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Canada’s Foreign Investment Review Act as a Model for Foreign Investment Regulation in the United States

by Barry M. Fisher*

Traditional U.S. policy toward foreign direct investment of "neutral-ity with encouragement" was formulated when the U.S. economy dominated the worldwide marketplace and there existed little inward investment to offset the flow of outward capital. Although the Reagan Administration advocates this policy by encouraging its adoption in America's trading partners,1 and pursues negotiating initiatives more aggressively than prior Administrations,2 it is here suggested that substantial and increasing levels of foreign direct investment in the United States merit a policy re-thinking.3 This article analyzes the level of, and legisla-

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The author wishes to thank Professor Alan Ruben of Cleveland Marshall College of Law for helpful comments on an earlier draft of this paper.

1 The President released a statement on Sept. 9, 1983, reiterating the U.S. policy that foreign investment flows "which respond to private market forces will lead to more efficient international production." To counter government intervention which it perceives to adversely affect investment flows or which attempts to artificially shift the benefits of these flows, the Reagan Administration proposes an "active international investment policy aimed at reducing foreign government actions that impede or distort investment flows." President’s Statement on International Investment Policy, 19 WEEKLY COMP. PRES. Doc. 1214 (Sept. 12, 1983) [hereinafter cited as President’s Statement]. This policy has been formulated in a Statement developed by the President's Senior Interdepartmental Group in International Economic Policy. In some ways this represents a more conciliatory and negotiation-oriented policy directive than the Administration's U.S. Trade Policy of July 1981 to "strictly enforce United States laws and international agreements." Legislation Authorizing International Trade Negotiations: Hearing before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 98th Cong., 2d Sess. 3 (1983) (quoted by David R. MacDonald, Deputy U.S. Trade Representative).


For the first 20 years of the postwar period, the United States so dominated the
tive barriers to foreign investment in the United States and proposes that the concept of a screening mechanism patterned after Canada’s Foreign Investment Review Act (FIRA) should be considered among available policy options.

I. REGULATION OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

Notwithstanding the Reagan Administration’s position that the United States accords foreign investors “the same fair, equitable and nondiscriminatory treatment it believes all governments should accord foreign direct investment under international law,” the complex U.S. legal system and extensive regulatory framework has erected a number of barriers to foreign direct investment. In addition to the Trading with the Enemy Act and laws of general application, including taxation, securities regulation and the acquisition of real property, U.S. law restricts foreign investment in the United States without regard to the short-term consequences because our domestic economy was strong enough to absorb increased imports. In the past decade worldwide inflation . . . coupled with major economic strides by the [newly industrializing countries] have significantly increased protectionist pressures. The ground we have gained by cutting tariffs has been eroded by these new practices. These developments call for a re-examination of our policy goals.


* See President’s Statement, supra note 1, at 1215.

* Elmer & Johnson, Legal Obstacles to Foreign Acquisitions of U.S. Corporations, 30 Bus. Law. 681, 698 (1975). Elmer and Johnson conclude: “Occasional fevers of nationalism and legitimate concerns for national security have created a number of restrictions and a few bars to alien takeover and ownership of domestic corporations. In addition, poorly drafted statutes encumbered by myriad modifications and amendments have left confusion in several areas.”


* For a summary of such laws, see the Operations of Federal Agencies Hearings, supra note 2, Part 5-Appendix 9, at 139-46; see also Sparkman, The Multinational Corporation and Foreign Investment, 27 Mercer L. Rev. 381-89 (1976). With respect to antitrust, securities and tax considerations, see Young, The Acquisition of United States Businesses by Foreign Investors, 30 Bus. Law. 111 (1974).

foreign investment in several ways: (1) outright prohibition; (2) the inability to secure a right or privilege or withdrawal of an existing privilege; (3) the necessity of approvals prior to action; or, (4) the imposition of requirements that are impossible, difficult or inconvenient for an alien to satisfy. These “key sector” limitations on unrestricted foreign direct investment include the regulation of communications, energy and natural resources, transportation, banking, defense and procurement.

Legal Issues and Techniques (J. Marans et al. eds. 1980) [hereinafter cited as J. Marans]; Bale, The U.S. Federal Government’s Policy Toward Direct Investment, in Foreign Investment Regulation in Canada and the United States 45-46 (Fry & Radebaugh eds. 1983); Gewanter, Legal and Financial Considerations in Acquisitions of U.S. Companies by Foreign Investors, 34th Annual N.Y.U. Institute (1973). For a detailed analysis of foreign investment patterns and limitations in the United States with an emphasis on real estate, see B. Zagaris, Foreign Investment in the United States (1980); see also Butler, The Rise and Fall of the U.S. Capital Controls, Canadian Foreign Investment Review Seminar 34 (1974); Hinton, United States Policy Toward Foreign Investment, id. at 34; Weiser, Restraints on Foreign Investments in the United States and Problems Arising from Such Investments, id. at 42.

10 Department of Commerce, Foreign Direct Investment in the United States: Report of the Secretary of Commerce to the Congress in Compliance with the Foreign Investment Study Act of 1974, at K-x to K-xi (1976) [hereinafter cited as DEP’T OF COMMERCE REPORT] (“Although there are a few marked exceptions such as insurance, states have in general afforded aliens, alien corporations and alien-controlled domestic corporations national treatment . . . . The Federal Government has pre-empted state authority and thereby modified national treatment in selected areas”). For an interesting empirical study of the effects of subnational units upon policies toward foreign investment, see Fry, Foreign Investment in Canada and the United States: The Perspective of the Provinces and the States (Sept. 30, 1983) (paper presented at the 7th Biennial Meeting of the Association for Canadian Studies in the United States, Rockport, Maine); see also States Go for Exports, Euromoney Trade Finance Report, Jan. 1984, at 27.

11 For example, the Communications Act of 1934, 47 U.S.C. § 310(a) (1976) (as amended), prohibits a station license from being granted to any foreign government or representative thereof and § 310(b) prohibits broadcast by common foreign corporations or corporations with any alien officer or directors; and, the Communications Satellite Act of 1962, (as amended), 47 U.S.C. § 734(d) (1976), prohibits the holding of more than 20 percent of the stock of the Communications Satellite Corporation by persons described in § 301(b). See also 47 U.S.C. §§ 222(d), 303(1) (1976).

12 For example, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2133(d), 2134(d) (1976) (as amended), prohibits the issuance of licenses to aliens; and, the Mineral Leasing Act of 1920, 30 U.S.C. § 22 (1976) (as amended), provides that all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found open to occupation and purchase by citizens of the United States and those who have declared their intention to become such, and § 181 provides that citizens of a country other than the United States, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of the United States, shall not by stock ownership, holding or control, own any interest in any lease acquired under the Act. See also the Continental Shelf Lands Act Amendment of 1978, 43 U.S.C. § 1331 (1976); the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1821 (1982) (as amended) (prohibits foreign fishing within the “fishery conservation zone”); the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1976) (no tract of land may be disposed of under the Act to any person who is not a citizen of the United States, or in the case of a corporation is not subject to the laws of any State or of the United States); the
United States policy favoring the free flow of investment capital and trade was tailored to domestic economic realities existing at the time of its formulation. The policy dealt almost exclusively with outward capital flow at a time when the United States exported large amounts of investment capital and faced little inward investment. As an example of U.S.


For example, the Federal Aviation Act of 1958, 49 U.S.C. § 1401(b) (1976) (as amended), provides that an aircraft shall be eligible for registration if, but only if, it is owned by a citizen or permanent resident of the United States and not registered under the laws of a foreign country. The Shipping Act of 1916, 46 U.S.C. § 808 (1976) (as amended), provides for the registration, enrollment and licensing of vessels by citizens of the United States. For instance, § 835(c) prohibits during a national emergency the issuance, transfer or assignment of indebtedness secured by a mortgage of a vessel to a non-citizen unless approved by the Secretary of Transportation; § 835(e) prohibits the vesting of control of a corporation owning a vessel or facilities in a non-citizen; § 883 requires merchandise transported by water between points in the United States to be carried by vessels built in and documented under U.S. laws and owned by its citizens; § 1132(a) requires all licensed officers of vessels documented under U.S. laws to be citizens; and, § 1171(a) limits financial aid in the operation of a vessel used in an essential service in the foreign commerce to U.S. citizens. The Tariff Act of 1930, 19 U.S.C. § 1641(a) (1982) (as amended), provides for the licensing of citizens of the United States as customs house brokers.

