electorally. The fact that not all continentalists or, for that matter, all nationalists were entirely happy with FIRA's existence or performance was really of relatively little consequence to the politicians who had created the Agency for their own "vote-maximizing" purposes. However, it is important to keep in mind that certain grievances did exist as they will provide a better understanding of the objectives of those who, taking advantage of important changes in the economy and in public opinion, launched an offensive against FIRA in the early 1980s.

## VI. CONCLUSION: FIRA IN CONTINENTALIST TIMES

Towards the end of the 1970s Canada's economy slid into a recession from which it has not yet fully recovered. Moreover, due to factors such as the sluggishness of the world economy as a whole — certainly not as a result of FIRA activities — the formerly abundant flow of foreign capital declined considerably.<sup>146</sup> This came at a time when the need to develop Canadian mineral resources generated an unprecedented demand for investment capital, a demand which the domestic capital market was allegedly unable to meet.<sup>147</sup> Economic nationalism

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<sup>144</sup> Quote from Reuber, *supra* note 20 at 250; also see Migué, *supra* note 22 at 13-14; Globerman, *supra* note 48 at 75, 95.

<sup>145</sup> Migué, *supra* note 22 at 29, 48.

<sup>146</sup> See, e.g. Calvet & Crener, *supra* note 17 at 436.

<sup>147</sup> *Ibid.* at 433.

was increasingly viewed as a luxury Canadians could not (or could no longer) afford. Issues other than foreign ownership, such as unemployment and inflation, commanded a higher priority. Opinion polls reflected the changing trend in public opinion and concluded that "Canadians do not rank [foreign ownership] as such an important issue as unemployment, inflation, and other economic problems."<sup>148</sup> Economic nationalism lost its former popularity and, consequently, was more effectively ridiculed as "national myopia" and unaffordable "xenophobic nationalism".<sup>149</sup> Foreign investment controls, in particular, were singled out as "obnoxious disincentives to investment" and one of the causes of the recession.<sup>150</sup> Conversely, free trade and continentalism were viewed by growing numbers of Canadians as the only strategy which offered any hope of economic improvement. "Continentalism", writes Trudeau's biographer, became "the new chic".<sup>151</sup> "Greater continental economic integration" in general, and unrestricted access to Canadian markets for American capital in particular, were advocated as cures for the country's economic problems. There was nothing new about this, but what mattered to the politicians was that, at that time, the gospel of laissez-faire and continentalism was not restricted to special interest groups but enjoyed *mass appeal*.<sup>152</sup>

Although FIRA had never been a genuine regulatory threat, the Agency's mere existence (as opposed to its performance) was a thorn in the side of the proponents of free trade. Foreign investors, Canadian businesspeople and their lawyers had put up with the admittedly minor yet still irritating "disaffection" and "uncertainty costs" associated with FIRA procedures, but now that public opinion appeared to be on their side they probably asked themselves why they had to put up with *anything*. Precisely when the anti-FIRA forces moved to the offensive is difficult to say, but in retrospect the election of Ronald Reagan late in 1980 was probably an important milestone in this respect. American investors and Canadian continentalists alike must have realized that they would be able to count on the active support of a president who had been elected on a platform of economic neo-conservatism and who was determined to clear the world's markets of all obstacles — even symbolic ones, such as FIRA — to the free international flows of capi-

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<sup>148</sup> Rugman, *supra* note 11 at 127.

<sup>149</sup> Laxer, *supra* note 5 at 41.

<sup>150</sup> *Ibid.* at 39-40.

<sup>151</sup> Gwyn, *supra* note 4 at 304.

<sup>152</sup> Laxer, *supra* note 5 at 21.

tal.<sup>153</sup> In any event, following the 1980 election of Reagan, Ottawa found itself under pressure to relax its FDI policies.<sup>154</sup>

It has been remarked that the Trudeau government "de-fanged" FIRA once it had become clear that continentalism was gaining popularity.<sup>155</sup> However, since FIRA had never had "fangs", Trudeau could introduce only purely cosmetic changes which purported to placate the continentalists (as well as the Americans) symbolically.<sup>156</sup> Among these symbolic gestures were the demotion of "high-profile" nationalists in a 1982 Cabinet shuffle (which, *inter alia*, caused Herb Gray to be divested of the post of Minister of Industry, Trade and Commerce and thus of the stewardship of FIRA),<sup>157</sup> the appointment of a new commissioner, Robert Richardson (who publicly declared that "he understood the businessman's point of view"),<sup>158</sup> efforts to demystify FIRA's *modus operandi*, to shorten procedures and to "soften investor rules" in general;<sup>159</sup> and, finally, the inevitable announcement that the issue of FIRA's role would be studied by all sorts of experts.<sup>160</sup>

All these measures were purely cosmetic. The appointment of officials whose benevolence to business was widely publicized, for example, was unlikely to make much difference since FIRA administrators had been benevolent regulators from the start. Disclosing more information was irrelevant as far as the results of FIRA procedures were concerned, as secrecy had covered up the benevolence of the regulators. While openness might have demonstrated this, more disclosure could have done little to increase this benevolence. A few statistics may illustrate this point: in 1982, the first year of "openness", FIRA approved 92 percent of all proposals; this was certainly an impressive figure, but not much more than the 86.9 percent of 1981 and the 89.3 percent of 1980.<sup>161</sup> The promise of "softer investor rules" sounded fine, but

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<sup>153</sup> Clarkson, *supra* note 42 at 84.

