

# Michigan Journal of International Law

---

Volume 6 | Issue 1

---

1984

## Canada's Foreign Investment Review Act and the Problem of Industrial Policy

James M. Spence Q.C.  
*Tory, Tory, DesLauriers & Binnington*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Business Organizations Law Commons](#), [Comparative and Foreign Law Commons](#), [International Trade Law Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

James M. Spence Q.C., *Canada's Foreign Investment Review Act and the Problem of Industrial Policy*, 6 MICH. J. INT'L L. 133 (1984).

Available at: <https://repository.law.umich.edu/mjil/vol6/iss1/9>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

# Canada's Foreign Investment Review Act and the Problem of Industrial Policy

James M. Spence, Q.C.\*

The purpose of this article is to consider the Foreign Investment Review Act (FIRA or the Act)<sup>1</sup> of Canada in the context of the continuing discussion in North America of the concept of "industrial policy." The particular version of industrial policy of interest for this purpose is the concept which involves interventionist activity by the government designed to affect directly the economic activity of an industry, company, or plant.<sup>2</sup> The first part of the article briefly describes the background and operation of FIRA. The second part comments on the concept of interventionist industrial policy as it has developed in Canada. Following this background, the article considers various aspects of FIRA as a vehicle for the formulation and implementation of industrial policy. In part III, a method of approach is suggested for dealing with two questions: the effectiveness of FIRA as an institution to implement foreign investment industrial policy, and the potential of FIRA as a model for a larger industrial policy institution.

## I. THE FOREIGN INVESTMENT REVIEW ACT: ITS BACKGROUND AND OPERATION

FIRA came into force in 1974. In general terms, the Act provides that no foreign person or foreign-controlled enterprise is permitted to take over an existing Canadian business, or to establish a new and unrelated Canadian business, without receiving the approval of the Government of Canada. Underlying this far-reaching legislative initiative was an increasing concern in many quarters

\* Partner, Tory, Tory, DesLauriers & Binnington, Toronto, Canada. Senior Legal Advisor, Foreign Investment Review Agency, 1975-1976. B.A. 1962, University of Toronto; LL.B. 1966, University of Toronto.

1. Foreign Investment Review Act, ch. 46, 1973-74 Can. Stat. 619, amended by ch. 52, § 128(2), 1976-77 Can. Stat. 1266, and ch. 107, § 63, 1980-81-82 Can. Stat. 3131. [hereinafter cited as FIRA]. This article was prepared prior to the Canadian federal general election held in September of 1984. For a description of the important changes relating to FIRA which have occurred since that election, see *infra* note 56.

2. This definition is suggested in P. Davenport, *Industrial Policy in Ontario and Quebec* 1 (Feb. 23, 1982) (discussion paper presented for the Economic Council of Canada).

throughout Canada that the high level of foreign investment in the Canadian economy and foreign control over large elements of the Canadian economy carried real and significant disadvantages, in addition to significant benefits. The disadvantages generally were considered to lie in the phenomenon of the "truncated" enterprise; that is, a Canadian subsidiary established by a foreign multinational parent corporation to serve only the very limited Canadian market and unable to develop technology, know-how, or other capabilities necessary to enable it to compete effectively in export markets. Of similar concern was the belief that the high level of foreign investment could shift the development of the Canadian economy away from the direction most beneficial to Canadians. This concern was seen to be exemplified by the fact that Canada's resource sector was far more developed than its manufacturing sector.<sup>3</sup>

These concerns are reflected in the criteria which the Cabinet is required to take into account in assessing FIRA applications. The five factors enumerated in the Act are as follows:

- (a) the effect of the investment on the level and nature of economic activity in Canada, including employment, resource processing, utilization of parts, components and services produced in Canada, and exports from Canada;
- (b) the degree and significance of participation by Canadians in the business and its industry;
- (c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- (d) the effect of the investment on competition; and
- (e) the compatibility of the investment with national, industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by any province likely to be significantly affected.<sup>4</sup>

The Minister responsible for the Act is the Minister of Industry, Trade and Commerce (the Minister). The Act also provides for the establishment of the Foreign Investment Review Agency (the Agency) to advise and assist in connection with the administration of the Act.

Various enforcement provisions are contained in the Act. One of these provides that the government may seek a court order to "render nugatory" an investment made in contravention of the Act. This could include an order prohibiting the exercise of voting rights on shares, or an order requiring the divestiture of shares or property.<sup>5</sup>

In practice, the review procedure under the Act works in the following way. The Assessment Branch of the Agency reviews the application and consults with the provinces significantly affected by the investment, and also with those federal government departments whose views can be expected to be relevant.<sup>6</sup> Through this procedure, the Agency develops a preliminary view of the application and

3. See INFORMATION CANADA, FOREIGN DIRECT INVESTMENT IN CANADA (1972).

4. FIRA, *supra* note 1, at § 2(2).

5. *Id.* at §§ 19-20.

6. However, the Act prescribes definite rules of confidentiality with respect to information submitted by the applicant. See FIRA, *supra* note 1, at § 14.

then consults with the applicant to consider the matter further. The Agency may believe, for example, that the application has certain weaknesses that make government approval questionable. In such a case, the Assessment officers will consult with the applicant about possible improvements in the plans. In other cases, the officers may look for a more detailed statement as to some part of the plans only generally described in the application. In order to confirm their plans, applicants frequently undertake to own and carry on the business in a particular manner. For example, there may be an undertaking to provide prospective Canadian suppliers with an equal opportunity to bid on the enterprise's requirements for raw materials and services. When the Agency has formulated a recommendation, it is submitted to the Minister for his consideration. Once the Minister is satisfied with it, the recommendation goes forward to the Cabinet.<sup>7</sup> Under the Act, the Cabinet is required to allow the investment only if it determines that it "is or is likely to be of significant benefit to Canada." Otherwise, the Cabinet must disallow the investment.<sup>8</sup>

The Agency regularly publishes information on investment proposals approved under the Act. This includes identification of the categories or headings under which prospective benefit has been identified. Usually the published information is without details of the expected benefit reflected in the plans or undertakings. In some cases, however, the applicant gives permission to release this information. These reports provide valuable insight into the types of consideration that have operated in particular cases.<sup>9</sup> The Agency published a statement of the highlights of the Annual Report of 1982-83, in which it described the results for that fiscal year as follows:

During the fiscal year just completed, the value of planned new investment in allowed cases rose more than 89% over 1981-82 levels, to more than \$3 billion. In addition, 25,545 jobs were expected to be created and 5,670 to be saved in cases allowed in 1982-83, an overall increase of 61% over 1981-82.<sup>10</sup>

7. FIRA, *supra* note 1, at § 10.

8. *Id.* at § 12.

9. For example, the proposal by Soprema, S.A. of Strasbourg, France, to establish a new business in Quebec to manufacture and distribute specialized heavy-duty roofing products was approved. The Annual Report under the Act comments on that proposal as follows:

In addition to introducing new technology to Canada, Soprema's investment is expected to bring a number of other benefits to Canada. For example, Soprema undertook to invest \$1 million in the acquisition of land and buildings and an additional \$1 million in the purchase of machinery and equipment in Canada. Soprema will create 25 new jobs during the first two years of activity if a projected sales volume is reached, will train employees in France, and will bring its French technical experts to Canada to train Canadian personnel in the manufacture and installation of Soprema's roofing products. Soprema also undertook to provide the new business unrestricted and exclusive access to the applicant's technology and know-how, and to establish a product development laboratory in Canada. The day-to-day management of the new business will be in the hands of Canadians.

