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## Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?

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# Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?

*Simone Collins\**

*Abstract: With the globalization of the world's economy, countries have relied heavily on foreign direct investment within their borders to spur domestic economic growth and compete in the global marketplace. Canada, historically a leading destination for foreign investors, has seen its share of global foreign direct investment decline steadily over the past several decades. Most recently, Canada has made waves in the global community by taking positive actions to interfere with foreign acquisitions of Canadian entities, despite the Canadian government's declarations to global competitors advocating free market principles and denouncing protectionist policies. This article discusses Canada's procedures governing foreign direct investment within its borders and examines the Canadian government's recent foreign direct investment decisions and their potential negative implications on Canada's position in the global marketplace. Given the benefits of foreign direct investment, this article argues that Canada needs to improve transparency regarding its decisions on foreign direct investment to alleviate global concerns of increasing government interference with foreign investors seeking to enter the Canadian economy. Additionally, the article argues that Canada should establish clearer metrics for its review of foreign direct investment to ensure that Canada maintains credibility in the global community as a leading destination for foreign investment opportunities.*

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## INTRODUCTION

The growth in the world's economy over the past twenty years has, in large part, resulted from the rapid increase in, and globalization of, foreign direct investment (FDI)<sup>1</sup>. Recognizing the benefits of FDI, many nations have taken an active role in liberalizing their trade and investment policies to make their investment landscapes more attractive to foreign enterprises. Canada followed suit and relaxed its barriers on foreign investment with the passage of the Investment Canada Act (ICA) in 1985. Historically, Canada has been a leading destination for FDI. Recent trends in FDI, however, raise concerns that Canada might be losing ground in the global FDI race. While Canada still maintains a strong foothold on FDI, downward trends in FDI growth and controversy over Canada's recent applications of the ICA indicate Canada should reevaluate its foreign investment law to ensure it is in a position to better compete with other nations and continue to take advantage of the global FDI market that is set to expand further in the near future.

Although Canada has largely lived up to its self-described status as a "wide open foreign direct investment opportunity,"<sup>2</sup> the truth of this statement has come under scrutiny with Canada's recent decisions to use the ICA to block foreign acquisitions of Canadian companies and to undertake enforcement proceedings against a particular foreign investor. Most recently, Canada stepped in to prevent the Anglo-Australian mining company BHP Billiton Ltd. from acquiring the Canadian Potash Corporation of Saskatchewan Inc.<sup>3</sup>

While the full impact of Canada's recent decisions on FDI is still to be

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<sup>1</sup> Foreign direct investment (FDI) can be defined as the "total value of equity, long-term debt and short-term debt held by foreign enterprises" within a country's borders. MICHAEL HOLDEN, LIBRARY OF PARLIAMENT, OVERVIEW OF CANADIAN FOREIGN INVESTMENT 1 (2008) (Can.), available at [http://www2.parl.gc.ca/Content/LOP/ResearchPublications/\\_prb0833-e.pdf](http://www2.parl.gc.ca/Content/LOP/ResearchPublications/_prb0833-e.pdf). Stated differently, FDI "reflects the objective of obtaining a lasting interest by a resident entity in one economy ('direct investor') in an entity in an economy other than that of the investor ('direct investment enterprise')." ORG. FOR ECON. CO-OPERATION & DEV., OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 7 (3d ed. 1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf>.

<sup>2</sup> Nirmala Menon, *Canada's Flaherty: We're Wide Open to Foreign Investment*, WALL ST. J. BLOG (Nov. 11, 2010, 8:38 AM), <http://blogs.wsj.com/korearealtime/2010/11/11/canadas-flaherty-were-wide-open-to-foreign-investment/> (quoting Canadian Minister of Finance Jim Flaherty).

<sup>3</sup> See *infra* Part III.

determined, Canada must make necessary changes to its investment review process to prevent any potential negative effects on foreign investment in Canada and to protect Canada's ability to invest abroad. In its review of Canada's foreign investment laws, the Canadian federal government must reevaluate its foreign investment review process under the ICA in order to better align it with Canada's stated policy objectives. Specifically, Canada must provide clearer, more objective metrics for its review of FDI to prevent political motivations and personal agendas from influencing government decisions. By recognizing the significance of its recent decisions and answering concerns with appropriate policy amendments, Canada can ensure it continues to reap the benefits of FDI.

Part I of this Comment discusses the evolution of Canada's policy on FDI and the current review process under the ICA. Part II provides research on the merits of FDI and empirical data on global FDI trends in relation to FDI trends in Canada. Part III discusses the Canadian government's recent history-making applications of the ICA that potentially signify a change of course in the government's attitude toward foreign investment. Lastly, Part IV argues that, in light of the positive influence of FDI and Canada's desire to attract foreign investors, the Canadian government should bring more transparency to the review process under the ICA to alleviate global concerns about the potential for increased government interference with foreign takeovers of Canadian companies.

## I. THE EVOLUTION OF CANADA'S POLICY ON FDI

Government policies have significant influence on FDI as they can serve to make a country either more or less attractive to foreign investors.<sup>4</sup> Canada's attitude and policies on FDI have vacillated over the last forty years with the country's changes in political and public opinion, swaying from laissez-faire to protectionist and then back again.<sup>5</sup> Prior to the 1970s, Canada's hands-off approach to FDI created a favorable environment for foreigners to invest in the country free of any serious obstacles.<sup>6</sup> This liberal climate took a drastic change, however, when a 1972 publication by then-Canadian Consumer and Corporate Affairs Minister Herb Gray on the level of FDI in Canada, known as the "Gray Report," confirmed a growing public belief that foreign investment had expanded to potentially harmful levels.<sup>7</sup> According to the report, the ownership landscape for Canadian companies was heavily foreign controlled with foreign ownership at 60% of

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<sup>4</sup> Steven Globerman & Daniel M. Shapiro, *The Impact of Government Policies on Foreign Direct Investment: The Canadian Experience*, 30 J. INT'L BUS. STUD. 513, 515 (1999).

<sup>5</sup> Chris Lalonde, *Dubai or Not Dubai?: A Review of Foreign Investment and Acquisition Laws in the U.S. and Canada*, 41 VAND. J. TRANSNAT'L L. 1475, 1484 (2008).

<sup>6</sup> *Id.*

<sup>7</sup> See GOV'T OF CANADA, FOREIGN DIRECT INVESTMENT IN CANADA (1972).

manufacturing companies, 76% of the energy sector, and 90% in certain other industries.<sup>8</sup> The Gray Report indicated foreign control had become so rampant that any potential benefits from FDI were overshadowed by the serious threat posed to Canada's economic goals.<sup>9</sup>

To counteract these fears, the government implemented the Foreign Investment Review Act (FIRA) in 1974, which created an agency tasked with review of "all direct and indirect acquisitions of control of Canadian businesses and the establishment of all new businesses by foreigners."<sup>10</sup> The FIRA review process required all foreign investors seeking to acquire control of Canadian businesses to submit applications promising significant undertakings to ensure their requested investment would bring considerable benefits to Canada.<sup>11</sup> Although FIRA's stated mission was "not to discourage FDI but to ensure significant benefits to Canadians,"<sup>12</sup> the added obstacles and burdens the FIRA review process placed on FDI and foreign investors were questioned in the 1980s when Canada began to feel the negative effects of a significant downturn in FDI.<sup>13</sup> In the face of a recession in the early 1980s and mounting criticism of the FIRA review process from the international community, along with "a better understanding, in all sectors of Canadian society, of the costs of a policy perceived by foreigners as being antagonistic to foreign capital," the government realized "economic nationalism" should no longer drive its attitude and policy on FDI.<sup>14</sup>

Following the election of a new Conservative Party, the government passed the Investment Canada Act (ICA) in 1985, which repealed FIRA and implemented a more moderate review process consistent with the political climate shift towards increased foreign investments.<sup>15</sup> The stated mission of the ICA was a departure from that of FIRA:

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<sup>8</sup> *Id.* at 20–21.

<sup>9</sup> *Id.* at 5–8 (summarizing major economic and social costs associated with foreign investment in Canada).

<sup>10</sup> Jean Raby, *The Investment Provisions of the Canada–United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT'L L. 394, 396 (1990).

<sup>11</sup> Globerman & Shapiro, *supra* note 4, at 516. During the period between 1974 and 1984, more than 90% of applications reviewed by the Agency were approved, presumably on a finding of a "significant benefit" to Canada. Raby, *supra* note 10, at n. 6. While this figure indicates the review process was relatively mild, the Agency's roughly 7% rejection rate is high compared to Australia's 2.7% rejection rate over the same time frame. In addition, the 7% rejection rate does not reflect the possible deterrent effect FIRA had on foreign investors who were discouraged from putting investment proposals up for review, although some argue against the existence of any deterrent effect. Globerman & Shapiro, *supra* note 4, at 516.