<sup>154</sup> See, e.g., "Ottawa quietly debating Changes for FIRA", *The Globe & Mail* (20 Nov. 1982). For a good example of corporate pressure on the government, see Gulf Canada's "suggestion" with regard to FIRA in ads in both *Time* and *The Globe & Mail* during 3-10 Oct. 1983.

<sup>155</sup> Clarkson, *supra* note 42 at 84.

<sup>156</sup> It is true, on the other hand, that Trudeau did shelve plans, announced during the 1981 election campaign, *i.e.* when nationalism was still believed to be fashionable, to put more teeth into the Foreign Investment Review legislation.

<sup>157</sup> Clarkson, *supra* note 42 at 105-106; "Canada: Facing a Winter of Discontent", *Time* (8 Nov. 1982).

<sup>158</sup> Goar, *supra* note 115.

<sup>159</sup> Lewington, *supra* note 115; see also "Administrative Changes Under FIRAct" (1982) 6 *For. Inv. Rev.* 1.

<sup>160</sup> "Lumley Seeking Advice on FIRA", *The Globe & Mail* (5 Apr. 1983).

<sup>161</sup> "Only 8% . . .", *supra* note 77. These figures are attributed to FIRA sources, but differ from those cited in the Appendix, which are also based on figures provided in FIRA publications.

FIRA's investor rules, having always been very soft, could hardly be made much softer.

Continentalists undoubtedly derived some satisfaction from these symbolic gestures,<sup>162</sup> but passionate arguments against FIRA continued to be heard. Why, then, did Trudeau not simply abolish the Agency? At a time when foreign investment was seen as the *sine qua non* of economic recovery, the elimination of what was perceived as an obstacle to FDI would certainly have seemed to make sense economically. The answer is that, for a number of reasons, it was not politically rational for Trudeau to abolish FIRA.

First, abolishing FIRA would have been tantamount to acknowledging a serious past mistake, something which would have entailed significant political costs.<sup>163</sup> Such a step would have amounted to an unspoken admission that the opposition was correct when it contended that earlier government policies had caused the recession. Second, Trudeau must have wondered whether nationalism could be written off for good. Although battered, it continued to be a force in the land, and the possibility that it might stage a comeback some day could not be ruled out. Since the continentalists and free traders had found a home in the Progressive Conservative Party, Trudeau must especially have wished to avoid burning the bridges that led to the remaining strongholds of economic nationalism, lest he be marooned in an ideological no man's land. Had he decided to do away with the Agency, he would certainly have antagonized the nationalists, many of whom viewed FIRA as a "sacred cow".<sup>164</sup> Third, FIRA continued to be politically useful to the Trudeau Cabinet which, it must be remembered, controlled the Agency directly and was therefore able to regulate or to avoid regulating, depending on which option was politically most useful. Now that continentalism was in vogue, FIRA's flexibility made it possible for Trudeau to engage in the "high-visibility moderation" and "low-visibility enforcement" (as opposed to the earlier "low-visibility moderation" and "high-visibility enforcement") of the Foreign Investment Review legislation; this enabled him to please the continentalist interest groups and the now more continentalist-oriented public without doing what he would certainly have done had he dissolved FIRA, namely, incurring the wrath of those individuals and interest groups who remained un-

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<sup>162</sup> Favourable continentalist reactions are described in Valpy, "FIRA, Remade?", *The Globe & Mail* (9 Nov. 1982), and Lewington, *supra* note 115.

<sup>163</sup> Quinn & Trebilcock, *supra* note 141 at 130.

<sup>164</sup> A *Sunday Star* editorial (27 Feb. 1983) sternly warned, as its title had it, that "FIRA's Work is Vital".

abatedly nationalist.

As an instrument for the efficient regulation of FDI, FIRA had been virtually worthless from the start. From the viewpoint of technical efficiency, therefore, there was no reason to keep the Agency alive when, during the last few years of Trudeau's career as Prime Minister, continentalism was sweeping the land and even purely symbolic regulatory constraints of FDI no longer appeared desirable or even affordable. However, FIRA had always been primarily a cog, an invaluable cog even, in the "vote-maximizing calculus" of its political sovereigns. This usefulness for political purposes ensured the Agency's survival, regardless of whether nationalism or continentalism was in the ascendant, until Trudeau's retirement from politics.