GOV'T OF CANADA, FOREIGN INVESTMENT REVIEW ACT ANNUAL REPORT 1982-83, at 4 (1983).

10. Foreign Inv. Review Agency, Gov't of Canada, Release No. F-40, at 29 (Sept. 30, 1983) [hereinafter cited as Release No. F-40].

## II. INDUSTRIAL POLICY IN CANADA

Over the past couple of years or so, the idea of an "industrial policy" has apparently become a subject of ever-increasing comment in the United States. As one writer has put it, it would appear that "all God's chill'un want industrial policy."<sup>11</sup> The version of industrial policy usually discussed is the "boost the winners, forget (or restructure) the losers" approach. The following is one description of the approach:

What people who talk about 'industrial policy' mean, if they mean anything at all (and some don't), is a new level of intervention by the government in the economy—basically, attempts by government to guide the fate of particular industries. These people say it's not enough for the government to worry about the size of the budget deficit or the money supply, and about general incentives for saving and investment. Instead, the government must be prepared to roll up its sleeves and get its hands dirty promoting or discouraging particular industries, or even particular firms. Most industrial policies involve some scheme for government investment in America's faltering 'basic industries' (steel, rubber, machine tools) in exchange for a government role in 'restructuring' those industries. Most also involve an attempt to boost the high-technology 'sunrise' industries (semi-conductors and the like) that are said to populate our future.<sup>12</sup>

There are certainly some parallels between the recent U.S. discussion of industrial policy and the Canadian debate. One principal difference is that the Canadian debate has been going on far longer, since at least the early 1970s. The following description identifies the factors that were at work over the past two decades, leading to Canadian concerns about the need for an industrial policy for Canada:

By the early Seventies . . . observers began to feel that Canadian optimism about the country's economic future bordered on complacency. Basic social and economic changes in Canada and in its principal trading partner, the United States, dramatically undermined Canada's traditional approach to economic policy. These changes affected the resource sector and, most significantly, the manufacturing sector. . . .

As a result of these pressures, the late Sixties and early Seventies saw a general recognition that inelasticity of supply factors, and other costly developments, required a much more careful and considered allocation of resources. New and more

11. Kaus, *Can Creeping Socialism Cure Creaking Capitalism?*, HARPER'S, Feb. 1983, at 17. On industrial policy in the United States, see, for example, Rohatyn, *The State of the Banks*, N. Y. REV. BOOKS, Nov. 4, 1982, at 3, 8 (includes a call for the "creation of a modern version of the federal Reconstruction Finance Corporation of the 1930s") and R. REICH, *THE NEXT AMERICAN FRONTIER* 275-76 (1983) (calling for "[P]olitical institutions capable of generating large-scale compromise and adaptation . . . [and] a national bargaining arena for allocating the burdens and benefits of major adjustment strategies. . . . It would enable government, business, and labor to fashion explicit agreements to restructure American industry.") For an example of the criticisms of the call for an industrial policy, see Stein, *Don't Fall for Industrial Policy*, FORTUNE, Nov. 14, 1983 at 64, 74 ("In principle, industrial policy might contribute to economic growth if it fostered the movement of labor and capital to more productive and progressive industries. But in practice the Corporate-Union Welfare State would almost certainly do the opposite.")

12. Kaus, *supra* note 11, at 17.

complex kinds of decisions were necessary to minimize, for example, foreign debt and foreign investment, to economize on expensive and finite natural resources, and to distribute development to underdeveloped regions. The objectives and criteria in forming such choices would according to some observers be the essential elements of an industrial strategy. For example, the Gray Report on foreign direct investment in Canada referred repeatedly to the need for an industrial strategy for Canada, to guide the decisions of the screening agency which it recommended to regulate new foreign investment. Furthermore, commercial and exchange policies would be amongst the instruments of such a larger strategy as would additional micro-economic policies focused on particular supply factors other than foreign capital.<sup>13</sup>

Despite the perceptions of the early Seventies, no such far-reaching industrial strategy has ever been formulated and implemented in Canada. One factor standing in the way of the formulation of any such policy has been said to be the problem of regional diversity in Canada.<sup>14</sup> The importance of federal political and bureaucratic opposition has also been noted.<sup>15</sup>

13. R. FRENCH, *HOW OTTAWA DECIDES* 93-94 (1980). The Gray Report discussed in French's description is the report of a working group on foreign investment policy established by the Government of Canada and chaired by the Honourable Herb Gray, P.C. M.P. The report was published by the Government of Canada in 1972. It contained a number of proposals which were subsequently developed and incorporated into the Foreign Investment Review Act.

14. See M. JENKIN, *THE CHALLENGE OF DIVERSITY: INDUSTRIAL POLICY IN THE CANADIAN FEDERATION* 25-26 (1983). Jenkin explains:

Canada is geographically large, as well as socially and economically diverse. Since its creation it has had an industrially developed centre which has been primarily reliant on the domestic market, and a series of resource—or staples—producing regions on the periphery, largely dependent on exports. As a result, different patterns of economic development and interests have evolved, with provincial governments becoming the natural focus for those interests. This has turned the issue of industrial strategy into one involving territorial-political conflict . . . support for one industry or one firm is seen as support for one region or province rather than another.

*Id.*

15. See *id.* at 160. This factor has been summarized as follows:

The more elusive political problems of federal industrial strategy relate, as Richard French has noted, to two problems: first, the political risks for a government when it proclaims goals for which it can be held accountable; and second, an ingrained hostility in the upper reaches of the federal bureaucracy to the concept of industrial strategy. French argues that most political systems are averse to risk. Faced with a policy that has uncertain prospects, but which creates high public expectations, politicians will lose their resolve without significant outside support or pressure. The shrinking away from commitments to industrial strategy by the federal government in the early 1970s make this clear. According to French, this withdrawal has been compounded by a hostility to the more positive, or dirigiste, proposals for industrial strategy centred in the Department of Finance and in senior levels of the IT&C [Federal Department of Industry, Trade and Commerce].

Opposition was partly ideological and partly policy oriented; in the case of the Finance Department, it was an objection to the interventionist nature of industrial-strategy proposals which originated in the PCO [Privy Council Office] in the early 1970s. The Finance Department, in keeping with its role and the chief exponent, until recently, of Keynesian economic orthodoxy, preferred a mainly tax-based system which relied on the market and was largely neutral in its effects on individual firms. IT&C, on the other hand, opposed interventionism because the PCO's emphasis on a coherent and rational selection of priority sectors and firms ran against its traditional policy making approach which was largely incrementalist and designed to support industry evenly on a sectoral basis. This position also largely supported

The lack of steady progress towards a national industrial policy is, of course, not universally viewed with regret.<sup>16</sup> While the notion of an overall industrial policy may not be alive and well and thriving, it would be premature to announce the demise of industrial policy as an armory of related industrial strategies. In November of 1982, some news releases suggested that the Government of Canada shortly would move to unveil an industrial strategy that would target sectors of the economy for support in expansion efforts. The automobile and aerospace industries were said to be the targets of the new strategy.<sup>17</sup> The accounts indicated that other sectors were also being looked at as possible targets, including the petrochemical and forest products industries. A rail transportation strategy was said to be in place, and work apparently was underway for a strategy for the fishing and shipbuilding industries.<sup>18</sup> Other reports shortly after this indicated that the government would also consider the adoption of a "high-tech" industrial strategy before the end of 1982. Its possible key ingredients were to be richer tax incentives for research and development by industry and a campaign to promote technological changes to increase productivity.<sup>19</sup>

---

the status quo in terms of both the location of industry and the process of industrial adjustment.