<sup>12</sup> Globerman & Shapiro, *supra* note 4, at 516.

<sup>13</sup> Lalonde, *supra* note 5, at 1485.

<sup>14</sup> Raby, *supra* note 10, at 396.

<sup>15</sup> Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.) (Can.).

Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.<sup>16</sup>

Emphasizing that the new Act was an encouragement of FDI, then-Prime Minister Brian Mulroney declared, “Canada is open for business again.”<sup>17</sup>

#### A. The Investment Canada Act

Since its passage in 1985, the ICA has been the body of law governing the review of foreign investment in Canada. Although, like FIRA, the ICA requires non-Canadians to obtain government approval before undertaking any direct or indirect investment in Canada, the ICA procedures outline a new, more streamlined scope of review.<sup>18</sup> First, under the ICA, not all foreign investments will come under review. Rather, review of a direct or indirect investment or creation of a business by a non-Canadian<sup>19</sup> will only be triggered when certain thresholds are met. The ICA requires government review of an investment to acquire control of a Canadian business in the following cases: (1) direct acquisition<sup>20</sup> of control of a Canadian business with more than C\$5 million (approximately US\$4.9 million) in assets;<sup>21</sup> (2) indirect acquisition<sup>22</sup> of control of a Canadian business with more than C\$50 million (approximately US\$49 million) in assets;<sup>23</sup> and (3) in the case of a World Trade Organization (WTO) investor,<sup>24</sup> direct acquisition of

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<sup>16</sup> *Id.* § 2.

<sup>17</sup> James M. Spence, *Current Approaches to Foreign Investment Review in Canada*, 31 MCGILL L.J. 508, 508 (1985–1986).

<sup>18</sup> Raby, *supra* note 10, at 397.

<sup>19</sup> Investment Canada Act, § 11.

<sup>20</sup> A “direct acquisition” refers to the acquisition of voting shares, voting interest, or all or substantially all of the assets of a corporation incorporated in and carrying on business in Canada. *Id.* at § 28(1)–(d).

<sup>21</sup> *Id.* §§ 14(1)(a)–(b), 14(3), 28(1)(a)–(d).

<sup>22</sup> “An indirect acquisition is a transaction involving the acquisition of the shares of a company incorporated outside of Canada, which owns a subsidiaries in Canada.” *Investment Canada Act—Help with Forms*, INDUSTRY CANADA (June 18, 2010), <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00055.html#indirect2>.

<sup>23</sup> Investment Canada Act, §§ 14(1)(d), 14(4), 28(1)(d)(ii).

<sup>24</sup> The World Trade Organization (WTO) is an organization consisting of 153 member countries that seeks to liberalize trade and establish rules of trade between nations. *Understanding the WTO: What is the World Trade Organization?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Sept. 30, 2011). A “WTO investor” refers to an individual who is a WTO member, a government of a

control of a Canadian business with more than C\$312 million (approximately US\$305 million) in assets.<sup>25</sup>

Acquisitions by WTO investors, whether direct or indirect, may come under government review at the C\$5 million (approximately US\$4.9 million) and C\$50 million (approximately US\$49 million) thresholds<sup>26</sup> if the proposed acquisition relates to “Canada’s cultural heritage or national identity.”<sup>27</sup> The ICA identifies a reviewable “cultural business” transaction as one involving the publication, distribution, and sale of books, magazines, periodicals, newspapers, film, or music.<sup>28</sup>

In order for an investment to be approved under the ICA, the government must be “satisfied that the investment is likely to be of net benefit to Canada.”<sup>29</sup> This open-ended standard is qualified by the following list of factors that the government will take into account when determining the existence of a “net benefit”:

the effect of the investment on the level and nature of economic activity in Canada;

the degree and significance of participation by Canadians in the [business or industry at issue];

the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

the effect of the investment on competition within any industry or industries in Canada;

the compatibility of the investment with national industrial, economic, and cultural policies [of Canada or any province therein];

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WTO member, or a WTO investor-controlled entity. Investment Canada Act, § 14.1(6).

<sup>25</sup> Investment Canada Act, § 14.1(1)(a), (2)–(3); Tony Clement, *Investment Canada Act*, 145 CANADA GAZETTE, Feb. 12, 2011, at 238. Section 14.1(2) of the ICA provides that the threshold for WTO investors shall be determined by the Minister in January of each year based on the nominal GDP at market prices for the current and previous year, and, pursuant to section 14.1(3) of the ICA, that threshold is published in the Canada Gazette. The threshold was C\$299 million (approximately US\$292 million) for 2010 and C\$312 million (approximately US\$305 million) for 2009. *Investment Canada Act—Thresholds*, INDUSTRY CANADA (Feb. 21, 2011), [http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h\\_lk00050.html](http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html). The current WTO threshold is based on book value of assets, but amendments to the ICA that are not yet in force propose to increase the review threshold to C\$600 million (approximately US\$587 million) in “enterprise value,” increasing to C\$1 billion (approximately US\$987 million) over the next four years. Investment Canada Act, R.S.C. 1985, c. 28, 448(1) (1st Supp.) (Can.).

<sup>26</sup> *Investment Canada Act—Thresholds*, *supra* note 25.

<sup>27</sup> Investment Canada Act, § 15(a).

<sup>28</sup> *Id.* § 14.1(6)(a)–(e).

<sup>29</sup> *Id.* § 16(1).

and

the contribution of the investment to Canada's ability to compete in world markets.<sup>30</sup>

In weighing these factors, the government is not bound by any set formula and can consider a multitude of factors tailored to the specific situation, giving the government broad discretion in its review process.<sup>31</sup> A literal reading of the factors suggests that the review process involves a significant government undertaking requiring time-consuming, complex economic studies. However, in practice, the ICA review process is not nearly as meticulous and exacting as it sounds.<sup>32</sup>

Those investments that do not get through the review process relatively unimpeded will usually end up in negotiations, where the government will insist the applicant guarantee certain undertakings in order to ensure a "net benefit" is achieved.<sup>33</sup> To persuade the government, "the applicant may submit undertakings with respect to such matters as levels of employment, Canadian participation, research and development, and investment so as to boost his request" for government approval.<sup>34</sup> Consistent with the ICA's stated purpose of encouraging foreign investment, the government has historically preferred to use the ICA review process as a means of "obtain[ing] concessions from potential foreign investors through side agreements" rather than as a means of preventing acquisitions.<sup>35</sup>

The review process under the ICA has largely lived up to former Prime Minister Mulroney's 1984 declaration that "Canada is open for business." For the first twenty-three years since the enactment of the ICA, Canada did not reject any investment application under the ICA, with the exception of certain isolated transactions involving sensitive cultural industries.<sup>36</sup> The refusal to approve an investment proved so rare that the ICA was described as a "paper tiger,"<sup>37</sup> and its review process analogized to "a 'Welcome to

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<sup>30</sup> *Id.* § 20(a)–(f).

<sup>31</sup> Raby, *supra* note 10, at 399.

<sup>32</sup> See BUSINESS LAWS OF CANADA § 14:16 (Miller Thomson LLP ed., 2009) (discussing how ICA review of foreign investment proposals is based on "a very open-ended and subjective standard," where approval is obtained by negotiation with government officials over the amount of undertakings the foreign investor agrees to carry out).

<sup>33</sup> *Id.*

<sup>34</sup> Raby, *supra* note 10, at 399.

<sup>35</sup> Lalonde, *supra* note 5, at 1488.

<sup>36</sup> Howie Wong & Robert Dechert, *Canadian Foreign Takeover Review*, BUS. L. TODAY, Jan.–Feb. 2009, at 22.

<sup>37</sup> Kevin Ackhurst & Paul Beaudry, *Canada: The Investment Canada Act: Paper Tiger No More*, MONDAQ (Nov. 4, 2009), <http://www.mondaq.com/canada/article.asp?articleid=88800>.