For example, the Banking Act, 12 U.S.C. § 72 (1982) (as amended), requires that every director must, during his whole term of service, be a U.S. citizen; and a majority of the shares of an Edge Act corporation must be owned by U.S. citizens or corporations controlled by U.S. citizens under 12 U.S.C. § 619. See also The Operations of Federal Agencies Hearings, supra note 2, Part 4—Foreign Investments in U.S. Banks.

The Industrial Security Program formulated by Exec. Orders No. 10,450, 3 C.F.R. 55 (1973), No. 10,865, 3 C.F.R. 83 (1973), and No. 11,652, 3 C.F.R. 375 (1973), and Department of Defense Regulation 5220.22-R inhibits security clearances for foreign controlled corporations required to carry out classified contracts; see also the Defense Production Act, 50 U.S.C. App. § 2071 (1956).

For example, the Buy American Act of 1933, 41 U.S.C. § 10(a) (1976), provides that unless inconsistent with the public interest or at unreasonable cost, only such unmanufactured articles, materials and supplies as have been mined and produced in the United States from such supplies shall be acquired for public use (see also 41 C.F.R. § 1-6.104); the Agricultural Credit Act of 1978, 7 U.S.C. §§ 1922, 1941 (1982) (as amended), provides that the Secretary of Agriculture is authorized to make and insure loans to farmers and ranchers that are U.S. citizens; the Electric Hybrid Vehicle Research, Development and Demonstration Act of 1976, 15 U.S.C. § 2509(f) (1982), provides that an applicant seeking a guarantee under the section must be a citizen or national of the United States; and, the Foreign Assistance Act of 1979, 22 U.S.C. § 2198(c) (1982) (as amended), defines “eligible investors” as U.S. citizens, U.S. corporations, or foreign corporations wholly-owned by U.S. citizens.

legislation supporting this policy, the Interest Equalization Tax Act\(^8\) imposed an excise tax on purchases by U.S. persons of foreign securities in an attempt to discourage foreign use of domestic capital markets.

II. U.S. CONGRESSIONAL RESPONSE TO SIGNIFICANT INCREASES IN THE LEVEL OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES IN THE 1970's

The level of foreign direct investment in the United States grew at an annual rate of 4.1 percent from 1962 to 1967, 8.6 percent from 1968 to 1972, and then blossomed to 38.3 percent and 22.3 percent in 1973 and 1974 respectively.\(^9\) The primary reason for the increase was the investment potential of petrodollar reserves generated by the 1973 oil price increases. The 1973 oil shock precipitated a U.S. government review of its policy toward foreign direct investment.\(^20\) The concern over the significant increase in the level of foreign direct investment in the United States resulted in several congressional hearings\(^21\) and legislative initiatives.\(^22\) The realization that the reporting base for Department of Com-


\(^22\) For example, H.R. 8951, 93d Cong., 1st Sess. (1973) and H.R. 11,265, 93d Cong., 1st Sess. (1974), entitled the Foreign Investors Limitation Act, would have restricted foreign persons from acquiring more than 5 percent of the voting securities or more than 35 percent of the non-voting securities of publicly held U.S. corporations. For a summary of the legislative proposals of the 93d Congress, see Note, U.S. REGULATIONS OF FOREIGN DIRECT INVESTMENT: CURRENT DEVELOPMENTS AND CONGRESSIONAL RESPONSE, 15 VA. J. INT'L L. 611 (1975). The Note concludes that while a re-examination of policy was required, there was, at the time, no demonstrated need, based upon available information as to the extent of foreign direct investment in the United States, for the legislation then pending in Congress. A survey of legislation proposed in the 94th Congress is set forth in Shecter, FIRA: Experience of a U.S. Lawyer, 1976 CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA 45; see also Young, The Acquisition of United States Businesses by Foreign Investors, 30 Bus. LAW.
merce figures from the preceding benchmark survey in 1959 were out of date and that data on foreign investment in real estate and agricultural facilities were almost nonexistent led to the enactment of the Foreign Investment Study Act of 1974 (1974 Act). The 1974 Act authorized a comprehensive report which concluded that no adjustment in traditional U.S. policy was needed at the time, but also recommended legislation designed to improve data collection on a continuing basis. Although there was no perceived need for legislation to restrict foreign direct investment, a Committee on Foreign Investment in the United States (CFIUS) was established by Executive Order. Among the significant responsibilities of CFIUS are:

1. Providing guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States, and
2. The review of investments in the United States, which in the judgment of CFIUS might have major implications for United States national interests.

Relying on the 1974 Act report recommendations, Congress subsequently enacted the International Investment Survey Act of 1976 (1976 Act). The 1976 Act empowers the President to establish and maintain a regular information collection program with respect to foreign investment in the United States and U.S. investment abroad. Because of the potentially deleterious consequences of disclosure of the sources of foreign investment, several investors have sought to avoid the reporting requirements, and a strengthening of reporting regulations has been advocated.


24 See Dep't of Commerce Report, supra note 10; see also Treasury Department, Report to Congress on Foreign Portfolio Investment in the United States (1976).

25 See Dep't of Commerce Report, supra note 10, vol. 1, at 233-40 (at that time, total foreign direct investment totalled only 3.5 percent of non resident gross private fixed investment); see also Rose, Special U.S. Rules Directly Affecting Foreign Investment, 1982 DICK. Int'l L. Ann. 59.


27 Id.


29 Id. § 3103.

30 Note, International Investment Survey Act: The High Cost of Knowledge, 14 LAW &
III. RECENT TRENDS IN FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

In the period from 1965 to 1982 alone, foreign direct investment in the United States increased by more than 1000 percent. From 1970 to 1982, the United States attracted $86 billion in new foreign direct investment, compared to $13 billion from 1789 to 1970.31

In 1982, the foreign direct investment position in the United States increased 13 percent to $101.8 billion, compared with a record 32 percent increase in 1981.32 Although the rate of increase declined, it was only moderately smaller than the increases in 1980 and 1981 ($13.9 and $12.0 billion respectively) and larger than those in any year before 1979.33 Between 1976 and 1981, foreign direct investment flows into the United States have increased significantly, not only in absolute amounts, but relative to U.S. direct investment abroad. In 1981 and 1982, inward foreign direct investment was $24.2 billion more than outward direct investment.34

Although these 1982 figures are lower than 1981 due to high borrowing costs and depressed corporate earnings, the 1982 figures continue to reflect the most current trend toward significant levels of foreign direct investment in the United States which began in 1978, growing at an average of 25 percent each year until 1982.35

The reason for this surge in foreign direct investment in the United States has been well documented.36 Despite fluctuations in the relative
value of the U.S. dollar and in the strength of the U.S. stock and real estate markets, the United States remains attractive to foreign investors because of its unparalleled economic and political stability, the size and homogeneity of its domestic markets, its raw materials and technological advances.

A. U.S. Legislative Response Before 1981

Subsequent concerns in particular economic sectors have resulted in legislation such as the Agricultural Foreign Investment Disclosure Act of 1978\(^3\) which requires foreign persons acquiring or transferring any interest, other than a security interest, in agricultural land to report the transaction to the Agriculture Department. Concern over the level of foreign banking activity in the United States led to the enactment of the International Banking Act\(^3\) which amends section 25(a) of the Federal Reserve Act\(^3\) to require, inter alia, that any foreign bank operating in the United States be subject to the provisions of the Bank Holding Company Act of 1956. Disclosure of citizenship and residence by beneficial owners of five percent or more of the equity securities of U.S. issuers under section 13(d) of the Securities Exchange Act of 1934\(^4\) was added by the Domestic and Foreign Investment Improved Disclosure Act of 1977.\(^4\) Other disclosure statutes include the Department of Energy Organization Act\(^4\) and the Budget and Accounting Procedures Act of 1980.\(^4\) Laws of broader application such as the Foreign Sovereign Immunities Act\(^4\) restrict immunity in commercial transactions.