#### POSTSCRIPT: "INVESTMENT CANADA", BRIAN MULRONEY'S FIRA?

Brian Mulroney's Progressive Conservative government, elected in September 1984, has recently replaced FIRA with "Investment Canada". This new Agency will continue to screen FDI, but its powers will be even more limited than FIRA's had ever been because foreign investment in new business ventures (as opposed to takeovers of existing businesses) will no longer be subjected to the screening process. Moreover, whereas FIRA supposedly approved only those proposals which were deemed to be of "significant benefit to Canada", "Investment Canada" will be satisfied if an investment merely promises a "net benefit" to the country.<sup>165</sup>

The Mulroney government apparently expects that this change will convince the world that Canada is once again "open for business". However, it remains to be seen whether foreign investors will respond as enthusiastically as the new Prime Minister hopes. As some New York investment bankers were quick to point out, FIRA had never deterred foreigners from taking advantage of investment opportunities in Canada so that the Agency's demise is, by itself, unlikely to "bring them back".<sup>166</sup> It can be argued, moreover, that FIRA has not really been laid to rest, but has merely been "changed" into "Investment Canada"; in any event, the latter will still perform at least some of the "screening" duties to which foreign investors had supposedly objected

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<sup>165</sup> *Investment Canada Act*, S.C. 1985, c.20; Walkom, "Foreign Investors Welcome as Tories Lowering Barriers", *The Globe & Mail* (8 Dec. 1984).

<sup>166</sup> Walkom, "Bankers see no Flood of Foreign Capital: Softer FIRA and NEP have Little Impact", *The Globe & Mail* (20 Dec. 1984); Little, "Replacing FIRA may not attract Investors", *The Globe & Mail* (17 Jan. 1985).



in the past.

This raises the question whether the Mulroney government, which purports "to encourage investment in Canada by . . . non-Canadians",<sup>167</sup> made the technically most efficient policy decision for that purpose when it replaced FIRA with "Investment Canada". It clearly did not, because foreign investors — to the extent that their plans are influenced by Canadian government policies at all (an increasingly questionable premise) — would undoubtedly have been even more encouraged had FIRA been totally abolished. The reasons for not doing so are related to Mulroney's "vote-maximizing calculus".

Firstly, Mulroney undoubtedly realized, as Trudeau did before him, that eliminating a FIRA-type body would have been politically risky, since nationalism has continued to be a force in the land despite its setbacks of recent years. Had he dissolved FIRA altogether, Mulroney would have pleased foreign investors and Canadian continentalists, but he would certainly also have antagonized the nationalists. By changing FIRA into "Investment Canada", he managed to please the former without antagonizing the latter (or, at least, not too much). The Tory government undoubtedly hopes that the continentalists will view "Investment Canada" as an agency which aims to promote FDI, and that the nationalists will view it as a policy instrument which, like FIRA, will inhibit FDI. Secondly, "Investment Canada" is to inherit the admirable flexibility which had been built into FIRA, allowing Mulroney to prevent foreign takeovers whenever and wherever it will be politically useful (or even indispensable) for him to do so. The announcement that "culturally sensitive" industries will continue to enjoy special protection reflects Mulroney's desire not to alienate influential nationalist private interests such as the publishing industry; with the establishment of "Investment Canada" he has created for himself the means to do so.

FIRA symbolized the regulation of FDI in nationalist times. However, in reality it did very little regulating (or, if it did, did so very selectively) because it served first and foremost as a cog in the machinery of Pierre Trudeau's "vote-maximizing calculus." In this respect, and only in this respect, FIRA was a very successful instrument. "Investment Canada" is supposed to symbolize the deregulation of FDI in neo-conservative, continentalist times, but it is clear that this Agency, too, must be understood primarily as a "vote-maximizing" tool in the hands of Brian Mulroney. Whether "Investment Canada" will be as

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<sup>167</sup> *Investment Canada.*

successful in this respect as its predecessor remains to be seen.

APPENDIX: PROPOSALS ALLOWED BY FIRA, 1974-1983

Year	Approved Percentage of:	
	Acquisitions	New Businesses
1974	66	—
1975	71	—
1976	78	80
1977	91	89
1978	86	86
1979	86	86
1980	76	85
1981	80	71
1982	94	89
1983 (first two quarters)	98	93

Sources: Foreign Investment Review, vol. 2, no 2, spring 1979, pp. 30-31, and vol. 5, no 2, spring 1982, pp. 34-35; also FIRA, "Quarterly Statistics," October-December 1982 and April-June 1983.