The result of the opposition was an approach to industrial policy that was, in French's view, incrementalist, centralist and continentalist. Incrementalist in its reluctance to pick particular sectors or firms for special attention, centralist in its status quo approach to industrial location which inevitably favoured the further concentration of industry in central Canada, and continentalist in its continued reliance on primary markets which de facto accepted Canada's heavy dependence on U.S. trade and investment.

*Id.*

16. See, e.g., J.M. Bliss, *The Evolution of Industrial Policies in Canada: An Historical Survey 31-32* (Feb. 23, 1982) (discussion paper presented for the Economic Council of Canada). Bliss's judgment displays an attitude of what might be called melancholy relief:

With the possible exception of the brief period after World War II, when a broad consensus existed among Canadian policy makers in the context of a particularly favourable historical situation, there has been little unity or coherence to Canadian industrial policy. Policies have sometimes been contradictory, sometimes complementary, sometimes simply confused. Whether they have succeeded or failed, on balance, cannot be determined. Some specific policies have certainly been disastrous failures. Perhaps it is time to ask whether the burden of proof in evaluating a policy ought to remain on the side of finding failure. Which Canadian industrial policies, if any, can be proven to have been clearly successful? Is Canadian prosperity a legacy of visionary, effective government economic management, or is it testimonial to the triumph of Canadian resources and enterprise over political mismanagement? Perhaps the net effect of Canadian industrial policies is to have made the Canadian people poorer than they would have been had they been far less governed. It is unlikely, given the record of the past, and given the plurality of interests composing modern Canada, that there can ever be a single Canadian industrial policy. . . . In the realm of industrial policy, as in so many other areas of our national life, we have to learn with diversity, ad hocery, and a certain amount of disorder.

*Id.*

17. See Walkom, *Lumley targets strategy plans for two sectors*, *Globe and Mail*, Nov. 10, 1982, at B1 (Hon. Edward Lumley has been the Minister of Industry, Trade and Commerce since September 1982).

18. See *id.*

19. See Lewington, *Cabinet may be shown hi-tech plan by year-end*, *Globe and Mail*, Nov. 16, 1982, at B1.

By March 1983, only four months later, the government apparently had decided that the prospects for a large-scale industrial strategy were not promising. According to press reports, the Minister of Industry, Trade and Commerce indicated that the government would restrict its involvement in industrial development to situations where it was clear that the private sector wanted government involvement.<sup>20</sup> This, however, was not the end of the industrial strategy story: press reports spoke of the prospect of a "secret, interventionist push by [the Minister's] department in support of the private sector."<sup>21</sup> Reports indicated that the Minister was looking forward to receiving reports from industry and labor task forces that he had set up to study the automotive, aerospace, oil, and chemical industries. While the collection of sectoral strategies produced by these task forces would be a kind of industrial strategy, the indication was that the Minister was not planning to work on a more comprehensive and grand-scale industrial strategy.<sup>22</sup>

### III. FIRA AS A VEHICLE FOR INDUSTRIAL POLICY

While the debate on an overall industrial policy for Canada has followed its wandering and fitful course since the early 1970s, the Foreign Investment Review Act has remained in place and the number of investment cases decided under it has steadily increased to well over 4,500 cases. The Act has frequently been the subject of domestic controversy. It has also been the focus of considerable tension with the United States. This tension reached its height in early to mid-1982, but has since abated in very large degree. The reduction in tension clearly derives from the efforts of the Canadian government to streamline the operations of FIRA. The results of these efforts are described in a November 1982 report: "Foreigners are finding it twice as fast and twice as easy to invest in Canada."<sup>23</sup> One year later, in its Annual Report on FIRA for 1982-83, the Agency released a statement of the highlights which included the following comment: "Of the 984 applications decided in 1982-83, 94 percent were allowed and six percent were disallowed."<sup>24</sup>

At the time of the writing of this article, it appears that FIRA has reasonably good prospects to continue operating at this relatively "benign" level, notwithstanding the possibility of a change in the leadership of the Government of Canada. In these circumstances, it is timely to consider the effectiveness of FIRA as a vehicle for industrial policy. This assessment requires attention to three different aspects of FIRA: the industrial policy or policies which it implements, the process of implementation, and the role of the implementing authority.

20. See Walkom, *Industrial Strategy dead, Lumley says*, *Globe and Mail*, Mar. 30, 1983, at 8.

21. Silversides, *Lumley adds new fuel to the flames on future of an industrial strategy*, *Globe and Mail*, Apr. 11, 1983, at B1.

22. See *id.*

23. *FIRA's rejections are halved, proposals handled doubled*, *Globe and Mail*, Nov. 9, 1982, at B6.

24. Release No. F-40, *supra* note 10, at 30.



## A. The FIRA Industrial Policies

### 1. The Statutory Criteria

The Gray Report<sup>25</sup> contemplated the need for an industrial policy for Canada to provide a proper basis for the making of decisions on individual cases under FIRA. In view of the absence of any such overall policy, a question arises as to how decision making under FIRA can proceed on any adequate basis. One response to this may well be that the statutory criteria enshrined in the Act provide a type of industrial policy. It may certainly be argued that any industrial policy, whatever its specific terms, would aim to maximize the types of benefits identified in the criteria, with the possible exception, to be considered later, of Canadian ownership.

The statutory criteria, however, fall short of the usually assumed prerequisites for an articulated industrial policy in a number of respects. They are relatively general in their terms and, perhaps more importantly, there is no order of priority set out for them. Related to this is the fact that there is no rule established for making a determination when the result in a particular case is negative with respect to one criterion and positive with respect to another, either as a general matter or with respect to any specific industry or industry sector. The usual reason advanced for this situation is that the FIRA review process is intended to be, and is administered as, a case-by-case process, and in each case the positive and negative factors are weighed within the context of the particular business and its industry to determine whether, in the judgment of the Cabinet, there is a prospective "net benefit."

The statutory criteria do not explicitly favor investment in any particular industry or industry sector. It has been observed, however, that it is difficult to see any "natural" application for the criteria in some investment areas, such as the rental real estate business. As a practical matter, this has not prevented the government from approving investments in areas with apparently only marginal potential for significant benefit. Indeed, in the real estate area, the government has effectively exempted smaller transactions and has indicated a general disposition to allow larger investments, except where they would adversely affect the level of residential rents.<sup>26</sup>

The use of the word "significant" in the Act's "significant benefit" test<sup>27</sup> might be thought to imply some additional, general test that the prospective benefit must be of major proportion in comparison to the general level of economic activity in Canada. Since the vast majority of the cases submitted for review under the Act have a proportionally small impact, any interpretation of this type would lead to the disallowance, on a massive scale, of foreign investment proposals. The government has never taken this approach to the test. On the contrary, the approach has been that the proposed investment should be able to

25. See *supra* note 13.

26. See House of Commons Comm., Standing Comm. on Finance, Trade & Economic Affairs, Issue No. 44, at 29 (May 6, 1975).

27. FIRA, *supra* note 1, at § 2.

show some prospective net improvement over the existing situation that, in comparison with the existing situation, is "significant." For example, a prospective increase in employment in the target business of, say, 15 percent over its existing employment could well be considered "significant" even though that might mean an addition of only three new employees in a business which had previously employed 20 persons. This "incrementalist" approach to the significant benefit test has been characteristic of the review process from the outset of the Act.