Finally, several state laws prohibit or regulate alien ownership.\(^4\) For example, section 202 of the Delaware Corporation Law permits Delaware corporations to restrict the transfer of their securities to designated persons or classes of persons with certain limitations.\(^4\) Notwithstanding this regulatory matrix, however, the level of foreign investment in the United States has continued to rise to unprecedented levels.

\(^11\) See Bale, supra note 9, at 45-46.
IV. LEGISLATIVE PROPOSALS IN THE 97TH AND 98TH CONGRESSES

The theme of legislative proposals receiving support from the Admin-
istration in the last two sessions of Congress is "reciprocity." The term
"reciprocity" has evolved to mean that U.S. trading partners should ac-
cord American goods, services and investments the same treatment that
their goods, services and investments receive in U.S. markets. Although
this application of a trade term to an investment situation is well beyond
traditional trading rules, at least three sets of hearings by subcommit-
tees of the House of Representatives and Senate have been held on the
issue. Reciprocity legislation would counter allegations that the open-
door policy unfairly allows foreign investors access to U.S. markets that
are not so readily available to U.S. investors abroad. This concept also is
consistent with the Administration's objective of encouraging a reduction
in investment barriers. The paradox, however, is that reciprocity will only
be successful to the extent that the level of foreign investment in the
United States is large enough that foreign investors will pressure their
own governments to remove investment restrictions to U.S. investors.
Thus, the reciprocity concept will have little or no effect on countries
with restrictive barriers which have little or no investment in the United
States or on those countries which consider the domestic regulation of
foreign investors to be more important than foreign regulation of their
investors. The fallacy is that reciprocity legislation would affect those
countries which have imposed restrictions to limit foreign domination of
their economies and which are least likely to be concerned about U.S.
regulation of foreign investment. If reciprocity affects countries with pro-
hibitive investment regulations, it is likely to have exactly the opposite of
the intended effect, i.e., an increase rather than decrease in investment
barriers. Additionally, reciprocity will do nothing to relieve the poten-
tially adverse effects of foreign investment in the United States.

Although some of the other legislative proposals were directed at re-

\footnote{Hay & Sulzenko, U.S. Policy and Reciprocity, 16 J. WORLD TRADE L. 471 (1982); see
also Gadaw, Reciprocity and its Implications for U.S. Trade Policy, 14 LAW & POL'Y INT'L
Bus. 691 (1982).}

\footnote{Reciprocal Trade and Market Access Legislation: Hearings Before the Subcomm. on
on H.R. 5383, 5596, 6433, 6773 and 5205); Legislation Authorizing International Trade Ne-
gotiations: Hearing Before the Subcomm. on International Economic Policy and Trade of
the House Comm. on Foreign Affairs, 97th Cong., 2d. Sess. 1 (1982) (testimony on H.R.
6773 and 5519); Oversight of U.S. Trade Policy: Joint Hearings Before the Subcomm. on
International Trade of the Senate Comm. on Finance and the Subcomm. on Banking,
Housing and Urban Affairs, 97th Cong., 1st Sess. 1 (1981). See also Reciprocity in Invest-
ment: Hearings Before the Subcomm. on Consumer Protection and Finance of the House
Comm. on Interstate and Foreign Commerce, 96th Cong., 2d. Sess. 1 (1980) (testimony on
H.R. 7791 and 7750 which sought to extend the principle of trade reciprocity to investment
reciprocity, see infra note 49).}
striking certain forms of foreign investment altogether,\textsuperscript{49} most Congressional committee activities centered on bills which proposed to regulate stock margin requirements.\textsuperscript{50} None of the referenced bills were, however, ever enacted.

Among the proposals submitted by the Government Operations Subcommittee Chairman, Representative Rosenthal, was a proposal for an agency with discretionary authority to prohibit or restrain foreign investment when it determines that a foreign investment is adverse to U.S. national interests.\textsuperscript{51} Based upon available information, others considered such a proposal counterproductive,\textsuperscript{52} but it foreshadowed other legislative initiatives in the 98th Congress.

\textsuperscript{49} Bills such as H.R. 7791, 97th Cong., 1st Sess. (1981) (to amend the Securities Exchange Act of 1934 to provide that a person who is a citizen of or is incorporated in a foreign country may acquire certain amounts of U.S. securities only to the extent that the laws of such foreign country are no more restrictive with respect to the acquisition of comparable amounts of foreign securities by a person who is a citizen of or is incorporated in the United States) and H.R. 7750, 97th Cong. 1st Sess. (1981) (to amend the Securities Exchange Act of 1934 to make it unlawful for a foreign corporation to acquire certain ownership interests in U.S. securities unless in which such corporation is incorporated permits the acquisition of similar ownership interest in foreign securities by U.S. companies) are two examples of such reciprocal legislation which focus on and would tend to perpetuate retaliation by creating an administrative nightmare, requiring enforcement of different sets of rules for investors from different countries. See also Reciprocity in Investment: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980).

\textsuperscript{50} E.g., H.R. 4145, 97th Cong., 1st Sess. (1981) (to amend the Securities Exchange Act of 1934 to provide uniform margin requirements in transactions involving the acquisition of securities of certain U.S. corporations by non-United States persons where such acquisition is financed by non-United States lenders); see Acquisition of U.S. Companies by Foreign Nationals: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 3, 5 (1981); H.R. 1294, 97th Cong., 1st Sess. (1981) (to amend § 7 of the Securities Exchange Act of 1934 to apply margin restrictions to foreign credit transactions in connection with acquisitions of U.S. securities); H.R. 287, 97th Cong., 1st Sess. (1981) (to make the margin requirements applicable to foreign purchasers rather than foreign lenders); H.R. Rep. No. 258, 97th Cong., 1st Sess. 1, 6 (1981), which was introduced as a revised bill following subcommittee hearings on H.R. Con. Res. 59 (instructing the SEC and DOC to conduct a study of the impact of foreign investment on the U.S. economy and U.S. securities markets); see also Herzel & Rosenberg, Foreign Bank Loans to Finance Tender Offers for U.S. Companies, 62 Calif. B. Rec. 80, 91 (Sept. 1980); S. 1429, 97th Cong., 1st Sess. (1981) (to amend the Securities Exchange Act of 1934 to make the margin requirements for domestic purchasers of securities applicable to foreign purchasers of securities in certain significant transactions involving the U.S. securities markets and to impose a nine-month moratorium on major acquisitions by Canadian companies of U.S. energy companies); Extension of Margin Requirements to Foreign Investors: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 12 (1981); S. 1436, 97th Cong., 1st Sess. (1981) (to amend the Securities Exchange Act of 1934 to provide uniform margin requirements in transactions involving the acquisition of securities of certain U.S. corporations by foreign persons where such acquisition is financed by a foreign lender).

\textsuperscript{51} See infra note 65, at 10.