Canada' wave from the sleepy Canadian border guard."<sup>38</sup> However, such descriptions of the ICA are no longer accurate in light of Canada's recent decisions under the ICA to block foreign takeovers of Canadian companies for the first time in the legislation's history.<sup>39</sup>

## II. EMPIRICAL DATA ON THE EFFECTS OF FDI

Foreign direct investment (FDI) refers to "the total value of equity, long-term debt and short-term debt held by foreign enterprises."<sup>40</sup> More generally, FDI "involves an entity in one economy (the direct investor) obtaining a lasting economic interest in another enterprise in a foreign economy."<sup>41</sup> The Canadian government enacted the ICA with the goal of attracting FDI into Canada.<sup>42</sup> The international consensus, supported by numerous studies, is that FDI and the resulting existence of multinational companies within a country's borders has a positive influence on the host country's economy.<sup>43</sup> The competition among nations to attract and retain global enterprises has led to a dramatic surge in global FDI in the past three decades, and nations continue to adapt their policies to be more FDI-friendly. According to the United Nations Conference on Trade and Development in its 2006 World Investment Report, "there were 205 FDI-related policy changes across the world in 2005, and most of these changes made conditions more [favorable] for foreign companies to enter and operate."<sup>44</sup> Since 1982, global inflows of FDI have soared, increasing from just C\$59.4 billion (approximately US\$58.1 billion) to over C\$1.3 trillion (approximately US\$1.27 trillion) in 2006.<sup>45</sup>

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<sup>38</sup> Wong & Dechert, *supra* note 36.

<sup>39</sup> See *infra* Parts III and IV.

<sup>40</sup> HOLDEN, *supra* note 1.

<sup>41</sup> Ram C. Acharya & Someshwar Rao, *Foreign Direct Investment Trends: A Canadian Perspective* 1 (Industry Canada, Working Paper 2008-13, 2008), available at <http://www.ic.gc.ca/eic/site/eas-aes.nsf/eng/ra02066.html> (citing the definition of FDI provided by the Organisation for Economic Co-operation and Development (OECD)).

<sup>42</sup> See *supra* notes 15–16 and accompanying text.

<sup>43</sup> See, e.g., WALID HEJAZI, INST. FOR RESEARCH ON PUB. POLICY, DISPELLING CANADIAN MYTHS ABOUT FOREIGN DIRECT INVESTMENT 6–10 (2010), available at [http://www.irpp.org/pubs/IRPPstudy/IRPP\\_Study\\_no1.pdf](http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no1.pdf) (discussing the "many economic benefits associated with inward FDI," including advanced technology, increased productivity, higher-paid jobs, and better management).

<sup>44</sup> Someshwar Rao et al., *Role of FDI in the Canadian Economy: A Synthesis of Empirical Research* 9 (Industry Canada, Working Paper 2009-04, 2009), available at <http://www.ic.gc.ca/eic/site/eas-aes.nsf/eng/ra02088.html> (citing U.N. CONFERENCE ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 23 (2006)). Most recently, in the period from October 1, 2010 to January 15, 2011, at least twenty-seven countries or economies adopted policies related to foreign investment, and most of these policies focus on liberalizing and promoting foreign investment. UNITED NATIONS, INVESTMENT POLICY MONITOR 1 (2011), available at [http://www.unctad.org/en/docs/webdiaeia20112\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20112_en.pdf).

<sup>45</sup> Rao et al., *supra* note 44, at 6.

Studies further indicate that the long-term economic benefits of FDI outweigh the possible short-term difficulties.<sup>46</sup> A 2007 comprehensive appraisal of available evidence prepared by the Organisation of Economic Co-operation and Development (OECD) concludes that FDI brings a net benefit to host countries:

Based on empirical studies so far it is fair to conclude that inward direct investment generally help [sic] host countries raise total factor productivity and, in consequence, their GDP. The main channels through which this takes effect are, first, direct impacts through (1) enhanced access to international trade through the link-up with the investor's international networks; (2) corporate restructuring and enhanced governance in the targeted enterprises; and (3) the effect on host country competition. Most of these impacts are present in empirical evidence of the effects of M&As on individual companies. Secondly, important indirect effects ("externalities") are possible, chiefly in the form of (4) technology spillovers; and (5) the diffusion of human capital and knowledge. OECD (2002) [report] not only found evidence of each of these channels but also concluded that inward direct investment generally leads to a higher economy-wide factor productivity and, in consequence, GDP.<sup>47</sup>

As in other nations, the benefits of FDI have been felt in Canada. Studies of the impact of FDI on the Canadian economy confirm the OECD's conclusions that FDI stimulates economic growth, finding that in Canada (1) foreign-controlled firms have higher productivity levels<sup>48</sup> and pay higher wages<sup>49</sup> than domestic firms; (2) foreign-controlled firms spur innovation by spending more on research and development than domestic firms;<sup>50</sup> (3) FDI contributes to domestic job growth,<sup>51</sup> and (4) FDI increases capital formation in Canada.<sup>52</sup>

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<sup>46</sup> See, e.g., W. Hejazi & P. Pauly, *Motivations for FDI and Domestic Capital Formation*, 34 J. INT'L. BUS. STUD. 282, 283 (2003); Madanmohan Ghosh & Weimin Wang, *Does FDI Accelerate Economic Growth? The OECD Experience Based on Panel Data Estimates for the Period 1980–2004*, GLOBAL ECON. J., Oct. 2009, at 1. See *infra* text accompanying notes 53–55 for a discussion of the perceived difficulties related to foreign ownership of domestic firms.

<sup>47</sup> ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT PERSPECTIVES 2007: FREEDOM OF INVESTMENT IN A CHANGING WORLD 87 (2007).

<sup>48</sup> *Id.*; Hejazi & Pauly, *supra* note 46, at 287.

<sup>49</sup> HEJAZI, *supra* note 43.

<sup>50</sup> Rao et al., *supra* note 44, at 6. FDI brings about innovation, not just from foreign-owned firms, but also from domestic firms. Studies show that inward FDI complements, rather than replaces, domestic firm research and development, which dispels fears that Canada will "free ride" on foreign-owned intelligence and will not strive to build its own knowledge base and technical expertise. Hejazi, *supra* note 43, at 27.

<sup>51</sup> HEJAZI, *supra* note 43, at 26.

<sup>52</sup> Hejazi & Pauly, *supra* note 46, at 283; Acharya & Rao, *supra* note 41, at 11. "Capital

Despite offering apparent economic benefits, FDI has faced some criticism. One argument against FDI that has particularly raised concerns in Canada is that foreign takeovers of Canadian businesses lead to the “hollowing out” of firms’ head offices located in Canada.<sup>53</sup> There is a fear that foreign takeovers will result in the movement of head offices, and their accompanying functions (e.g., human resource management, research and development, high-skill and high-wage positions, financial management), out of Canada, thereby negatively affecting the Canadian economy.<sup>54</sup> Among other things, head offices are found to benefit local economies through “knowledge transfer and knowledge spillovers” into the general marketplace.<sup>55</sup>

Contrary to these concerns, studies find no evidence supporting a “hollowing out” phenomenon in Canada,<sup>56</sup> and employment at head offices has actually steadily increased from the 1990s through 2005.<sup>57</sup> This increase in head offices has largely been driven by foreign-controlled firms, which have accounted for six out of ten new head-office jobs created during the period.<sup>58</sup> Furthermore, a survey of senior managers of both foreign-owned and Canadian-owned multinational firms in Canada indicates “foreign-owned subsidiaries operating in Canada have become strategic leaders in their company’s [sic] global network.”<sup>59</sup>

In spite of evidence supporting FDI’s positive influence on the Canadian economy and evidence disputing a “hollowing out” phenomenon, FDI remains a controversial topic in Canada as fears of too much foreign ownership continue to fuel debate.<sup>60</sup> Public perception and apprehension about increasing foreign ownership, however, are very different from the reality of Canada’s domestic marketplace. A comparison of FDI activity in Canada in relation to the rest of the developed world confirms that such fears are unfounded and should not drive policy debate on FDI regulation.

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formation” refers to the accumulation of capital stock, which is equipment, buildings, and goods that are invested into the economy instead of consumed. Capital stock is a source of economic growth. Therefore, a higher rate of capital formation leads to increased growth in economic productivity and aggregate income. *Capital Formation*, THE CANADIAN ENCYCLOPEDIA, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001384> (last visited Sept. 30, 2011).

<sup>53</sup> HEJAZI, *supra* note 43, at 9–10.

<sup>54</sup> Rao et al., *supra* note 44, at 12.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> HEJAZI, *supra* note 43, at 8–9.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> GLEN HODGSON, CONFERENCE BD. OF CANADA, IS CORPORATE CANADA BEING HOLLOWED OUT? IT ALL DEPENDS WHERE YOU ARE 3 (2007), available at <http://www.conferenceboard.ca/documents.aspx?did=1931>.