## 2. Canadianization

An important part of the rationale for FIRA has been the theory that foreign-controlled firms in Canada have a relatively greater lack of responsiveness to domestic Canadian economic concerns than Canadian-owned enterprises. For this reason, the legislation focuses on foreign control as the jurisdictional basis for the application of the Act's requirements. Moreover, the criteria for significant benefit under the Act specifically address "the degree of participation by Canadians."<sup>28</sup> This has been taken, in the administration of the review process, to include the degree of Canadian equity ownership and the degree of Canadian management autonomy in the enterprise. Indeed, during one period of the administration of the Act—principally from 1980 to mid-1982—undertakings by foreign investors to increase the degree of Canadian equity participation in the acquired enterprise played a particularly important part in approvals under the Act.

The need to undertake commitments of this type has been a source of irritation to foreign investors; it has been alleviated only in part by the government's willingness to allow such undertakings to be qualified by allowing the achievement of the desired level of Canadian participation over a period of three to five years and conditioned upon the foreign investor receiving "fair value" for the disposition of the equity interest in favor of Canadian investors. Since mid-1982, as part of the comparative relaxation of the administration of the Act, less importance has been placed by the government on receiving such Canadian ownership undertakings.<sup>29</sup>

Since the jurisdictional application of the Act is premised upon foreign control, the existence of the Act encourages greater Canadianization. Foreign investors who wish to avoid the uncertainties, the time, and the cost of the review process have the alternative of structuring their investment to include a Canadian partner or joint venturer so that the investment can be considered "Canadian-controlled." In a number of cases, the foreign investor has agreed to take not more than 49 percent of the equity in the corporate vehicle to be used for the transactions, with the Canadian-controlled partner taking the 51 percent majority position. Such an arrangement is ordinarily sufficient to avoid the application of

28. *Id.* at § 2(2)(b).

29. There are certain exceptions to this, particularly in the oil and gas industry. *See infra* text accompanying notes 31–33.

the Act, provided, of course, that there are no ancillary arrangements which would erode the sole control constituted by the 51 percent holding.<sup>30</sup>

There is little documentation on the extent to which enterprises carrying on business in Canada or seeking to make acquisitions in Canada have resorted to Canadianization in order to avoid FIRA and thereby enhance their tactical effectiveness, but observers of the operation of the Act generally feel that there has been an important incidence of Canadianization efforts which would not have occurred in the absence of the Act.

### 3. *Specific Industrial Policies*

The Act makes it clear that specific government policies are to be taken into account in the review process.<sup>31</sup> One of the most important of these is the National Energy Program announced by the Government of Canada in October 1980, which states the government's objectives in the oil and gas industry. The two principal objectives of the National Energy Program which FIRA has been used to further are the achievement of 50 percent Canadian ownership of the industry by 1990 and the enhancement of exploration and development in the industry, particularly in Canadian frontier areas.<sup>32</sup> There have been fewer FIRA allowances in the oil and gas industry, presumably on account of the rigorous application of these objectives. It appears that during the recent relaxation of FIRA, oil and gas acquisitions have continued to present more exacting standards to the foreign investor than investments in other areas of the Canadian economy.<sup>33</sup>

There are other areas where specific industrial policy concerns of the government seem to affect the outcome of the FIRA review process, although these policies are not as explicit as the National Energy Program. One of these areas is what might be described as the "culture industry," including print and other media. While there is no single enunciated statement on the application of FIRA to acquisitions in this area, it is generally accepted that the thrust of Canadian government policy is heavily against foreign ownership in the industry. Cases decided under FIRA bear this out.<sup>34</sup>

30. If there are arrangements which have the effect of sharing the control of the enterprise between the foreign minority investor and the Canadian majority investor, the arrangement will be considered to constitute "control by a group" in which one member of the group is foreign-controlled. Generally speaking, such mixed-controlled ventures are reviewable under the Act. See FIRA, *supra* note 1, at § 8.

31. *Id.* at § 2(2)(e).

32. See Lacasse, *Legal Issues Relating to the Canadian National Energy Program*, 16 VAND. J. TRANSNAT'L L. 301, 302-06 (1983).

33. In September 1982, the Government of Canada approved the Getty Oil acquisition of Canadian Reserve. This major oil and gas acquisition was part of a larger acquisition by Getty of Reserve Oil and Gas of Denver. The undertakings which Getty Oil gave to the government included commitments to achieve 50 percent Canadian ownership of the combined Getty/Canadian Reserve enterprise within five years and to carry out over \$1 billion of exploration and development over a ten year period. Foreign Inv. Review Agency, Gov't of Canada, Release No. F-66, at 1 (Sept. 13, 1982).

34. For example, the acquisition by Dow Jones & Company, Inc. of New York, of Irwin-Dorsey Ltd. of Ontario was rejected twice, first in December of 1976 and subsequently in January of 1979. On February 14, 1984 the Globe and Mail reported the rejection of two proposals out of a group of 22;

Another area of this kind is the high-technology field. It appears that the government is principally concerned with protecting the computer service industry in Canada, both as a matter of enhancing high-technology development in the country and ensuring the integrity of Canadian data bases.<sup>35</sup> The Canadian government has provided critically important sponsorship of the development of computer-related systems such as Telidon,<sup>36</sup> and it is generally assumed that a FIRA application that had the potential to erode the prospects for such systems would have a very difficult time in the FIRA review process.

In some cases, industrial policy seems to be developed on an ad hoc basis by the government in response to specific FIRA applications. One case that seems to exemplify this type of development, and caused concern on this score, was the Coca-Cola acquisition of the Canadian operations of Columbia Pictures Industries, Inc. as part of the takeover of Columbia in the United States. In that case, it was reported that following the announcement of the proposed acquisition, the Canadian Department of Communications launched efforts to block the acquisition, employing policy objectives that had not previously been enunciated.<sup>37</sup>

Another area where the existence of the FIRA process brought to light policy concerns of general application in an industry sector is the distribution business. In cases where foreign manufacturing companies have sought to establish controlled distributorships in Canada, they have frequently had the impression that the government viewed distribution as an activity that should be left to Canadian-controlled businesses unless the foreign investor demonstrated some special need for foreign control or showed a prospect of significant upgrading of the Canadian business, for example, through assembly or manufacturing activities in Canada.<sup>38</sup>

one of the rejected proposals was that of National Publishing Group Ltd. of Tulsa, Oklahoma, to establish a business at Toronto to publish and distribute a monthly wedding guide. See 20 *Foreign plans allowed by Ottawa*, *Globe and Mail*, Feb. 14, 1984, at B5.