\textsuperscript{52} Id. at 43.
In the 98th Congress, bills again were proposed to ensure reciprocal trade opportunities, to provide uniform margin requirements and to restrict certain foreign investments. Two separate legislative proposals, however, merit special attention. The first is H.R. 600, which would be known as the Foreign Investment Reorganization Act of 1983. Subsection 2(a) chronicles the basis for the Bill:

The Congress finds that -

(1) Federal efforts to monitor, analyze, and report on foreign investment in the United States and its impact on United States national interests are inadequate and ineffective;

(2) The activities of eighteen separate Federal agencies and entities with responsibility for monitoring, policy analysis, promotion, or regulation with respect to foreign investment in the United States lack coordination and consistency;

(3) Existing Federal statutory and Executive order restrictions on foreign acquisitions in certain industry sectors are piecemeal and haphazard, and do not protect the United States in many vital and strategic national interest sectors of our economy;

(4) United States national interests are becoming dangerously vulnerable to foreign governmental and private investors in certain sectors of our economy as a result of rapidly increasing foreign acquisitions of United States enterprises, assets, and resources; and this has resulted in (A) more and more decisions about the United States economy being made outside the United States; (B) the unintended transfer of sensitive high technology and research capability; (C) the export of finite natural resources; (D) reduced international competition; and (E) increased acquisitions of healthy United States companies rather than the creation of new manufacturing facilities and new jobs; and

(5) Present Federal policy fails to distinguish between beneficial and harmful acquisitions.

H.R. 600 would establish an independent regulatory commission

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84 H.R. 2371, 98th Cong., 1st Sess. (1982) (to amend the Securities Exchange Act of 1934 to provide uniform margin requirements in transactions involving the acquisition of securities of certain U.S. corporations by non-United States lenders, to specify a private right of action for violations of margin requirements and for certain other purposes).

85 H.R. 942, 98th Cong., 1st Sess. (1982) (to amend the Securities Exchange Act of 1934 to restrict persons who are not citizens of the United States from acquiring more than 35 percent of the non-voting securities or more than 5 percent of the voting securities of any issuer whose securities are registered under such Act, and for other purposes).

86 H.R. 600, 98th Cong., 1st Sess. (1983) (to reorganize, consolidate, and expand Federal monitoring, analysis, reporting and policy functions with respect to foreign acquisitions of U.S. businesses and assets in vital and sensitive national interest sectors of the U.S. economy and for other purposes).

87 Id. § 2(a).
which would be responsible for monitoring, evaluating, analyzing and reporting on the nature, extent and impact of foreign investment in the United States as well as the policy formulation and implementation functions of CFIUS and the United States Trade Representative. The Commission would also be responsible for prohibitions of, and restrictions on, investments by "foreign persons" (non-citizens or residents) in certain national interest sectors and would monitor the behavior of foreign-owned corporations. The Bill would prohibit any foreign person from acquiring a "significant interest," (five percent of a public company, ten percent of a private one), in any business enterprise in a "vital national interest sector," (armaments, nuclear energy and weapons and telecommunications) or in a "sensitive national interest sector" (banking, transportation, power, technology and certain natural resources), unless the Commission has approved the acquisition. The standard for such approval is whether the net potential economic benefits justify the increased degree of foreign control and outweigh the "potential or actual negative economic and political consequences" resulting from the acquisition. The Bill provides factors for the Commission to consider, including the net benefits likely to accrue, and possible effects on national security, foreign policy and competition. Time limits would be prescribed for Commission determination. Confidential treatment could be obtained, and determinations would be subject to judicial review except in vital interest sectors. The Commission would have limited investigative and enforcement authority.

Analogous legislation was proposed in H.R. 300, to be entitled the Foreign Investment Control Act of 1983, which would establish a National Foreign Investment Control Commission with powers to prohibit non-citizens from acquiring any voting security of an issuer substantially involved in an area "essential" to national or economic security (e.g., nuclear energy, radioactive minerals or petrochemicals) or, in the Commission's determination, "important" to such security (e.g., steel, drugs, radio or television) if such non-citizens possess effective control of the issuer. The Commission would determine and publish the names of all issuers

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68 The need for a coordinating agency to compile and disclose information on foreign investment in the United States was documented in Council on International Economic Policy, Office of Management and Budget, United States Government Data Collection Activities with Respect to Foreign Investment in the United States (1975).

69 H.R. 300, 98th Cong., 1st Sess. (1983) (to establish a National Foreign Investment Control Commission to prohibit or restrict foreign ownership control or management control, through direct purchase, in whole or in part; from acquiring securities of certain domestic issuers of securities, by merger, tender offer, or any other means; control of certain domestic corporations or industries, real estate, or other natural resources deemed to be vital to the economic security and national defense of the United States).

60 A companion bill, H.R. 318, 98th Cong., 1st Sess. (1983), would create a Joint Congressional Committee on Foreign Investment Control in the United States which would study the manner in which the National Foreign Investment Control Commission fulfills its purposes.
substantially involved in essential and important areas who would thereupon submit the names and nationalities of all non-citizens who own voting securities thereof. The Commissioner would monitor the sales of securities of such issuers on a daily basis.

H.R. 300, if enacted, would create massive intrusion of government into the marketplace and raise questions about enforceability. The proposed bill shares a fundamental flaw of the reciprocity proposals in that it differentiates solely on the basis of alienage, rather than the merits of the particular investment. While reciprocity would treat otherwise identical investments from different countries differently, H.R. 300 would treat all investors and investments alike, even where such investment is beneficial or even essential to development of the American economy.

In Canada, however, existing legislation does not judge foreign investment only on the basis of alienage. The advantage of Canada's Foreign Investment Review Act (FIRA) is that it is not intended to discourage foreign investment, but only to assure that such investment will be beneficial to Canada. The initial reaction to FIRA concerned not the principle of regulation but the uncertainty and non-reviewability of the investment procedures, the broad scope of investment review, the lack of enunciated policy guidelines, the vagueness of the significant benefit standard, and administrative delays in obtaining investment approval. As noted previously, the administration of the FIRA has attempted to balance the quest for a national identity through a repatriation of control of the means of production against the realization of the potential benefits of foreign investment. By screening all foreign investment proposals with only limited exceptions, however, the Foreign Investment Review Agency precipitated an administrative quagmire. It has been suggested that FIRA and its regulations be amended to raise the thresholds of the review procedure significantly, eliminate the review of indirect acquisitions, render applications, interventions and reasons for decisions public and create an administrative tribunal to decide investment approvals, leaving the Cabinet of the Canadian government to formulate directions of policy.

In the United States, H.R. 600 eliminates thresholds in favor of limitations in vital and important national interest sectors. It would have no direct extraterritorial application, is a public process (except when confidentiality is appropriate), and it provides for judicial review (except in

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63 The Honourable Donald S. Macdonald, Notes for Remarks to Mercantile Bank—Wilfrid Laurier University M.B.A. Seminar 3 (Nov. 6, 1981) (to transfer investment decisions to an administrative tribunal would, of course, be replacing elected ministers responsive to public concern, with a bureaucracy). For a contrast of administrative agencies in the United States and Canada, see Roman, Regulatory Law and Procedure, in The Regulatory Process in Canada (G. Doern ed. 1978).
limited circumstances). It thus implements many of the suggested changes to the FIRA procedure analyzed in this article. The Foreign Investment Review Act, however, provides a more flexible standard in the review procedure than the inflexible prohibitions in vital interest sectors mandated by H.R. 600.64

V. PROPOSED LEGISLATIVE RESPONSE: THE ESTABLISHMENT OF A FOREIGN INVESTMENT REVIEW MECHANISM

It is generally perceived that high levels of foreign direct investment are not an unmixed blessing.65 While it is recognized that the inflow of investment dollars creates employment and economic diversification and affords the local economy access to levels of technology that would not otherwise be available, not all investment involves such capital flows with resulting enhanced employment, economic diversification and increased tax revenues. Most foreign direct investment is not for the establishment of new operations, but the acquisition of existing enterprises.66 Most of these acquisitions are accomplished by the use of domestic credit sources of unsecured lines of foreign credit unaffected by, for example, U.S. margin limitations. When U.S. credit is used by foreigners, available sources of productive capital are lessened and upward pressure is exerted upon interest rates.67

One of the strongest reasons for inward investment into the United States is access to U.S. technology. Exportation of U.S. technology clearly affects America's long range competitive position. In addition, the cost of inward foreign investment may entail the importation of foreign components, the eventual repatriation of profits from that investment and the

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65 Foreign Investment in the United States: Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 2 (1982), during which Benjamin S. Rosenthal, Representative of the State of New York, stated that the Government Operations Subcommittee on Commerce, Consumer and Monetary Affairs had in part concluded:

Not all foreign investment benefits the American economy. Some foreign investments present a clear and present danger not only to the well-being of the U.S. economy, but to the independence and integrity of our political processes and institutions. More and more decisions about our economy and our public policy are being made by foreign governments, corporations and individuals.