<sup>60</sup> HEJAZI, *supra* note 43, at 1 (discussing and dispelling the “misleading caricature” that inward FDI is synonymous with excessive foreign control of Canada’s economy).

Canada has historically been an international leader in inward FDI (i.e., investment by foreign entities within a country's borders), and, like the general global community, experienced an increase in inward FDI from 20% of GDP in 1980 to 31% in 2006.<sup>61</sup> However, global FDI trends suggest "Canada has been losing its attractiveness, relative to other countries, as a destination for foreign investment."<sup>62</sup> Canada's share of global FDI has dropped from 15.7% in 1970 to 3.2% in 2006.<sup>63</sup> In 1980, Canada ranked second behind Ireland in FDI as a percentage of GDP, but as of 2004, it ranked eleventh among OECD nations.<sup>64</sup> Canada's growth in foreign investment through mergers and acquisitions, the main source of FDI in Canada as well as globally,<sup>65</sup> lagged behind international levels in 2004 and 2005.<sup>66</sup> Furthermore, recent data shows that FDI in Canada actually fell in 2008.<sup>67</sup> Most importantly, the decline in Canada's share of global FDI is not simply attributable to the recent increase in FDI in emerging markets. Rather, as indicated above,<sup>68</sup> Canada has seen its share of FDI by industrialized countries continually decreasing since 1970.

While the global upward trend in FDI since 1980 is a result of nations significantly liberalizing their foreign investment policies, FDI still generally faces more barriers than the international trade in goods.<sup>69</sup> A 2006 OECD study of international regulatory regimes on FDI, revised in 2010, evaluated the restrictiveness of such policies among OECD nations.<sup>70</sup> The study measures restrictiveness based on "(i) foreign equity restrictions, (ii) screening and prior approval requirements, (iii) rules for key personnel, and (iv) other restrictions on the operation of foreign enterprises."<sup>71</sup> Based on these metrics, Canada was found to be one of the most restrictive nations

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<sup>61</sup> HOLDEN, *supra* note 1, at 1; Ghosh & Wang, *supra* note 46, at 3, 17.

<sup>62</sup> HEJAZI, *supra* note 43, at 3.

<sup>63</sup> HOLDEN, *supra* note 1, at 1 fig.3 (citing data from the United Nations World Investment Report); Hejazi, *supra* note 43, at 14 fig.3 (citing data from the United Nations Conference on Trade and Development).

<sup>64</sup> Ghosh & Wang, *supra* note 46, at 3, 17.

<sup>65</sup> HEJAZI, *supra* note 43, at 6.

<sup>66</sup> Achayra & Rao, *supra* note 41, at 4–5.

<sup>67</sup> HEJAZI, *supra* note 43, at 12–13 (noting that, while still an important indicator that Canada is not being overrun by foreign investors, the drop in 2008 may have been attributable to the global financial crisis).

<sup>68</sup> See *supra* note 63 and accompanying text.

<sup>69</sup> Achayra & Rao, *supra* note 41, at 6.

<sup>70</sup> Blanka Kalinova et al., *OECD's FDI Restrictiveness Index: 2010 Update 6* (OECD Working Papers on International Investment, No. 2010/3, 2010), available at <http://www.oecd.org/dataoecd/32/19/45563285.pdf>. The OECD has thirty-four member countries, including Canada, the United States, and major economies of Europe. A list of OECD member countries can be found at [http://www.oecd.org/countrieslist/0,3351,en\\_33873108\\_33844430\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/countrieslist/0,3351,en_33873108_33844430_1_1_1_1_1,00.html).

<sup>71</sup> Kalinova et al., *supra* note 70, at 9.

in terms of regimes regulating FDI,<sup>72</sup> which is not surprising considering Canada's decline in global share of FDI. Among the formal restrictions that contribute to Canada's high ranking on the FDI restrictiveness index are:

[R]estrictions on foreign ownership in select sectors; exclusive domestic ownership applied to select natural resource sectors; obligatory screening and approval procedures through the Investment Canada Act; stipulations that foreign investors must demonstrate economic benefits, increasing the cost of entry and discouraging the inflow of foreign capital; [and] prior approval of FDI over a certain threshold.<sup>73</sup>

These restrictions act as barriers to economically beneficial foreign investment and contribute to Canada's position as one of the most restrictive countries on FDI.

### III. RECENT APPLICATIONS OF THE INVESTMENT CANADA ACT (ICA)

While the Canadian government continues to assure the world that Canada is "wide open" to foreign investment, a series of recent applications of the ICA raise questions about whether Canada's current Conservative government, led by Prime Minister Stephen Harper,<sup>74</sup> is redefining or simply reinforcing restrictions on FDI under the ICA review process. First, in May 2008, the government used the ICA to block a foreign takeover of MacDonald, Dettwiler and Associates Ltd. (MDA), a Canadian aerospace company. This marked the first time the Canadian government blocked a takeover since the ICA was enacted in 1985 (excluding certain instances related to unique cultural businesses).<sup>75</sup> Then, in July 2009, for the first time in the twenty-four year history of the ICA, the government sued United States Steel Corporation, a foreign investor, to enforce guarantees the company had made when it acquired a Canadian business.<sup>76</sup> Most recently, in November 2010, the government decided not to approve the foreign takeover of the Canadian company Potash Corporation of Saskatchewan Inc. by the Australian mining company BHP Billiton Ltd.,

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<sup>72</sup> *Id.* at 17 graph II-1.

<sup>73</sup> Acharya & Rao, *supra* note 41, at 6-7.

<sup>74</sup> Prime Minister Stephen Harper took office as leader of the Conservative minority government in Canada after winning the 2006 election. Phil Hahn, *Stephen Harper Wins Conservative Minority*, CTV.CA NEWS (Jan. 23, 2006, 11:06 PM), [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060123/elxn\\_main\\_story\\_060123/20060124?s\\_name=election2006&no\\_ads=](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060123/elxn_main_story_060123/20060124?s_name=election2006&no_ads=).

<sup>75</sup> Wong & Dechert, *supra* note 36.

<sup>76</sup> Sue-Anne Fox, *Canada v. US Steel: Recent Developments under the Investment Canada Act*, N. AM. REG'L FORUM NEWS, Oct. 2010, at 12.

finding no “net benefit” to Canada in the acquisition.<sup>77</sup>

The Canadian government emphasizes that these are special, isolated cases and “should not be construed as a warning of greater intervention in the marketplace.”<sup>78</sup> While that may be true, these cases potentially signify a shift back to the protectionist attitude that spurred stricter regulation on FDI in Canada in the 1970s, to the detriment of economic growth.<sup>79</sup> Even if the Canadian government is not taking a tougher stance on FDI, it must be concerned with the message it has sent to the international community of foreign investors who may now perceive further obstacles, and accompanying costs, to potential investment in Canada. At the very least, the criticism from the international community as a result of these cases demonstrates the need for Canada to remove much of the subjectivity from its review process under the ICA and present clearer guidelines for foreign investors seeking to acquire control within its borders.

#### A. Canada’s Rejection of the MDA Takeover

On May 9, 2008, then-Minister of Industry<sup>80</sup> Jim Prentice “woke up the toothless tiger from its slumber” and blocked the proposed acquisition of MDA’s aerospace business by deciding that the purchase was not likely to bring a “net benefit” to Canada under the ICA’s review process.<sup>81</sup> The decision to block the transaction was the first time the Canadian government had done so since enacting the ICA in 1985 with the purpose of encouraging foreign investment. This decision called attention to Canada, as it was a rare departure from the Canadian government’s normal reluctance to interfere with market transactions. However, in this case, the government stepped in to block this acquisition because, in its view, the transaction presented “national security” concerns warranting its rejection.<sup>82</sup>

MDA is the leading Canadian information technology and space products company, well known for its satellite technology Radarsat-2, which, among other capabilities, monitors Canada’s Arctic.<sup>83</sup> Alliant Techsystems Inc. (ATK), a U.S.-based aerospace and defense company,

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<sup>77</sup> Ian Austen, *Canada Blocks BHP’s Purchase of Potash*, N.Y. TIMES (Nov. 3, 2010), [http://www.nytimes.com/2010/11/04/business/global/04potash.html?\\_r=1](http://www.nytimes.com/2010/11/04/business/global/04potash.html?_r=1).

<sup>78</sup> Wong & Dechert, *supra* note 36.

<sup>79</sup> See *supra* Part I.

<sup>80</sup> The Minister of Industry is tasked with carrying out the review process under the ICA. Investment Canada Act, R.S.C. 1985, c. 28, §4 (1st Supp.) (Can.).