35. See Hayden, *FIRA's Effect on the Computer Industry*, in FOREIGN INVESTMENT IN CANADA (P-H, Canada) ¶ 2,034 (Oct. 31, 1983). Hayden comments:

Canada has over 265 computer service bureau businesses which are mostly Canadian-owned. FIRA approval for foreign investors in this area is difficult to obtain. Canada has over 200 businesses which offer computer consulting service. Most of these are Canadian owned. It is also difficult to get FIRA approval in this area. . . . The most frequently approved applications in the computer service area are those related to packaged software. . . . Applicants who offer to manufacture computer hardware in Canada will be reasonably well received by the Agency.

*Id.*

36. Telidon is an interactive television-related communications system.

37. See Valpy, *Legally Hollow*, *Globe and Mail*, Sept. 18, 1982, at G1.

38. In July 1981, the Honourable Herb Gray, then the Minister of Industry, Trade and Commerce advised William Brock, United States Trade Representative, that at that time the Government of Canada had reviewed 225 investment proposals involving the establishment of importing and retailing businesses and had allowed 200 of those proposals. Mr. Gray stated that "these facts certainly do not support the contention that the Act is being used to block the establishment of U.S. or other goods into Canada." *Foreign Inv. Review Agency, Gov't of Canada, Release No. F-174*, at 2, 3 (Aug. 4, 1981).

## B. The Review Process Under FIRA

### 1. The Limited Scope of the Process

The FIRA review process applies only to foreign-controlled companies; Canadian-controlled enterprises are free to invest and expand as they wish without applying to the Agency. This means that the potential of FIRA as a vehicle for the implementation of an overall industrial policy is severely limited.

Even within the limited realm of foreign investment transactions, the scope of the Act is restricted. It applies only to acquisitions of control and to expansions into new and unrelated businesses. It does not apply to acquisitions of additional ownership interests where the acquisition would not result in a change in control.<sup>39</sup> In addition, it does not apply to an expansion by a foreign enterprise already carrying on business in Canada into a line of activity related to its existing business. For example, a proposal by a foreign-controlled company to make major capital expenditures on new plant or other facilities in its existing line of business would not be reviewable.<sup>40</sup> Consequently, a great deal of foreign investment in Canada falls outside the ambit of the Act.

The Act does not cover other forms of foreign business investment or activity in Canada that might be important to the Canadian economy. For example, agreements between foreign and Canadian businesses for the licensing of technology are not subject to review under the Act.<sup>41</sup>

While the process is limited as described above, it is not limited so as to apply only to transactions of major size or to transactions in sectors considered to be especially sensitive. Transactions of any size are theoretically subject to review, and the vast majority of the cases reviewed are comparatively small in terms of the investment amounts involved and their potential impact. The burden which this places on the government and investors alike has been alleviated considerably by the Agency's adoption of "streamlining" measures, which have reduced the paperwork and review time involved in these applications. Although these expediting measures generally operate well, they do not entirely eliminate the necessity of dealing with the Agency and that inevitably adds a complicating factor to transactions, and can be a source of irritation to investors.

39. The FIRA provides in effect that an acquisition of more than 50 percent of the voting shares of a corporation by a person who already had control in fact of the corporation at that time is not a reviewable acquisition of control for purposes of the Act. See FIRA, *supra* note 1, at § 3(3)(d).

40. See *id.* at § 8(2). This section requires an application to be made in respect of a proposal to establish a new business in Canada only where the new business would not be related to a business already carried on in Canada at the time by the person proposing the new business. In the Throne Speech in mid-April of 1980, the government stated that it would broaden the mandate of FIRA to include "performance reviews of how large foreign firms are meeting the test of bringing significant benefits to Canada." Gov't of Canada, House of Commons Debates, 32d Parl., 1st Sess., Apr. 14, 1980, at 6. The statement did not say what form this promised broadening of FIRA's mandate would take. One possibility was that the government was considering eliminating the exemption for related businesses in cases of major new capital projects. The government subsequently announced that it would not proceed with this proposed reform of FIRA. See GOV'T OF CANADA, ECONOMIC DEVELOPMENT FOR CANADA IN THE 1980s, at 13 (1981).

41. The Gray Report identified licensing and other contractual arrangements as a further type of foreign "investment" which could be included in the scope of the review process. See R. FRENCH, *supra* note 13, at 466.

The application of the Act is essentially reactive; that is, the Act only comes into play after a foreign investor has decided upon a proposed investment. The Act does not establish any mechanism for the government or the Agency to seek out foreign investors or foreign investment proposals which might yield the kinds of benefits contemplated under the Act. On the other hand, nothing in the Act would preclude the government from undertaking such an effort or from using the Agency in that effort. The possibility of adapting or supplementing the existing administration of the Act with such a "pro-active" effort to locate and bring new foreign investment into Canada has been the subject of increasing comment.<sup>42</sup> It also appears to be something which the government is actively considering. At a conference of international business representatives in Davos, Switzerland, the Commissioner of the Agency commented that the Agency proposes to communicate with investors who have had previous dealings with the Agency to explore with them whether they might consider developing new Canadian investment proposals.<sup>43</sup>

## 2. The Approval Format

The FIRA review process leads to only one of two results for the investor, either allowance of the investment, or disallowance. There are no financial or other incentives tied to the review process, although investors may independently qualify for one of the various forms of assistance that may be available under other government programs.<sup>44</sup> In the minds of some investors, this inevitably gives the process a "no-win" aspect. The best the investor can do is to get approval to carry out the plan he originally had in mind. With less luck, the

42. See, e.g., Spence, *FIRA: A Decade of Evolution*, in *FOREIGN INVESTMENT REVIEW LAW IN CANADA* 315, 340 (J. Spence & W. Rosenfeld eds. 1984). The author states:

By late 1982, it seemed timely to wonder whether FIRA's role could be expanded or supplemented to include a positive effort to seek out and encourage foreign direct investment in Canada of the type that would be beneficial. While such efforts are no doubt engaged in by various government departments, federally and provincially, a question could fairly be asked as to whether these efforts could be coordinated as part of a foreign investment development program in which FIRAs could plan an important and positive role. One year later, the question remains outstanding. One alternative would be to give the Agency a mandate to initiate efforts to seek foreign investors who could tap identifiable investment opportunities in Canada in a manner beneficial to Canada.

*Id.*

43. See *FIRA Head warms tone in pitch to executives*, *Globe and Mail*, Feb. 4, 1984, at 1. The report states in part as follows:

As his next step in taking the fear out of FIRA, Robert Richardson, Commissioner of the Foreign Investment Review Agency, is considering getting in touch personally with investors who were hassled under the old regime and asking them to try again. Mr. Richardson, who has headed the Agency since the fall of 1982, is pushing the Canadian Government's softened line on foreign investment at this gathering of businessmen and bankers.

*Id.*

44. During the 1980 election campaign, Mr. Trudeau, as leader of the Liberal Party, stated that "FIRA will help provide financial assistance to Canadian companies that want to compete for foreign takeovers or repatriate foreign ownership of assets." *Trudeau Industry Plan: Play our energy card*, *Toronto Star*, Feb. 13, 1980, at A10. The government subsequently decided not to proceed with this proposal.

investor can obtain approval, but at the cost of onerous commitments relating to new investment, expenditures on research and development, increased Canadian ownership, or other matters.