66 In 1979, for example, more than 90 percent of total foreign investment in the United States was in the form of acquisition of established businesses. U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1979, 61 Surv. Current Bus., No. 1, at 28, 36 (Jan. 1981).

consequential lessening of indigenous research, development and social independence. This effect is already being felt; the United States is being outspent on civilian research and development by its major industrial competitors such as Japan, France and West Germany.

Failure to react to significant levels of foreign direct investment in particular sectors may result in international tensions when action is unilaterally taken. For example, unlike many other nations, the United States imposes few such regulations or limitations on its national resource sector. As Canada's far-reaching National Energy Program has illustrated, international hostility is easily generated when national priorities dictate a repatriation of such economic sectors.

There is increasing evidence that the United States is becoming isolated in its advocacy of free trade. It has been argued that the world of individual traders with large pools of capital that prevailed in the first half of this century have been replaced by foreign-based corporations. These corporations have altered the pattern and composition of international trade through the spread of direct investment and licensing, and present institutions are unable to cope with the problems arising from international production and the emergence of multinational enterprises. One observer has stated: "Reduced to its simplest terms, there is an inherent conflict between the objectives of the international corporation and the nation-state."

It has also been noted that the comparative economic advantage, upon which the market forces theory is founded, will continue to erode with the emergence of "planned capitalism." The development of state

70 King, Foreign Restrictions on U.S. Investment, 11 SAN DIEGO L. REV. 27 (1973). For a survey of worldwide investment policies including ownership restrictions, exchange conversion restrictions, separation or remittance restrictions, employment restrictions and local material content requirements, see Price Waterhouse, Investment Policies in Seventy-Three Countries, Second Annual Survey (Nov. 18, 1983).
71 The Operations of Federal Agencies Hearing, supra note 2, Part 1, at 9.
72 See generally infra note 120.
73 Upsurge in Protectionism: Subsidies, Tariffs and "Voluntary" Agreements Erode Free Trade, TIME, May 9, 1983, at 66.
74 Behrman, Sharing International Production Through the Multinational Enterprise and Sector Integration, 4 LAW & POL'Y INT'L BUS. 1 (1972); see also S. ROBOCK, K. SIMMONDS & J. ZWICH, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES 233-34 (1977).
commercial enterprises (which have increased twelvefold between 1957 and 1976 to comprise 12 percent of the Fortune 500 companies)\textsuperscript{77} raises the prospect that foreign direct investment of significant proportions may be used to achieve political ends. Some have advocated that direct investments by such "eco-invaders" be rejected under the economic equivalent of the Monroe Doctrine as contrary to the "concept of the separation of corporation and state."\textsuperscript{78} It is, in any event, realistic to surmise that foreign investors controlled by, or having significant relationships with, foreign governmental entities may act in furtherance of objectives inconsistent with U.S. national interests,\textsuperscript{79} and are more likely to do so than profit motivated enterprises.

Economists such as Ira Magaziner and Robert Reich note that the unprecedented growth of the U.S. economy in the post-war period was founded on a benign international market in which other industrialized nations were recovering from the devastation of war and rebuilding their basic industrial and economic infrastructures. Low wage competition and foreign government assistance in high-growth industries are creating an unprecedented negative trade balance as the United States becomes progressively less competitive on a world-wide scale. Key sector regulation is arguably ineffective to protect U.S. national interests.\textsuperscript{80} What is advocated is a new industrial strategy,\textsuperscript{81} essentially, a re-thinking of the policy assumptions underlying the contradiction of the advocacy of unimpeded investment flows while yielding to special interest demands for subsidies.

Modern governments have found it no longer effective to merely adopt an observer’s role at the periphery of the economy, or to attempt to counteract market failures and dislocations by creating economic "floor" and "ceilings". In advanced industrial societies a new style of regulation is emerging, a system of co-participatory planning!

\textsuperscript{77} See generally D. Lamont, Foreign State Enterprises (1979). Lamont notes a quadrupling of sales by such enterprises every seven years and a doubling of assets every four. After tracing how foreign governments through political and economic ties compete successfully in the open market, Lamont advocates passive intervention in the form of a foreign investment review code, and active intervention through the establishment of competing commercial state enterprises to achieve national economic purposes. See also E. Zupnick, Foreign Investment in the United States: Costs and Benefits (Headline Series, Foreign Policy Association No. 249, 1980); U.S. Foreign Relations and Multinational Corporations: What Is the Connection?, Comptroller General’s Report to Congress, Aug. 23, 1979, at 33.

\textsuperscript{78} K. Crowe, America for Sale 266 (1978).

\textsuperscript{79} See ABA Guide, supra note 9, at 230-46, for an analysis of the application of the act of state doctrine and sovereign immunity to foreign government investors; see also The Operations of Federal Agencies Hearings, supra note 2, part 3, at 18, where Professor Cohen has noted that foreign investments take several forms, but they all reduce to one common denominator—a challenge to national sovereignty.

\textsuperscript{80} The Operations of Federal Agencies Hearings, supra note 2, part 3, at 19.

\textsuperscript{81} I. Magaziner & R. Reich, Minding America’s Business: The Decline and Rise of the American Economy (1982); see also R. Reich, The Next American Frontier (1983) (an argument that government must forge a partnership with business and labor to meet foreign competition).
and import quotas. Senator Daniel Inouye has, for example, stated: "Increasingly . . . the question appears to be how a host country can maximize the benefits it can obtain from [foreign direct investment] while minimizing any actual or potential drawbacks from such investment."2

Bilateral investment treaties like those signed with Egypt and Panama, but which have not yet been ratified, provide broader protection than Friendship, Commerce and Navigation Treaties that typically do not address the issues raised by unregulated foreign investment into the United States.3 Present U.S. policy incorrectly assumes that all foreign investment benefits the national interest. It fails to properly distinguish between beneficial and actually or potentially harmful forms of investment.4 This article proposes that an investment review mechanism modeled upon, but modified as appropriate from, Canada's Foreign Investment Review Act provides the necessary flexibility to deal with negative aspects of foreign direct investment in the United States without unnecessary intrusion into such investment and within the parameters of internationally accepted investment principles.5

VI. CANADIAN REGULATION OF FOREIGN DIRECT INVESTMENT

Canadian economic development, generated largely upon British

84 Representative Rosenthal concludes:

The present U.S. policy of indiscriminate neutrality assumes, I think incorrectly, that all foreign direct investment automatically benefits the Nation. It fails to distinguish between investments which are beneficial and those which are actually or potentially harmful to the United States. It fails to recognize that some foreign investment, particularly those by governments or foreign state enterprises, may be motivated more by political than by profit considerations. It fails to recognize that enormous political influences derives from ownership of U.S. enterprises and U.S. natural resources. It fails to adequately recognize that in certain sensitive sectors of the U.S. economy, such as defense, communications, natural resources, high technology, banking, and perhaps others, foreign investment may seriously jeopardize the U.S. national interests.

In short, U.S. laws and policies must begin to distinguish between foreign investment that provides new venture capital, creates new jobs, rehabilitates older cities, or enhances international relations and foreign investment that results in the export of profits, jobs, taxes, and capital; that transfers high technology, that permits control by a foreign government of scarce natural resources, that lessens national or international competition for valuable products and services, or that increases the ability of foreign governments to influence U.S. foreign and even domestic policies.