<sup>81</sup> Wong & Dechert, *supra* note 36.

<sup>82</sup> Bill Mann, *Potash Bids Will Test Canada’s Foreign-Takeover Rules*, MARKETWATCH BLOG (Aug. 23, 2010, 12:45 PM), <http://blogs.marketwatch.com/canada/2010/08/23>.

<sup>83</sup> Denis Gascon & Jason P.T. McKenzie, *Canada Uses Investment Canada Act to Block Acquisition of MDA by Alliant Techsystems*, OGILVY RENAULT LLP (Aug. 18, 2008), <http://m.en.ogilvyrenault.com/mobileweb/content/read/id/76A67C55-CB46-4EE8-9C68-E6E04D1C31E5>.

proposed a C\$1.325 billion (approximately US\$1.296 billion) acquisition of MDA, specifically seeking to acquire control of the Radarsat technology.<sup>84</sup> MDA strongly supported the transaction, finding the sale was necessary to maintain a thriving space and satellite business,<sup>85</sup> and argued to the Parliament of Canada that government funding on space technology was insufficient to support a company of MDA's size.<sup>86</sup> MDA further argued that, through the sale, MDA would have access to the U.S. market, providing new growth opportunities that were not possible in Canada.<sup>87</sup> MDA did not believe it could grow in the U.S. defense industry absent ownership by a U.S. company.<sup>88</sup> For these reasons, MDA's "shareholders and management overwhelmingly approved the deal."<sup>89</sup>

Despite this approval, then-Minister of Industry Prentice rejected the deal, siding instead with critics of the transaction who argued the acquisition "amounted to a handing over of Canadian taxpayer funded technology to the United States"<sup>90</sup> because the Canadian federal government had provided MDA approximately C\$445 million (approximately US\$435 million) in research and development funding to develop Radarsat-2.<sup>91</sup> Nationalist sentiment and protectionist concerns arose over Canada's "Arctic sovereignty," with the government asserting that the Radarsat technology was vital to defending Canada's coastline.<sup>92</sup> MDA's Chief Executive Officer, Daniel Friedman, rejected this argument as a basis for blocking its deal with ATK, stating that the Canadian government had "all the necessary powers and authority to ensure that in [the] future it will continue to exercise full control over Radarsat 2."<sup>93</sup>

The decision to reject ATK's bid for MDA was of some surprise,

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<sup>84</sup> David Ljunggren, *Canada Blocks Sale of MDA Satellite Unit to U.S.*, REUTERS (Apr. 10, 2008, 4:42 PM), <http://www.reuters.com/article/idUSN1038419320080410?pageNumber=1>.

<sup>85</sup> Gascon & McKenzie, *supra* note 83.

<sup>86</sup> Ljunggren, *supra* note 84.

<sup>87</sup> Gascon & McKenzie, *supra* note 83.

<sup>88</sup> Wong & Dechert, *supra* note 36.

<sup>89</sup> Gascon & McKenzie, *supra* note 83.

<sup>90</sup> *Id.*

<sup>91</sup> Wong & Dechert, *supra* note 36.

<sup>92</sup> *Id.* Central to concerns about giving the Radarsat technology to the U.S. was the fear that Canada would be handing over sensitive data regarding disputes over its Arctic territory. "Canada remains at odds with the U.S., as well as Russia, Denmark, and Norway, over a number of issues related to Arctic sovereignty, including a dispute over 1.2 million square kilometres (460,000 sq. miles) of Arctic seabed estimated to hold up to 25% of the world's undiscovered oil and gas reserves." Gascon & McKenzie, *supra* note 83. The U.S. previously rejected Canada's claims to sovereignty over the Arctic waters, claiming the waters are international territories. Critics of the MDA transaction also feared that the U.S. would prevent Alliant from viewing data gathered by its Radarsat satellite, in particular images of U.S. ships sailing the Arctic waters. Ljunggren, *supra* note 84.

<sup>93</sup> Ljunggren, *supra* note 84.

considering the Canadian government had formerly ignored calls to tighten restrictions on foreign investment and continually declared its hands-off attitude to market transactions. Prime Minister Harper previously assured that he “did not want to ‘micromanage’ international investment flows and pick which transactions to allow.”<sup>94</sup> Similarly, then-Minister of Industry Prentice previously stated, “[T]he Investment Canada Act should not—and will not—become a shield to protect Canadian industry from the full rigors of global competition.”<sup>95</sup> To address concerns over its apparent change of course, the government insisted it was not becoming protectionist, and emphasized that its rejection of the MDA transaction was “a very unique situation”<sup>96</sup> that “should not be construed as a warning of greater intervention in the marketplace.”<sup>97</sup>

Nevertheless, the MDA decision, as well as concerns over the Canadian government’s prior approvals of high-profile foreign acquisitions of iconic Canadian businesses, led the government to reevaluate its review process under the ICA.<sup>98</sup> The ICA was amended in March 2009 to give the Minister of Industry power to review proposed acquisitions if there are “reasonable grounds to believe that an investment by a non-Canadian could be injurious to [Canada’s] national security.”<sup>99</sup> While the amendments provide procedures for review of “investments that threaten national security,” they do not actually define what constitutes such an investment.<sup>100</sup> Thus, the ultimate effect of these amendments was to give the Minister of Industry broader discretion to review and potentially block foreign acquisitions.

## B. Canada v. U.S. Steel

In July 2009, not long after the blocking of the proposed purchase of MDA, then-Minister of Industry Tony Clement filed a suit in the Federal Court of Canada requesting a court order compelling United States Steel Corporation to fulfill commitments it had made to the Canadian government in order to obtain approval for its acquisition of Stelco Inc. back in 2007.<sup>101</sup> Specifically, Clement was seeking court enforcement of

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<sup>94</sup> Gascon & McKenzie, *supra* note 83.

<sup>95</sup> *Id.*

<sup>96</sup> Ljunggren, *supra* note 84.

<sup>97</sup> Wong & Dechert, *supra* note 36.

<sup>98</sup> Gascon & McKenzie, *supra* note 83.

<sup>99</sup> Investment Canada Act, R.S.C. 1985, c. 20 § 25.2(1) (Can.); *see also* Ackhurst & Beaudry, *supra* note 37.

<sup>100</sup> Ackhurst & Beaudry, *supra* note 37.

<sup>101</sup> Fox, *supra* note 76; *see also* Industry Minister Clement Takes Further Steps to Hold U.S. Steel to Its Investment Canada Act Commitments, INDUSTRY CANADA (July 17, 2009), <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html>; Beth Ballog, *Canadian Industry Minister Suing U.S. Steel*, PITTSBURGH BUS. TIMES (July 22, 2009, 3:26PM),

U.S. Steel's promise to "increase steel production in Canada" and "maintain employment levels."<sup>102</sup> As a condition for government approval, U.S. Steel had agreed to maintain employment and steel production above a negotiated minimum level over a term of three years.<sup>103</sup> After acquiring Stelco, however, U.S. Steel closed most of its Canadian operations and terminated 1,500 Stelco employees.<sup>104</sup>

In response to the suit, U.S. Steel claimed that its compliance with the undertakings was not supposed to be measured until the end of an agreed upon three-year term and, therefore, it was not in breach of its commitments.<sup>105</sup> U.S. Steel further claimed that any breach was due to circumstances beyond the company's control, for which investors should not be held accountable.<sup>106</sup> The company's main contention, however, was that the enforcement proceedings brought against it under the ICA were in violation of Canada's constitutional protection of the right to a fair trial.<sup>107</sup>

In June 2010, the Federal Court upheld the constitutionality of the Canadian government instituting proceedings and penalties against foreign investors as a means of enforcing the ICA.<sup>108</sup> Most importantly, in May 2011, the Federal Court of Appeal affirmed the lower court's decision, confirming the enforceability of a foreign investor's undertakings under the ICA.<sup>109</sup> This decision is significant because it presents another new development in the Canadian government's application of the ICA. Not only must foreign investors consider whether their proposed acquisition may be viewed as a "national security" concern (pursuant to the MDA takeover decision and the resulting ICA Amendments), but they must also take care in formulating any commitments made to the Canadian government, as it is now clear that the Minister of Industry will take action to ensure investors' compliance. Although "national security" review and enforcement proceedings under the ICA are exceptions rather than rules, the

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<http://www.bizjournals.com/pittsburgh/stories/2009/07/20/daily33.html>.