Since the review process operates at the time an investment proposal is initiated without continuing financial or other support, the decision to allow the investment inevitably must be made on the basis of estimates of the future conduct of the investor. This future conduct may not be readily controllable. The foreign investor may, in good faith, undertake to achieve certain levels of capital expenditure and research and development expenditure in Canada on the assumption that a targeted level of sales can be achieved. If market circumstances change and the target becomes unattainable, however, the government may be able to do very little. First, the undertakings of the investor may have been expressly conditioned on achieving the target level. In that case, the government simply could not enforce the undertaking. Even if the undertaking were not so conditioned, the foreign investor would no doubt take the position that he cannot do the impossible, and government may have little recourse. The Act makes undertakings given under the Act enforceable by a court,<sup>45</sup> but a court might well have difficulty granting an enforcement order framed in positive terms. An order framed in negative terms—enjoining the company from carrying on business until it can comply with the undertaking—may do more damage to the Canadian economy than allowing the business to continue at a greatly reduced performance level. So far, the Agency has not taken any foreign investors to court to seek performance orders with respect to their undertakings. It appears instead that the Agency has negotiated new undertakings with the investors that address the changed economic circumstances. This, of course, can be another source of irritation: the prospect of renewed rounds of negotiation with the government into the indefinite future.

### 3. Provincial Representations

When assessing a FIRA application, the government is required to take into account “industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected.”<sup>46</sup> In practice, the Agency regularly consults with the province that will be significantly affected by the proposed investment. The federal government, however, does not consider itself bound to act in accordance with representations of the provinces. This is not to say that the consultation process is a mere formality. On the contrary, while provincial input will not necessarily determine the outcome of any case, it can be a very significant factor. It appears such input is particularly important when the province expresses a strong regional policy and there is no offsetting, incompatible federal policy. For example, it is well known that the Atlantic provinces of Canada generally welcome any additional foreign invest-

45. Section 21 of the Act provides that where a person has given a written undertaking in connection with an allowed FIRA proposal and fails or refuses to comply with the undertaking, a court may make an order directing the person to comply. FIRA, *supra* note 1, at § 21.

46. *Id.* at § 2(2)(e).

ment in the region, and there is a related general impression that FIRA applications affecting the Atlantic region are seldom turned down. On the other hand, a FIRA application in the oil and gas industry which has no potential to meet the standards of the National Energy Program would not stand much chance of approval, even with the most enthusiastic support from one or more of the provincial governments in western Canada.

The Agency has been reluctant to become involved in any type of bidding war between provinces for prospective new investment. Traditionally, a FIRA application has included information as to the place where the investor proposes to locate the business. The FIRA officials do not seek to encourage location in a different province. Presumably, the reason for this policy is to prevent the Agency from becoming a captive in inter-provincial competition for new investment. It will be interesting to see whether the Agency is able to maintain this independent position if it launches upon a new initiative to seek out and encourage new foreign investment in Canada.

#### 4. Lack of "Transparency"

The FIRA review process has been criticized by both foreign and domestic observers for what is frequently called its lack of transparency. This criticism refers to three features of the process. First, as described above, there are very few specific criteria to determine significant benefit. Consequently, the process is regarded as highly subjective and discretionary, and therefore lacking in a necessary minimum level of predictability. Second, the process is an informal one in which the investor only meets with representatives of the Agency. However, the Agency receives information from a variety of sources other than the investor and formulates a recommendation never seen by the investor and considered by a deciding body, the Cabinet, before whom the investor never appears. A final feature of the process that makes it susceptible to a criticism for lack of transparency is that only selected information is published about individual cases. It is therefore difficult for the public to formulate any clear view of the effectiveness of the review process.

In view of the tortuous history of industrial policy in Canada, and its uncertain status at the present time, it should not be surprising that the government has not enunciated detailed guidelines as to what constitutes significant benefit. One fairly typical expression of the government's view is the following comment made in a letter from the Honorable Herb Gray, then Minister of Industry, Trade and Commerce, to the Canadian Bar Association, responding to certain recommendations made by the Association's committee on FIRA:

There may be some merit in the Committee's suggestion for the issuance of "guidelines on a regular industry sector basis to indicate the manner in which the Cabinet or Review Agency is interpreting the significant benefit criteria in light of changing economic conditions and government policy" but it appears to reflect an oversimplified view of the economy and of the assessment process itself. Sector guidelines could not possibly deal with all of the many variables that come into play as between different proposals, even within the same industry sector, e.g., state of a



business that is being acquired, the impact on competition, the impact on technological advancement, etc.<sup>47</sup>

The suggestion that the government should seek to develop such industry sector guidelines could well lead to some unintended results. An articulated policy that satisfied all the various constituencies whose views would have to be reflected in such a policy would likely be either very bland or very restricted; certainly, an official "opening of the flood gates" to foreign investment through highly permissive guidelines would be bound to reopen the political controversy over economic nationalism in Canada. That controversy is never far from the surface in Canadian politics; it has the potential to operate as a "wild card", and seasoned politicians usually like to keep their distance from the game or to ensure that they have control over it.

The controversy over the procedural informality of the process has abated to a degree, presumably partly because the significant increase in the level of approvals over the past year or so is a satisfactory proxy for the elimination of perceived deficiencies in procedure. In addition, Agency officials are now as forthcoming as possible, without breaching confidentiality, with the other relevant information that they have on file.<sup>48</sup>

The third part of the lack of transparency criticism, that the decisions on individual cases are not well enough reported, tends to be embraced more enthusiastically by members of the press than by investors. Investors typically are happy to have as little as possible disclosed about their investment plans and the commitments that they have made in connection with those plans. Over the past year, the government has generally divulged far less information about individual cases than before. The Agency currently reports levels of committed benefits only in aggregate terms and not on a per-transaction basis; this certainly preserves investor confidentiality but does little to accommodate the concerns of those who would like to have a public basis for the appraisal of the effectiveness of the Act and the Agency in specific cases.

The procedural informality of the review process is undoubtedly related to another factor: time and cost. It is at least arguable that the present process is as "streamlined" as possible, and is far more cost-effective than a formal process would be with its attendant formal submissions and public hearings.

### *C. The Deciding Authority*

#### *1. The Role of the Agency*

As described earlier, the Agency formulates a draft recommendation on the application for the Minister to consider. In formulating that recommendation, the

47. Foreign Inv. Review Agency, Gov't of Canada, Release No. F-13, at 9 (Mar. 2, 1982).

48. As for the criticism that the investor never gets to deal with the deciding authority, this is one of many factors bearing on the question of the appropriate deciding authority. See *infra* text accompanying note 49.

Agency takes into account the information provided by the applicant about the proposed investment and the industry in which it is to be made, information supplied by sources such as government departments and interested provinces, and interventions from other interested parties who learn of the transaction. The Agency officers who formulate the draft recommendation have varied experience in business and government. They carry out their responsibilities under the direction of career public servants who must try to anticipate the likely outcome of the Cabinet deliberation, based on past experience with FIRA cases and their understanding of present government attitudes. The Agency does not disclose to the investor either the contents of the recommendation or its substance. However, discussion with Agency officials usually brings to light those areas of a proposal where the Agency has continuing reservations about the acceptability of the investor's plan. Such discussion usually also provides an indication as to any other significant reservations the Agency may have regarding other matters such as the impact of the investment on competition.