Foreign Investment in the United States, supra note 65, at 3.
portfolio investment, shifted to primarily direct investment from the United States after World War II. Approximately two-thirds of all foreign investment in Canada now originates in the United States. Increasing concern about the level and effects of such foreign direct investment and its impact upon the quest for a Canadian national identity led to several studies and Royal Commission Reports. These studies and reports resulted in the imposition of restrictions in certain "key sectors" of the Canadian economy. Requirements of nationality for directors and limitations upon non-resident ownership of shares were imposed primarily upon financial institutions. Additionally, the Canadian government periodically intervened in the acquisition activity of foreign enterprises. Public concern over the effects of foreign investment resulted in a report, known as the Gray Report, which advocated the establishment of a reg-

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89 Wahn, Toward Canadian Indentity—The Significance of Foreign Investment, 11 Osgoode Hall L.J. 517 (1973).


90 For a summary of this legislation, see Foreign Investment Review Agency, Policy Division, Policy Development and Analysis Branch, Selected Readings in Laws and Regulations Affecting Foreign Investment in Canada, and Extracts from Provincial Laws and Regulations Affecting Foreign Investment in Canada (1972); see also G. Grant, Lament for a Nation, The Defeat of Canadian Nationalism (1965); I. Lumsden, Close the 49Th Parallel: The Americanization of Canada (1970); J. Meekison, Canadian Federalism: Myth or Reality (1977); Hughes, Historical Outline of Foreign Investment Policy in Canada, in A Commentary on the Foreign Investment Review Act (1975).


91 H. Gray, Foreign Direct Investment in Canada (1972); see Comment, The Canadian Foreign Investment Review Act: Red, White and Gray, 5 Law & Pol'y Int'l. Bus. 1018 (1973); see also for an analysis of the role of the multinational corporation in shaping Canadian Government policy toward foreign investment, McMillan, After the Gray Report: The
ulatory body with authority to screen new foreign investments, takeovers of Canadian-owned firms, licensing and franchising arrangements and the expansion of existing foreign-controlled firms. The first legislative proposal, the Foreign Takeover Review Act, died on the parliamentary order paper. Bill C-132 was subsequently introduced and became the Foreign Investment Review Act (FIRA). The Act presented a compromise between those seeking economic integration with the United States and those seeking an immediate and total halt to new foreign direct investment.

Summarized, FIRA provides a mechanism to screen certain investment proposals by "non-eligible persons" to determine which investments will be of "significant benefit" to Canada. FIRA applies to the acquisition of control of a "Canadian business enterprise" or the establishment of a new business or expansion of an existing business in Canada into an unrelated line of business by a non-eligible person or group that includes a non-eligible person. If a non-eligible person proposes such an investment, the body has authority to screen and approve or disapprove the proposal.

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Non-eligible persons are defined in section 3(1) of FIRA to mean essentially those who are neither citizens nor residents of Canada.

A Canadian Business Enterprise is defined in section 3(1) of FIRA to mean a business carried on in Canada by a Canadian citizen or resident, or which is incorporated in Canada and maintains at least one active place of business there; or any number of individuals or corporations, or combinations thereof, as long as there is one individual or corporation as mentioned above who is in control or in position to control the conduct of the business.

The Act also applies to indirect acquisitions, i.e., it is a reviewable transaction where a non-eligible corporation acquires "control" of another non-eligible corporation with a Canadian subsidiary.
investment, an application must be made to the Foreign Investment Review Agency (Agency) to establish that the proposal meets the "significant benefit" standard. Although "significant benefit" is not defined, each investment proposal is measured against the following factors:

(1) The effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on utilization of parts, components and services produced in Canada, and on exports from Canada;

(2) The degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(3) The effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(4) The effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(5) The compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.101

Broad administrative and ministerial discretion regarding emphasis placed upon any of these particular factors is contemplated.102 In essence, the foreign investor enters into negotiations with the Agency which, in most cases, results in undertakings made by the investor to establish compliance with these criteria.103

Although the original legislative proposal contemplated an independent administrative tribunal,104 (and, indeed this suggestion has been subsequently made),105 decisions on foreign investment proposals are

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102 For practical advice on formulating proposals, see Tennier, Canada’s Foreign Investment Review Act, in Legal Aspects of Doing Business in Canada 459 (1983).
made to the Cabinet of the Canadian government. Proposals are submitted by the Minister of Industry, Trade and Commerce (Minister) who acts with the assistance and advice of the Agency.\textsuperscript{106} FIRA imposes a time limitation upon decisions with respect to investment proposals by granting the allowance for such proposals when 60 days have elapsed since receipt by the Agency of a notice of a proposed or actual investment.\textsuperscript{107}

In addition to the venture capital exemption,\textsuperscript{108} a franchise exemption,\textsuperscript{109} an investment dealer exemption,\textsuperscript{110} and two limited reorganization exemptions,\textsuperscript{111} there is a general statutory exemption in section 5(1). This section does not apply to the acquisition of control of a crown corporation, a tax-exempt corporation, or a business enterprise with gross assets of less than \$250,000 and gross revenues of less than \$3 million.\textsuperscript{112}

Remedies for failure to comply with FIRA include injunctions, orders rendering transactions nugatory and orders requiring the fulfillment of undertakings.\textsuperscript{113} There has, however, been little litigation regarding these matters under FIRA.\textsuperscript{114}

\section*{VII. U.S. Reaction to FIRA and Proposed Amendments}

United States officials have been critical of perceived uncertainties as to the scope and application of FIRA. Allegations have been made that "significant benefit" is too vague a standard for approval of foreign investment proposals, and that FIRA permits virtually unfettered discretion concerning the conditions under which foreign investment proposals would be recommended for approval.\textsuperscript{115} Notwithstanding its advocacy of the free flow of international investment funds and ongoing criticism concerning Canadian foreign investment policies, the United States itself has

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recognized that screening foreign investment proposals is within the sovereign prerogatives of the Canadian government, at least if effected in an equitable and non-discriminatory manner. There is no evidence to indicate that FIRA has been or is being used to discriminate among foreign investors to the detriment of U.S. investors.

Although some have argued that FIRA has not damaged Canada's international trade relationships, Canada-U.S. relations over the issue of foreign investment began to chill with the speech from the Throne opening the 32nd session of Parliament in April 1980, in which a toughening of FIRA was proposed. In an attempt to secure its energy supply and increase Canadian participation in the Canadian petroleum industry from 25 to 50 percent by 1990, Canada subsequently enacted the National Energy Program. Subcommittees of the Committee on Energy and Commerce of the House of Representatives held hearings on Canadian energy policies and issued a report condemning the National Energy Program. The United States reaction was strongly adverse and pressure was brought to bear upon the Canadian government diplomatically and

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118 Note, supra note 114, at 198. There is no evidence that any country has retaliated against Canada or Canadian investors as a result of its investment regulation.

119 In the Throne Speech, 32nd Parl., 1st Sess., Apr. 14, 1980, vol. 1, at 6, col. 1, Government intent was stated as follows: The Foreign Investment Review Act will be amended to provide for performance reviews of how large foreign firms are meeting the test of bringing substantial benefits to Canada. As well, amendments will be introduced to ensure that major acquisition proposals by foreign companies will be publicized prior to a government decision of their acceptability. The government will assist Canadian companies wishing to repatriate assets or to bid for ownership or control of companies subject to takeover offers by non-Canadians.


123 See FOREIGN INVESTMENT REVIEW AGENCY, GOVERNMENT OF CANADA RELEASE F-174
in the media.\footnote{124} In response, the Canadian government shelved its plans to amend FIRA.\footnote{125} Faced with a worsening economy, the Canadian government continued, however, to defend its foreign investment policies,\footnote{126} notwithstanding mounting pressure for change in some 53 "protectionist" bills proposed to Congress.\footnote{127}

The matter escalated when the United States filed a complaint under Article XXIII of the General Agreement on Tariffs and Trade (GATT).\footnote{128} The complaint alleged that certain "trade-related aspects of FIRA," such

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as “requirements by the agency that foreign-owned companies buy materials in Canada or export certain products,” violated Canada’s GATT obligations. The panel finding rejected the complaint regarding export performance. The panel, however, agreed that domestic sourcing requirements violated Article III, which requires “national treatment” for foreign traders in domestic markets. Concerns over whether the GATT, which regulates trade issues, is an appropriate vehicle to challenge foreign investment regulations which only affect trade, and the ease with which the Agency can achieve a Canadian sourcing objective without violating the national treatment requirement, have diminished the impact of the GATT panel finding, even if it had been ratified. Rather than await a final ruling, recently Canada has accepted the panel finding.