<sup>102</sup> Fox, *supra* note 76.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 13.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Marl C. Katz, *Flash: Court Rejects U.S. Steel Challenge to Investment Canada Act*, DAVIES WARD PHILLIPS & VINEBERG LLP (June 18, 2010), [http://www.dwpv.com/en/17620\\_24598.aspx](http://www.dwpv.com/en/17620_24598.aspx). The Canadian government filed an application under section 40 of the ICA to impose a C\$10,000 (approximately US\$9,800) per day penalty on U.S. Steel for each day of non-compliance with its promised undertakings. The court rejected U.S. Steel's claims that the ICA, specifically section 40, was unconstitutional based on its finding that the ICA proceedings do not bring about true penal consequences on U.S. Steel and comport with principles of fundamental fairness. *U.S. Steel Corp. v. Canada*, [2010] FC 642 (Can.), available at <http://reports.fja.gc.ca/eng/2010/2010fc642.html>.

<sup>108</sup> *U.S. Steel Corp.*, [2010] FC 642 (Can.).

<sup>109</sup> *Id.*

mere potential for such applications creates cause for concern in light of the high costs foreign investors incur in making acquisition proposals. By permitting foreign investors to incur post-acquisition penalties, the Canadian government has armed itself with another means of interfering with market transactions.

### C. Canada's Recent Rejection of BHP's Bid for Potash Corp.

The latest significant application of the ICA came in Canada's review of BHP Billiton's \$39 billion hostile takeover bid for Saskatchewan-based Potash Corp., one of the biggest takeover bids of 2010.<sup>110</sup> On November 3, 2010, Canada's then-Minister of Industry Clement announced Canada's decision to block BHP's bid, stating that the company had not demonstrated that the deal would be of net benefit for Canada.<sup>111</sup> Although, pursuant to the provisions of the ICA, BHP had thirty days from the date of the ruling to appeal the decision and make further representations to the government, BHP decided to abandon the deal despite \$350 million in costs incurred on its bid.<sup>112</sup>

Although Potash's management did not approve of BHP's takeover offer,<sup>113</sup> the Canadian government's rejection of BHP's bid came as a

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<sup>110</sup> Steven M. Davidoff, *As BHP Waits, the Next Steps for Potash*, N.Y. TIMES DEALBOOK BLOG (Sept. 28, 2010, 9:30 AM), <http://dealbook.nytimes.com/2010/09/28/as-bhp-waits-the-next-steps-for-potash/>. Potash Corporation is the world's largest supplier of potash, the key ingredient in fertilizer.

<sup>111</sup> Phred Dvorak & Anupreeta Das, *Canada Slaps Down BHP's Potash Deal*, WALL ST. J. (Nov. 3, 2010), <http://online.wsj.com/article/SB10001424052748703506904575592870406638644.html>.

<sup>112</sup> Sonali Paul, *BHP Kills Potash Corp Bid, Revives \$4.2 Billion Buyback*, REUTERS (Nov. 15, 2010), <http://www.reuters.com/assets/print?aid=USTRE6AD2FA20101115>.

<sup>113</sup> Prior to the government's rejection, Potash had emphatically rejected BHP's \$130 per share bid as "grossly inadequate." Leslie Hook et al., *Sinochem Looks to Spoil BHP's Potash Bid*, FIN. TIMES (Sept. 21, 2010, 8:12 PM), <http://www.ft.com/cms/s/0/88de240a-c5af-11df-ab48-00144feab49a.html#axzz1ZNxSzrpX>. Potash had also taken its own steps to defend against the takeover by filing a securities suit in U.S. district court and adopting a "poison pill." Edward Welsch, *Potash Corp. Sues to Block BHP Takeover Offer*, WALL ST. J., Sept. 23, 2010, at B3; Steven M. Davidoff, *Canadian Takeover Rules Weigh on Potash*, N.Y. TIMES DEALBOOK BLOG (Aug. 17, 2010, 4:18 PM), <http://dealbook.nytimes.com/2010/08/17/canadian-takeover-rules-weigh-on-potash/>. A "poison pill" is a defensive tactic adopted by a target company's board of directors to "thwart hostile takeover bids by granting shareholders the right to purchase shares of their own company or shares of an acquirer at a deep discount," thereby making the acquisition more expensive and less attractive to the bidder. STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS 487 (3d ed. 2010). Canadian law generally prevents a company's board from taking defensive measures, but does allow a company to adopt a short-term poison pill lasting only sixty days in order for shareholders to make an informed decision on the hostile bid. Davidoff, *supra*. Potash had adopted a ninety-day poison pill without any government intervention, which is thirty days longer than historically allowed by Canadian regulators. Davidoff, *supra* note 110. BHP challenged Potash's poison pill, but the government's

surprise to the global market, as many had predicted that Canada would allow the bid to go through without interference, just as it has done for all but one of the more than 1,500 reviews undertaken by the government since adopting the ICA in 1985.<sup>114</sup>

Prior to the Canadian federal government's rejection, the Saskatchewan provincial government, through Premier Brad Wall, expressed its disapproval of the takeover due to its desire to maintain Canadian control over Potash, a company with strategic control over an important natural resource.<sup>115</sup> To support its position, Saskatchewan commissioned an independent evaluation of BHP's bid by the non-profit organization Conference Board of Canada, which found that BHP's bid would cost the province C\$2 billion (approximately US\$1.96 billion) in lower royalty payments over ten years (or 2% of the province's annual revenue).<sup>116</sup> However, the Conference Board's overall impression was that BHP's proposed takeover was favorable for Saskatchewan, particularly when compared with a potential competing bid made by China's Sinochem Corporation.<sup>117</sup> The following is a summary of the Conference Board's findings on the risks and opportunities of Potash's acquisition:

Due to the nature of [Potash Corp.] and the conditions under which it operates (unlike some other mining takeovers) the risk associated with acquisition is not related to the potential for [Potash Corp.] to be "hollowed out" through negative corporate takeover effects (CTEs). Our assessment of the impact of an acquisition of [Potash Corp.] on shareholders, governance, senior management, capital, employees,

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rejection and BHP's subsequent scrapping of its bid have made that challenge moot. See Doug Cameron, *Potash Canadian Regulators Won't Rule on Poison Pill Before Nov. 18*, CAPITAL.GR (Nov. 12, 2010), <http://english.capital.gr/News.asp?id=1085970>.

<sup>114</sup> Edward Welsch & Ben Dummett, *Potash Corp. Holders in Need of Convincing*, WALL ST. J., Oct. 6, 2010, at B3, available at <http://professional.wsj.com/article/SB10001424052748703298504575534422203883304.html?mg=reno-secaucus-wsj>. The sole bid rejected under the ICA up until that point was the proposed takeover of MDA, discussed *supra* Part III.A.

<sup>115</sup> Curtis Matwychuck-Goodman, *Foreign Direct Investment in Canada*, PROJECT GOODMAN (Dec. 17, 2010), <http://www.projectgoodman.com/2010/12/17/foreign-direct-investment-in-canada-bhp-billiton-and-potash-corporation-of-saskatchewan-%E2%80%93-how-exceptions-shape-international-perception-and-why-it-matters-%E2%80%93>.

<sup>116</sup> Euan Rocha & Rod Nickel, *Report Favors BHP Bid for Potash, Warns on China*, REUTERS (Oct. 5, 2010, 9:04 AM), <http://www.ibtimes.com/articles/68790/20101005/bhp-bid-potash-china.htm>.

<sup>117</sup> CONFERENCE BD. OF CANADA, SASKATCHEWAN IN THE SPOTLIGHT: ACQUISITION OF POTASH CORPORATION OF SASKATCHEWAN INC.—RISKS AND OPPORTUNITIES (2010) [hereinafter CONFERENCE BOARD REPORT], available at <http://www.gov.sk.ca/adx/asp/adxGetMedia.aspx?mediaId=1245&PN=Shared>; Welsch & Dummett, *supra* note 114. China's state-owned Sinochem Corp. was considering making a competing bid for Potash, but abandoned efforts after the Canadian government's rejection of BHP's bid. See Dvorak & Das, *supra* note 111.

corporate donations, and community support is that the impact would be marginal. In the case of an acquisition, there are some prospects of positive impact on employment, both in production and head office jobs.<sup>118</sup>

The Conference Board's report found that BHP's bid had "few negative takeover effects" and could be beneficial to the province in the long run, and that an acquisition by a state-owned company like China's Sinochem would pose a threat to Saskatchewan's economy.<sup>119</sup>

Despite the Conference Board's recommendations, Saskatchewan continued to oppose the bid on the basis of the potential lost royalty payments.<sup>120</sup> However, the final decision on whether to approve a takeover under the ICA does not rest with a provincial government, but rather with the Canadian federal government.<sup>121</sup> The international community thought that the report would in fact make it easier for the federal government to find a "net benefit," since the Conference Board concluded BHP's acquisition would be in the province's best interests.<sup>122</sup> Steve Globberman, a professor commissioned by the Canadian government to prepare a study on its foreign investment laws, expressed his belief that the government would approve the deal, stating that "Canadian officials understand 'selective protectionism . . . has long-run potential costs that are really antithetical to Canada's interests.'"<sup>123</sup>

Contrary to predictions, then-Minister of Industry Clement announced that he did not think BHP's acquisition of Potash would be of net benefit to Canada.<sup>124</sup> The government rejected BHP's proposal even though BHP had made commitments to "locate its potash executives in Potash's home

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<sup>118</sup> CONFERENCE BOARD REPORT, *supra* note 117, at 55.