Formally, then, the Agency is not a deciding authority; indeed it is not even a recommending authority since it is the Minister who makes the formal recommendation to the Cabinet. In practice, however, the Agency's view as to the correct disposition of the case is critical to the outcome. This is partly because the vast majority of cases are small and do not warrant a call upon the limited Cabinet time available for FIRA matters. Also, over the course of the past ten years, Agency officials have developed quite an acute insight into the way the Cabinet is likely to deal with FIRA matters.

## *2. The Role of the Cabinet*

Most FIRA cases are decided by a committee of a few members of the Cabinet; only the most significant cases in terms of their controversiality or their potential impact ever get to the full Cabinet.

The Cabinet does not publish reasons for its decisions on FIRA matters. The record of decision, published as an Order in Council of the Government of Canada, simply identifies the investment proposal and records the determination made by the Cabinet.

It strikes many people as amazing that the Cabinet should be, at least formally, the decision-making authority on all FIRA cases—even, as the point is usually put, “for the opening of a hot dog stand.” It is interesting that the Gray Report did not consider which authority should have responsibility for making final decisions on the cases. There are at least two factors which seem to favor the Cabinet as the natural place to locate the ultimate decision. The first is that each case has the potential to raise government policy implications. Since these policy implications have not necessarily been reduced to any statement of government policy—indeed, they may not even have come into focus prior to the particular case being decided—it makes sense to ensure an opportunity for direct Cabinet input into each decision. Secondly, since provincial representations must be taken into account in each case, the involvement of the Cabinet ensures that representations made by Ministers at the provincial level will be received and considered by Ministers at the federal level and not simply by officials. It is quite

possible that provincial governments would be disturbed if they were not able to ensure that their representations would be heard at a ministerial level.

However, it is clear that there is a cost in Cabinet time in maintaining Cabinet involvement in FIRA decisions. The fact of Cabinet involvement also imposes a limitation on the amount of disclosure that can be made in the course of the review process. Because of the principle of Cabinet solidarity, the Agency has typically taken the position that it is not at liberty to divulge to the investor the nature of the Minister's recommendation to the Cabinet.

From time to time it is suggested that the system could be improved by shifting the ultimate decision-making authority from the Cabinet to a special tribunal, designed along the lines of the Canadian Radio-Television and Telecommunications Commission (CRTC).<sup>49</sup> If this were to be done, it would be necessary to deal with the problem of ensuring effective government policy input to the tribunal. In recent years, it has become more common for federal government tribunals to receive and act in accordance with policy directives from the government. It is generally supposed, however, that such directives will take the form of principles of general application. One example is the existing directive as to the permitted level of foreign ownership in communications companies under the jurisdiction of the CRTC. It is by no means clear that the policy involvement of the Cabinet in FIRA decisions could be appropriately limited to this type of directive. If it became necessary to ensure that the Cabinet had an opportunity for more specific policy input, this could result in Cabinet involvement on a case-by-case basis, which is the present system. The difference would be that the Cabinet might be seen to be at odds with the tribunal; that type of public dispute is usually not attractive to politicians.

The creation of a tribunal for FIRA decisions would potentially address many of the criticisms concerning lack of transparency in the process. The proceedings of the tribunal could be designed so that all submissions, whether from the investor, interested government departments, or interested third parties, would have to be submitted and considered in public by the tribunal. It is not clear, however, that any of the parties involved in the process would regard that degree of publicity as acceptable; and any lesser degree of publicity could make the process misleading and the results incomprehensible.

#### IV. CONCLUSION

Whether FIRA is an effective instrument for the maximization of the benefits of foreign investment in Canada involves questions that mix fact and policy and may admit of no final answer. On the one hand, proponents of the Act typically argue that it provides an essential technique to ensure that investment proposals

49. Mr. Michael Wilson, the Trade and Commerce critic of the Progressive Conservative Party in the House of Commons, is reported to be considering the tribunal idea as part of a number of changes to FIRA which his party would endorse. See *Fin. Post*, Feb. 1, 1984, Magazine, at 43.

that would be detrimental to Canada are not implemented and that investment proposals with beneficial potential are carried out in a manner that realizes that potential. Critics of the Act contend it intervenes in the competitive flow of investment capital and is therefore detrimental to the interests of consumers. They contend that the Act interjects government policy into matters that should be governed exclusively by business imperatives. Thus, the benefits the Act appears to elicit are largely illusory and unenforceable. Moreover, there is the continuing problem of the tension that the Act introduces into Canada's dealings with other countries, although those tensions seem, at least for the moment, to be at a manageable level.

Any assessment of the effectiveness of the Act is bound also to address domestic political considerations. Economic nationalism, as mentioned earlier, is an ever-present factor in Canadian politics. From this perspective, FIRA can be seen perhaps as a typically Canadian compromise: it does not make anyone happy, but it makes administrable what would otherwise be an intractable political issue. On this basis, one might conjecture that FIRA will continue in force, not because it is the best way to deal with the dilemma of foreign investment, but because all of the alternatives—no controls at all or inflexible across-the-board legislation—are worse. This approach would suggest that the current direction in the administration of the Act will likely continue: a “streamlining” of the process so that transactions are dealt with quickly and the high rate of approval is maintained.

It would help investors and their advisors if the government could move from its present practice of ad hoc decision making to enunciate some guidelines for the process, even if those guidelines are confined to a limited range of sectors or types of investment and are carefully framed in terms that are conditional or provisional. To date, however, the administration of the Act does not provide any hope for that kind of development. A high rate of allowance may continue to serve as proxy for that type of evolution.

Since the existence of the Act has frequently been controversial and always has the potential to be so, these comments, like all conjectures about the future development of foreign investment review in Canada, are subject to the vagaries of political change. While neither the Liberal Party nor the Progressive Conservative Party in Canada seems disposed at the moment to adopt a policy of radical change to FIRA, the possibility cannot be entirely discounted, particularly if there is renewed opposition to the Act from the United States Government.<sup>50</sup>

50. A fairly typical expression of the U.S. Government's concerns about FIRA is the following statement made in September of 1982 by Mr. Richard J. Smith, Minister in the Embassy of the United States in Ottawa:

While we have thus far been successful in resisting domestic pressures to engage in such investment's screening in the United States we do not challenge Canada's right to do so if it chooses. It is particular aspects of FIRA's operation that concern us, such as the delays, the lack of transparency, the unwarranted intrusion into the merger activities of the U.S. parents of Canadian companies. Our complaint to the general agreement on tariff and trade, for

In the context of industrial policy, the larger question is whether FIRA provides a model that can be adopted for the formation or implementation of an overall industrial policy for Canada. On occasion it has been suggested that the jurisdiction of FIRA, or of a FIRA-type authority, should be enlarged to include investment proposals by Canadian-controlled companies. The idea seems eccentric—even wildly eccentric—in terms of both the traditional and the current climate of business and political opinion in Canada. Whatever ideological support there is for FIRA, it would seem to derive from Canadian concerns about the impact of foreign investment, and there is no similarly discernible ideological consensus in favor of such controls on domestic investment proposals.