Canada has, however, consistently maintained its right to regulate foreign investments. United States complaints have focused more on the uncertainties and administrative delays of attaining approval of foreign investment proposals than on the principle of investment regulation itself. FIRA was born at a time when nationalist sentiments ran high in Canada. Changed economic circumstances and national priorities have led to personnel and administrative changes. Thresholds for review under

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130 Partan & Herman, Canadian Foreign Investment Review: An Introduction, 1 B.U. INT’L L.J. 1, 8 (1982).


132 P. Hayden has pointed out that ratification would be hypocritical and unwise since many other member nations of the GATT Council share Canada’s concern with multinationals which import parts and supplies even though such supplies are available at lower prices in the host nation. Id. at 2134. For an analysis of the contingency protection measures available to the United States under the 1974 and 1979 Trade Acts, see Lazar, Canadian Industrial Strategy: A U.S. Impediment, 16 J. WORLD TRADE L. 223 (1982).


134 Alan MacEachen, Notes for a Statement made by the Secretary of State for External Affairs at the O.E.C.D. Ministerial Meeting in Paris (June 21, 1976).

135 The Honourable Herb Gray, Minister responsible for the Act and generally perceived as an economic nationalist, was replaced by the Honourable Edward Lumley, who is seen to have a more favorable disposition to business concerns. Business May Soon Find
expanded short form procedures were raised from $2 million and 100 employees to $5 million and 200 employees for new investment and direct acquisitions and to $15 million and 600 employees for indirect acquisitions, although there were discussions about amending FIRA, the changes and clarifications that have been made in its administration have effectively removed the bilateral tensions without compromise in principle. In the year 1982-83, the number of cases brought to decision increased 66 percent over the previous year, and the inventory of outstanding cases at the beginning of the year was reduced by 55 percent by year-end.

In sum, U.S. antipathy toward Canada's Foreign Investment Review Act has been directed to its administration rather than its governing policy. The hostile reaction to FIRA has been out of proportion to its economic impact, reflecting economic circumstances and differing ideologies between the Reagan Administration and the Trudeau Government. Although often misperceived, however, FIRA has achieved many of its original objectives.

The Commissioner of the Agency, Mr. G. Howarth was replaced by Mr. E. Richardson.
FIRA's Chief will Soften Investor Rules, Toronto Globe & Mail, Nov. 29, 1982, at B1, col. 1.
Interpretation Notes and Information Circulars to clarify the Act were issued. See Fisher, Foreign Investment Review Act Developments, 3 CAN. L. NEWSLETTER 3 (Jan. 1983); FIRA Clarifies Troublesome Clauses, Toronto Globe & Mail, Dec. 23, 1982, at B1, col. 1.
FOREIGN INVESTMENT REVIEW AGENCY, NINTH ANNUAL REPORT 1 (1982-83).
See J. Marans, supra note 9, at 84.
B. Fisher, FIRA and the Canadian-American Relationship (Sept. 30, 1983) (paper presented to the 7th Biennial Conference of the Association of Canadian Studies in the United States). R. Donald Pollach in the Toronto Globe & Mail, Oct. 23, 1981, at 7, col. 1, in an article entitled Why the U.S. is Putting the Squeeze on Canada concludes: "Indeed, FIRA is a paradox: while internationally Canada may have one of the highest profile institutions to regulate foreign investment, it may also have one of the weakest in terms of impact."
Dewhirst, The Canadian Federal Government's Policy Towards Foreign Direct Investment, in FOREIGN INVESTMENT REGULATION IN CANADA AND THE UNITED STATES 27-28 (Fry & Radebaugh eds. 1983), states:
[Wh]ile the amount of foreign direct investment in the Canadian economy has increased significantly, the level of foreign control of the Canadian economy has declined in virtually all sectors. For all non-financial sectors the level of foreign control declined from 37 percent in 1970 to 27 percent in 1980. In mining the decline was from 62 percent to 34 percent; in oil and gas from 91 percent to 59 percent; in manufacturing from 54 percent to 43 percent.
VIII. Arguments Against the Establishment of a Screening Mechanism in the United States

The suggestion of a review mechanism was made in the Twentieth Report by the Committee on Government Operations entitled The Adequacy of the Federal Response to Foreign Investment in the United States (Adequacy Report). The Adequacy Report chronicles political and economic costs of foreign investment and cites particular concerns. Federal statutory restrictions on foreign investments in specific industry sectors are found, contrary to Administration testimony, to be "piece-meal, haphazard and illogical." The policy of "neutrality with encouragement" is criticized as placing in jeopardy U.S. economic and political interests because it fails to distinguish between beneficial and harmful investments. The Adequacy Report concludes:

Most other industrialized countries recognize that effective monitoring, analysis and supervision of [Foreign Direct Investment (FDI)] are essential elements of a comprehensive national economic policy; and that ways can usually be found to minimize any harmful effects of foreign investments without excluding them. Accordingly, most countries require registration and prior approval of FDI and many place conditions on potentially harmful investments to extract substantial benefits for their economies. Evidence reviewed by the subcommittee indicates that (1) current U.S. policy towards FDI in the United States is held hostage on the mistaken assumption that this assures favorable treatment of U.S. multinationals abroad, even though foreign governments regulate those foreign investments to a much greater degree than we do, and (2) there is little or no evidence that registration and screening requirements impede foreign investment in those nations which impose such require-
ments and where investment opportunities are otherwise favorable. Consequently, it is highly unlikely that a changed U.S. policy will deter most FDI in the United States. Investment will occur where money is to be made, notwithstanding screening by host governments.\footnote{See Operations of Federal Agencies Hearings, supra note 2, at 22.}

This suggestion counters a 1979 report by the Comptroller General of the United States (1979 Report) that dealt specifically with the issue of whether Canada's screening practices for foreign investment should be used by the United States.\footnote{Comptroller General of the United States, Report B-172255 (Sept. 6, 1979); see also A FIRA for the U.S., EXECUTIVE, Dec. 1980, at 44.} The 1979 Report concluded that there did not appear to be any need "at this time" for establishing such a screening agency. Three reasons were offered to support this conclusion. Firstly, a screening agency would be inconsistent with long-standing U.S. policy to encourage the free flow of trade and investment and to promote equal treatment of domestic and foreign investors. This policy was formulated when the United States clearly dominated international investment and when inward investment into the United States was insignificant. The U.S. regulatory matrix and investment limitations affecting foreign investors has seriously undermined the force of this position. In addition, the changing nature of international economic relations and the emergence of multinational and state-controlled corporations are changing the principles upon which such U.S. policy was formulated.

Secondly, the 1979 Report expressed the view that although the United States is the world's second largest foreign investment host,\footnote{Foreign Investment Regulations in Canada and the United States 1 (Fry & Radebaugh eds. 1983).} Canada's reasons for creating a screening agency are more persuasive since foreign investment is a much less significant factor in the U.S. economy than Canada's economy. This argument too is losing its force as the net inward investment position continues to increase.\footnote{See generally Bale, supra note 9, at 31.} Professor William S. Barnes, of the Fletcher School of Diplomacy, has argued that host countries can promote desirable types of foreign based or controlled private enterprise only if an agency or mechanism is established to determine which foreign investors are desirable. Professor Barnes argues plausibly that the reasons leading Canada to enact its foreign investment review mechanism could well be applied to other host countries even though there is no equivalent level of foreign presence.\footnote{Barnes, Foreign Investment In Canada and Mexico: An Agenda for Host Country Screening, 1 B.C. INT'L & COMP. L.J. 1 (1977); see also Why Canada Gets the Attention, EXECUTIVE, Dec. 1980, at 51.}

Thirdly, the 1979 Report takes the position that the United States has already established methods to monitor and control some foreign investment. The Adequacy Report examined such methods and concluded:
“Federal efforts to monitor foreign direct investment (FDI) in the U.S. and its impact on America's national interests are so inadequate, disjointed and poorly implemented that Federal estimates of the total amount of FDI constitute little more than guesswork.”