<sup>119</sup> *Id.* at i; Phred Dvorak et al., *BHP Bid for Potash Gets Modest Boost*, WALL ST. J. (Oct. 5, 2010), <http://online.wsj.com/article/SB10001424052748704631504575531710442523550.html>.

<sup>120</sup> See *supra* note 116 and accompanying text.

<sup>121</sup> Under the ICA, provincial governments may be consulted by the Minister of Industry, acting on behalf of the federal government, in his administration of the ICA and its review process. However, provincial governments have no authority to act with respect to approval or disapproval of a foreign investment under the ICA. Investment Canada Act, 1985, c. 20, §§ 4, 5 (Can.); Paul Vieira & Ben Dummett, *Canada Turns a Wary Eye to Foreign Bids*, WALL ST. J. (July 21, 2011), <http://online.wsj.com/article/SB10001424053111904233404576458090678411176.html?KEYWORDS=potash> (describing the role of Canada's provincial governments in the ICA review process, stating that "[w]hile [Canada's provinces] don't have a formal role in vetting foreign investment, they have a long leash, enshrined in the country's constitution, over their energy, environmental, mining and land-use policies.>").

<sup>122</sup> Welsch & Dummett, *supra* note 114; Rocha & Nickel, *supra* note 116.

<sup>123</sup> Welsch & Dummett, *supra* note 114.

<sup>124</sup> Phred Dvorak, *Q&A with the Man Who Blocked BHP's Potash Deal*, WALL ST. J. DEAL J. (Nov. 5, 2010, 8:40 AM), <http://blogs.wsj.com/deals/2010/11/05/qa-with-the-man-who-blocked-bhps-potash-deal/?KEYWORDS=QA+Potash>.

province of Saskatchewan . . . structure the deal so the province doesn't take a big revenue hit and set up a committee to make sure it keeps its promises—all things that Canadian officials had signaled they wanted."<sup>125</sup> Clement publicly stated it was not clear that BHP's proposed transaction would benefit Canada, a conclusion based in part on BHP's lack of expertise in potash mining and marketing.<sup>126</sup> However, the Canadian government has yet to issue an official explanation of its decision,<sup>127</sup> which it is required to do under the ICA.<sup>128</sup>

The government's conclusion raised a red flag in the international community that Canada was taking a protectionist stance, a position it has repeatedly lobbied against in diplomatic talks with other nations.<sup>129</sup> Responding to criticisms of the government's interference with the deal, then-Minister of Industry Clement staunchly defended the decision as "a perfectly acceptable thing to do,"<sup>130</sup> and retorted that "it doesn't, quite frankly, lie in the mouth credibly of other nations to criticize Canada for a single decision about a single situation."<sup>131</sup> Nevertheless, in light of these criticisms, the Canadian government is again reevaluating the ICA review process and has promised to issue clearer guidelines for foreign investors.<sup>132</sup> The government's proposal to improve its review process suggests it recognizes that continued assurances (e.g., declaring that Canada is "wide open"<sup>133</sup> for foreign investment) are no longer sufficient.

#### IV. IMPLICATIONS OF RECENT ICA DECISIONS AND THE NEXT STEPS FOR CANADA

The full impact of the recent decisions under the ICA has yet to be determined. Like the Canadian government insists, the MDA, U.S. Steel, and Potash cases may truly represent unique situations—i.e. decisions

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<sup>125</sup> *Id.*

<sup>126</sup> Greg Quinn & Theophilos Argitis, *Canada to Give Investors 'Guidance' After BHP Drops Potash Bid*, BUS. WK. (Nov. 15, 2010, 12:15 AM), <http://www.businessweek.com/news/2010-11-15/canada-to-give-investors-guidance-after-bhp-drops-potash-bid.html>.

<sup>127</sup> *Foreign Takeover Decisions Beg More Transparency: Changes to Investment Canada Act Could Bolster Canada's Reputation Abroad*, UNIVERSITY OF CALGARY (Sept. 15, 2011), <http://www.ucalgary.ca/news/sept2011/takeover> [hereinafter *Foreign Takeover Decisions*]; Drew Hasselback, *If You Want Government Approval for Your Takeover, Do Your Homework First*, FIN. POST (Sept. 23, 2011, 8:17 AM), <http://business.financialpost.com/2011/09/23/if-you-want-government-approval-do-your-homework-first/#more-92466>.

<sup>128</sup> Investment Canada Act, R.S.C. 1985, c. 20, § 23.1 (Can.).

<sup>129</sup> Menon, *supra* note 2.

<sup>130</sup> Alexander Deslongchamps, *Clement Says Canada is in Process of Explaining Decision on Potash to BHP*, BLOOMBERG (Nov. 10, 2010), <http://www.bloomberg.com/news/print/2010-11-10/clement-says-canada-explaining-potash-decision-to-bhp.html>.

<sup>131</sup> Menon, *supra* note 2.

<sup>132</sup> Deslongchamps, *supra* note 130.

<sup>133</sup> Menon, *supra* note 2.

confined to their specific facts creating no serious threat to foreign investors' ability to acquire control in Canada in the future. However, investors and foreign nations cannot ignore the fact that Canada has recently taken actions under the ICA that represent a departure from the country's historical practice.<sup>134</sup> With these decisions, the current Conservative government has made some waves in the international community and has taken steps to strengthen the Canadian government's power to interfere with investment transactions.<sup>135</sup>

While the three cases signal the Canadian government is not beyond interfering with the market when it finds it necessary, the Potash deal in particular raises other important issues that could potentially influence a foreign investor's chances of passing the government's review under the ICA. First, it can be argued that the Canadian federal government's decision to block the Potash deal was, in part, politically motivated. At the time of the Potash deal review, the Conservative Party in power, led by Prime Minister Harper, was a minority government, meaning the party was elected with fewer seats in the national legislature than the combined seats of all other parties.<sup>136</sup> Minority governments enjoy less stability than majority governments because they must rely on support from the opposing parties in order to pass legislation and stay in power.<sup>137</sup> When Saskatchewan Premier Brad Wall announced his province's strong disapproval of the deal, Prime Minister Harper's government was

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<sup>134</sup> Although Canada ranks as one of the most restrictive countries in terms of its regime for managing FDI, Canada's practice under the ICA has historically been to approve transactions that come under review. See *supra* note 36 and accompanying text. The apparent hypocrisy in the government's recent ICA decisions is highlighted by the fact that, although Prime Minister Harper actively promotes free market principles in international discussions, all three of these decisions—MDA, U.S. Steel, and Potash—have come under his administration. See Terence Corcoran, *Harper's G20 Baggage*, FIN. POST (Nov. 5, 2010), <http://opinion.financialpost.com/2010/11/05/terence-corcoran-harpers-g20-baggage> (discussing Harper's promise at the June 2010 G20 Toronto Summit to "minimize any negative impact on trade and investment of our domestic policy actions"); see also Theophilos Argitis & Andrew Mayeda, *Harper's Free-Market Views Tested by Canada's Capital Inflows*, BLOOMBERG (Sept. 21, 2011, 11:02 PM), <http://www.bloomberg.com/news/2011-09-22/harper-s-free-market-views-tested-by-canada-s-capital-inflows.html> (discussing Harper's reassurance to potential investors after the rejection of the BHP-Potash deal that Canada remains open to foreign investment).

<sup>135</sup> Corcoran, *supra* note 134.