It could be argued that the National Energy Program of Canada provides a more likely model for the implementation of an overall industrial policy for Canada. This is because the program includes, as a central feature, major financial incentives for performance in the form of government grants. The experience with the National Energy Program to date, however, manifests the risks inevitably associated with such an effort. The costs of incentive programs have a potential to leap beyond the bounds of their original conceptualization. And, in a free enterprise economy, the implementation of a directly interventionist government scheme can provoke potent and continuing opposition. The government led by Prime Minister Trudeau indicated that it did not propose to institute a similar program in other industries. This was no doubt responsive to widespread investor anxieties as well as government internal concerns about the cost of such programs.

The government while it was led by Prime Minister Trudeau did not appear to have any disposition to move in the direction of a broadly-based, integrated industrial policy either employing a FIRA-type authority or a National Energy Program style of government control plus incentives. In early 1984, the government's agenda included, instead, a wide variety of measures, all of which have an impact on the making and implementing of industrial policy. These included a

---

example, relates only to FIRA's performance requirements, which threaten to distort trade patterns and undermine negotiated trade concessions.

*FIRA's operations chill investors, U.S. envoy says, Globe and Mail, Sept. 8, 1982, at 7.*

While more recent statements of U.S. government officials have not indicated that FIRA is a priority concern, it should not be assumed that this condition will continue. It is not impossible that U.S. criticism of FIRA could move in the direction of questioning whether FIRA should exist at all. This could happen if the U.S. Government were to adopt a policy in support of a new "GATT for investment" to protect the open flow of international investment around the world. *See International Investment: The Need for a New U.S. Policy, Hearings Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 6 (1981) (statement of C. Fred Bergsten).*

Recently proposed legislation on trade in services in the United States may have the potential to move in this direction. M.J. Abrams has commented that trade in services legislation would expressly authorize a U.S. response to restrictions such as those imposed under "various FIRA-related regulations." He also comments that "the two major bills on the subject make explicit that retaliatory action need not relate to the subject matter of the offending practice." *See M.J. Abrams, Proposed Legislation on Trade in Services 3 (paper prepared for the Canadian Law Newsletter, a publication of the Committee on Canadian Law, American Bar Association).*

reinvigoration of Canadian competition law,<sup>51</sup> sectoral industrial policies,<sup>52</sup> sectoral free-trade policies with the United States,<sup>53</sup> and policies to deal with direct government investment in critical sectors of the economy.<sup>54</sup> Tax policy is always

51. The Speech from the Throne in December 1983, setting forth the program of the Government of Canada for the session of Parliament commencing at that time, included the following statement:

Following extensive and continuing consultations with the private sector and the provinces, the government will introduce a new competition policy to bring market forces to bear in the continuing fight against inflation. The legislation will modernize conspiracy, monopoly and merger provisions, and promote the interests of consumers and small business through a freer market place. Amendments will also facilitate consortia to compete abroad for export sales and development projects.

Gov't of Canada, House of Commons Debates, 32d Parl., 2d Sess., Dec. 7, 1983, at 3 [hereinafter cited as Throne Speech].

A press report on the subject states: "One of the few, key issues of dispute between the government and the big business groups is believed to be the issue of pre-notification of mergers. The government wants to be advised 21 days before the consummation of a merger so that, if necessary, it can be undone." Lewington, *Ottawa waters down proposed competition reforms*, Globe and Mail, Jan. 17, 1984, at B1.

52. On the subject of sectoral industrial policies, the Throne Speech includes the following remarks:

Sectoral collaboration is at the core of the Government's industrial policy. Three business-labour task forces, on the automotive, aerospace and forestry industries, have now reported and are receiving responses. Another task force on the petro-chemical industry is under way. . . . Additional task forces are planned on information technology, private trading houses, textiles and clothing, shipbuilding and a deep-sea fleet, and selected elements of the service sector.

Throne Speech, *supra* note 51, at 3.

53. The Government of Canada published a paper in September, 1983 which according to reports, espoused a deliberate effort to move toward closer economic integration with the United States via free trade agreements in selected manufacturing sectors. In the Throne Speech, this subject was addressed in the following way:

While seeking new markets in the Pacific Rim, Europe and the developing world, we must continue to expand business and improve relations with our largest trading partner, the United States. Sectoral trade agreements with the United States will be examined in such areas as specialty steel products, urban transportation equipment, petrochemicals, textiles and clothing.

*Id.* at 2-3. A subsequent press report comments that, of the possible area for such trade agreements, "the most promising items, according to sources both in and outside government, appear to be informatics (the services carried by telecommunications equipment) and associated equipment, and agricultural machinery." Harrison, *Canada-U.S. Trade: Friendlier Noises*, Fin. Post, Feb. 4, 1984, at 22.

54. The Throne Speech includes the following statement: "The framework for the accountability and control of federal Crown corporations will be improved and a bill will be introduced to confirm in legislation the Canada Development Investment Corporation to better manage certain Crown assets." Throne Speech, *supra* note 51, at 4. The Canada Development Investment Corporation (CDIC) has responsibility for the Government of Canada's investment in Canada Development Corporation, Canadair, de Havilland Aircraft, Eldorado Nuclear, Teleglobe, and Massey-Ferguson. The Chairman of CDIC, Maurice F. Strong, has described the role of CDIC as follows: "Our role is to ensure that existing government investments in business are managed on a commercial basis in as business-like a fashion as possible, and to help reduce the government's business investments, through divestment, where this is feasible." Speech by Maurice F. Strong to Canadian Club of Toronto (Nov. 28, 1983).

an instrument that can be called on, and announcements at the time indicated a significant tax initiative in support of investment in scientific research and development in Canada.<sup>55</sup>

All of these matters are, of course, items on a particular political agenda; political agendas are always subject to change, through changes in political leadership, governing parties, or otherwise.<sup>56</sup> What remains constant are Canada's special economic circumstances. With its extensive natural resources, a developed industrial base, an educated populace, its proximity to the United States, and its lack of membership in an established trading bloc, Canada is bound to continually seek ways to position itself most effectively in the world economy. This makes industrial policy, whether in the form of a grand overall scheme or in the form of a variety of policy initiatives, an imperative of the Canadian political economy. As part of that effort, Canadians will undoubtedly seek ways to continue receiving foreign investment and to maximize the benefits of that foreign investment for Canada.

55. The Throne Speech comments that "legislation will be introduced to confirm the tax incentives for research and development announced in the April Recovery Budget." Throne Speech, *supra* note 51, at 3.

56. Subsequent to the writing of this paper, Prime Minister Trudeau resigned as leader of the Liberal party and Prime Minister of Canada and was succeeded in both capacities by Prime Minister John Turner, who took office at the beginning of July 1984. Both Mr. Turner and the leader of the Progressive Conservative party, Mr. Brian Mulroney, have made various statements favoring restricting the role of foreign investment review in Canada. A federal election was held in Canada on September 5, 1984. The Progressive Conservative party won the election and Mr. Mulroney became Prime Minister of Canada. In December 1984, the government introduced Bill C-15, known as the Investment Canada Act. The new Act was designed to repeal FIRA and established in its place a new foreign investment review procedure, similar in many respects to FIRA, but applicable only to major foreign takeovers and a limited range of new business establishments. The Act contains a different test ("net benefit" instead of "significant benefit") for approval of foreign investment. The new Act became law at the end of June 1985. See Bill C-15, 33rd Parl., 1st Sess., 33-34 Elizabeth II (1984-85).