In December 1980, the Department of Treasury issued the Administration's responses to recommendations made in the Adequacy Report. With respect to the recommendation for a screening mechanism, it was stated:

The Administration opposes, as unnecessary and harmful to U.S. interests, the creation of an agency to register or screen foreign investment in the United States. Such an agency is unnecessary since the SEC and the Commerce Department (as well as others) currently collect information on all sizeable foreign investment. Therefore, very little additional information would be obtained from registration. In addition, since the CFIUS currently reviews investments with major implications for U.S. national interests, there is no need for a screening procedure.

Moreover, the costs of setting up and operating an additional bureaucracy could not be justified by any benefits that would accrue to the United States. In fact, the establishment of such an agency would prove harmful to U.S. interests.

Foreign investments in the United States would decline as foreigners reassessed their views of the investment climate. Since they are generally risking substantial assets over a prolonged period, any movement toward restriction or screening would be interpreted negatively and increase the element of risk involved in any investment decision.

Second, the establishment of such an agency by its very creation would generate pressure for its use. This would make it likely that investment would be blocked or delayed for reasons unrelated to U.S. national interests.

Third, if we condone increased government intervention in foreign investment decisions, there is a possibility that foreign governments would react by taking actions harmful to the substantial U.S. investments abroad.

Fourth, the United States has taken the lead in promoting world trade and an open world economy, both very much in its own interest. To reverse our long-standing position on direct investment would be a significant retrogression from the free trade principle, would undermine our credibility, would remove pressure on other countries to move towards free trade, and would retard progress towards an open world economy.

The Adequacy Report deals with each of these unsupported observations in detail. The proposed agency is said to be unnecessary because information is already collected on sizeable foreign investments by a

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152 See H.R. Rep. No. 96-1216, supra note 144, at 19.
154 Id.
number of federal agencies. Both the Adequacy Report and H.R. 600 indicate that federal data collection agencies are inadequate and duplicative, that balanced and responsible views from the private sector are not secured, that there is little inter-agency communication and that analytical efforts are almost non-existent.

The U.S. Administration further contends that, since CFIUS\textsuperscript{155} reviews investments with major implications a screening procedure is unnecessary. The Adequacy Report claims that CFIUS is a "dormant entity run by Treasury to create the appearance of action in order to forestall legislation."\textsuperscript{156} The Treasury Department utilizes a pre-review process which screens out investments from full committee review and thereby minimizes the role of CFIUS. By directive, CFIUS excludes private investments, foreign state enterprise investments, and portfolio investments from its review process, and foreign governments need only consult with CFIUS if the investment is "significant enough, in the opinion of the foreign government," to merit consultation. The Adequacy Report claims that no criteria have been issued to determine whether a foreign investment has major implications for the national interest, and that, absent a national emergency under the International Economic Powers Act of 1976,\textsuperscript{157} the U.S. government would not be able to prevent or modify an investment unless it were voluntarily withdrawn. These allegations cast doubt upon Treasury's claim that, in light of CFIUS, no screening mechanism is necessary.

The Treasury additionally asserts that the cost of the additional bureaucracy would outweigh the benefits. Without definition or corroboration, Treasury asserts that such an agency would prove harmful to U.S. interests. As H.R. 600 contemplates, the projected screening agency would consolidate existing agencies. In light of recent shifts in international economic concentrations and the emergence of state enterprises, a screening mechanism requiring U.S. benefit from investment proposals would assuredly justify its bureaucracy, in particular if the application of the review reflects only investments impacting the national interest under clear criteria.

The allegation that foreign investment in the United States would decline if a screening mechanism were to be imposed for foreign direct investment yields two responses. Firstly, the proposed screening agency would pose no threat to an investment that projected economic benefit to the United States. It would merely exclude those investments which could not be shown to be of benefit to the United States if they were not made. There is no indication that screening mechanisms reverse investment flows and the existence of controls in France, Canada and Japan has not prevented major amounts of U.S. investments from being introduced

\textsuperscript{155} See Exec. Order No. 11,858, \textit{supra} note 26.

\textsuperscript{156} See \textit{ADEQUACY REPORT, supra} note 153, at 41; \textit{see also} Bale, \textit{supra} note 9, at 39.

in those countries. Secondly, Treasury asserts that reversal of the long-standing U.S. position on foreign investment would remove pressure on other countries to move toward free trade. This article has attempted to demonstrate, however, that, despite its advocacy of the free trade doctrine, few nations are in concurrence in theory or in fact.

Two other arguments may be raised. One asserts that restrictions imposed on foreign investors that do not apply to domestic investors would violate the Due Process and Equal Protection clauses of the U.S. Constitution. Classifications based on alienage are inherently suspect and subject to close judicial scrutiny. The state must show compelling interest which justifies unequal treatment. Non-resident aliens physically present within the United States are probably also protected although there is no unequivocal Supreme Court authority on the proposition. A strong argument can be made, however, that non-resident aliens outside the United States with no property interest in the United States are not entitled to the benefit of the Equal Protection Clause.

Finally, it may be argued that a change in government policy would contravene U.S. commitments under bilateral treaties of Friendship, Commerce and Navigation (FCN Treaties) or contravene U.S. obligations under various declarations of the Organization for Economic Cooperation and Development (OECD).

Although most of the more recent FCN treaties contain express assurance on the right to acquire shares, they are subject to express exceptions for certain types of vital activities. The national treatment principle may be further qualified by escape clauses and by the protocols that accompany the treaties. Older treaties would allow the United States to regulate foreign investment. Additionally, most of such FCN treaties are terminable upon one year's notice.

All of the major trading and investment parties of the United States

161 Graham v. Richardson, 403 U.S. 365 (1972); In re Griffiths, 413 U.S. 717 (1973).
166 Note, supra note 158, at 570.
167 Id. at 571.
168 Id. at 576.
are members of the OECD, and all except Canada have adhered to the Code of Liberalization of Capital Movements. This Code is not itself a treaty, yet it is perceived to be binding upon the parties. There are, however, flexible qualifications including derogation for various "economic and financial" reasons.

In sum, both the FCN treaties and OECD Codes provide some latitude for a reversal of Administration policies. The OECD Guidelines for Multinational Enterprises provide greater breadth for policy changes. It should be noted that the OECD standard of national treatment only applies once the foreign entity has established its investment.

IX. CONCLUSION

The United States' open door policy toward foreign direct investment fails to account for the potentially adverse effects of significant and increasing levels of such investment. While regulated and controlled by a host of U.S. laws, efforts to monitor foreign direct investment in the United States are duplicative and inadequate. Existing screening procedures are narrow in scope and relatively ineffective in coping with the modern evolution of multinational corporations and state commercial enterprises. As part of a new industrial strategy to deal with these developments, this article has advocated the consideration of a centralized monitoring and screening agency, and proposes Canada's Foreign Investment Review Act as a model. Legislative proposals which would minimize administrative issues in the establishment and operation of such an agency and corollary adjustments in policy have been suggested.

169 Id. at 577.
170 Id. at 579.
171 See OECD, INTERNATIONAL INVESTMENT, supra note 165.
172 See Bale, supra note 9, at 35; Canadian Foreign Investment Review: Questions and Answers, 1 B.U. INT'L L.J. 33 (1982).