<sup>136</sup> *When the Majority Doesn't Rule Survival Isn't Easy in Often Short-Lived Minority Governments*, CBCNEWS (Nov. 20, 2008), <http://www.cbc.ca/news/canada/story/2008/11/14/f-minority-government.html> [hereinafter *When the Majority Doesn't Rule*]. In the 2011 Canadian federal election, Prime Minister Harper's Conservative Party won a majority of the seats in Parliament, marking the first time Harper has enjoyed a majority government since he was elected in 2006. *Stephen Harper's Conservatives Win Canadian Election*, BBC NEWS (May 3, 2011), <http://www.bbc.co.uk/news/world-us-canada-13259484>.

<sup>137</sup> *When the Majority Doesn't Rule*, *supra* note 136. The governing minority party may lose power by a vote of "no-confidence" from the opposing parliamentary powers.

vulnerable to lose the province's support if it went against Wall's wishes.<sup>138</sup> Harper's Conservative Party relied heavily on Saskatchewan's support, with thirteen of the fourteen parliamentary seats in Saskatchewan held by the Conservative Party at the time of the Potash takeover review.<sup>139</sup> If Harper did not respect Saskatchewan's wishes and allowed the takeover of Potash, Wall might have campaigned against Harper's Conservative Party, which would have left the Conservative Party vulnerable to losing seats in Saskatchewan during the upcoming 2011 parliamentary election.<sup>140</sup> In addition, Wall garnered support for his position against the Potash takeover from the other provincial leaders, all of whom represented the opposition parties in the national legislature.<sup>141</sup> While political opposition is not an unusual basis for a government's decision, "politics" is not one of the factors of consideration provided for in the ICA. However, this case demonstrates that domestic politics can and do play an influential part in the review process.

The political influence issue leads to another question: How much power do the provincial governments have in the ICA review process, and how much power *should* they have? In the Potash deal, the opinion and conclusions of one provincial government appeared to hold a considerable amount of weight, even though the ICA clearly designates decision-making power to the Canadian federal government. The questions left in the wake of the blocked Potash deal add further emphasis on the need for clarification and transparency in the ICA review process.

Although then-Minister of Industry Clement promised in the fall of 2010 to issue a clarification of how the Canadian government applied the ICA to block the Potash deal, as of September 2011 the government has not yet done so.<sup>142</sup> The Canadian House of Commons' review of the ICA is ongoing,<sup>143</sup> and it is uncertain whether there will be any major change in the legislation or Canada's general policy on FDI.

In the Canadian government's review, it is important that substantial empirical data—and not false public perception—drive the government's

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<sup>138</sup> Vieira & Dummett, *supra* note 121 (discussing how provincial decisions are vulnerable to ad hoc reactions depending on political ideologies).

<sup>139</sup> Matwychuk-Goodman, *supra* note 115.

<sup>140</sup> *Not So Fast: The Government Put the Kibosh on a Bid for PotashCorp*, THE ECONOMIST (Nov. 2010), <http://www.economist.com/node/17421347> (discussing the 2008 campaign by Premier Danny Williams of Canada's Newfoundland and Labrador province against the Conservative Party that deprived the party of any seats in his province, illustrating the "damage one angry premier can do").

<sup>141</sup> *Id.*

<sup>142</sup> See Vieira & Dummett, *supra* note 121; *Foreign Takeover Decisions*, *supra* note 127; Hasselback, *supra* note 127.

<sup>143</sup> THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY, MINUTES OF PROCEEDINGS, MEETING NO. 58 (2011), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4977381&Language=E&Mode=1&Parl=40&Ses=3>.

decisions when developing, changing, or evaluating its policies on FDI and making changes to the ICA review process. Available research finds that inward FDI brings substantial benefits to a domestic economy, including enhanced access to international trade networks, improved corporate governance in targeted enterprises, and increased competition, productivity, innovation, capital formation, job growth, and, ultimately, increased GDP.<sup>144</sup> Moreover, research finds that these considerable benefits do not come at the expense of “hollowing out” of Canadian head offices. Rather, research provides evidence of the exact opposite—that Canada has enjoyed an increase in head offices and accompanying positive economic influences as a result of foreign acquisitions.<sup>145</sup>

Despite the fact that Canada has seen its share of global FDI decrease over the last decade and the evidence demonstrating the positive impact of FDI, fears of foreign ownership of Canadian business continue to be a part of the debate. An important fact often ignored by those who criticize a liberal stance on foreign investment is that Canada has been a strong player in the outward FDI market—while foreign ownership in Canada has increased, Canadian companies are continually acquiring businesses abroad. Since 1997, Canada has actually experienced a net outflow of FDI, with Canadian investments in other nations exceeding foreign investment in Canada.<sup>146</sup> Therefore, Canada should be careful not to unduly restrict foreign investment and suffer retaliation from the global community as a consequence.<sup>147</sup>

It is important that the Canadian government emerge from its review of the country’s foreign investment law with clear guidelines for enforcement of commitments made under the ICA, like the proceedings brought against U.S. Steel, and also provide a sincere explanation of its decision to reject BHP’s bid for Potash. Transparency, and not simply increased government discretion, must be the focus of changes to the ICA. Clarifications of the Canadian government’s stance on FDI and its intended use of the ICA to intervene in acquisitions moving forward are necessary to regain credibility in the eyes of the global community and show that its

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<sup>144</sup> See *supra* Part II.

<sup>145</sup> See *supra* Part II..

<sup>146</sup> HOLDEN, *supra* note 1, at 1; HEJAZI, *supra* note 43, at 12.

<sup>147</sup> In perhaps the first signs of fallout from the Potash decision, Canadian corporation High Liner Foods faces international opposition to its attempted takeover of Icelandic Group, a global fish giant based in Iceland. Terence Corcoran, *Bjork Meets Captain High Liner*, FIN. POST (Jan. 10, 2011), <http://opinion.financialpost.com/2011/01/10/terence-corcoran-bjork-meets-captain-high-liner/#more-9166>. Canada’s decision to protect a “strategic natural resource” in the Potash deal now lends credibility to the Icelandic government taking the same action to protect its strategic natural resource by preventing High Liner’s acquisition. The Potash deal may end up being the basis for backlash against Canadian FDI in other nations and may have set a precedent, however minor, that Canada surely does not want to be responsible for.

anti-protectionist platform in discussions with global leaders is not just smoke and mirrors.<sup>148</sup> Data plainly indicates Canada has lost some of its sheen as a destination for foreign investment and is becoming less attractive relative to its global competition. Considering Canada currently ranks as the one of the most restrictive countries on FDI and is continuing to lose ground on more liberal nations like the UK and France,<sup>149</sup> the Canadian government must structure its policies to better compete in the FDI market, not further restrict FDI because of false public perception or political biases.

The Canadian government was primed for its first major post-Potash test with an ICA review of the proposed merger between the Toronto and London Stock Exchanges.<sup>150</sup> However, the Canadian government was never forced to decide whether to approve the deal as it was ultimately called off because of a lack of support from the companies' shareholders.<sup>151</sup> Although the proposed merger did not involve a natural resource, it again presented a deal related to a "strategic asset in a strategic industry,"<sup>152</sup> which would have shed light on the existence of potential protectionist or political influences motivating the Canadian government's decisions under the ICA. With the demise of the merger, the Canadian government has for now avoided the international scrutiny that will likely accompany a post-Potash ICA decision. If the merger had not been called off and Canada had decided to block the deal, it would have been much more difficult for Prime Minister Harper to persuade other nations that Potash was an aberration and Canada is a free-market promoter, not a protectionist government. The international community will not know the true impact of the Potash decision until Harper's government clarifies the ICA review process as promised, or another deal involving a "strategic asset" comes under ICA review. The global business community's interest in the Toronto–London merger highlights the need to remove uncertainty and add transparency to the ICA review process to lend consistency and credibility to Canada as a global force in the FDI market.

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<sup>148</sup> On January 28, 2001, then-Ministry of Industry Clement participated in the World Economic Forum in Davos, Switzerland, where his message to the international participants emphasized that "[the Canadian government is] here to say that Canada is open for business." *Industry Minister Tony Clement Carries Canada's Economic Message to the World Economic Forum*, INDUSTRY CANADA (Jan. 28, 2011), <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06242.html>.

<sup>149</sup> See *supra* Part II and accompanying text.

<sup>150</sup> Julian Beltrame, *Ottawa to Review Stock Market Merger, Says Provinces May Also Have Say*, ST. ALBERT GAZETTE (Feb. 14, 2011), <http://www.stalbertgazette.com/article/GB/20110214/CP07/302149835/-1/SAG08/industry-minister-tony-clement-to-make-brief-statement-on-stock&template=cpArt>.

<sup>151</sup> Vieia & Dummett, *supra* note 121.

<sup>152</sup> Beltrame, *supra* note 150.