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Competition Policy Review Panel
Research Paper Summary

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Title: Evaluation of the Operation and Effectiveness of the *Investment Canada Act* and Recommendations for Changes to this legislation

Subject(s) Addressed:

- Investment Canada Act

Background:

The paper notes that the ICA was enacted in 1985 to replace the *Foreign Investment Review Act* (“FIRA”) to address criticisms that the former legislation was discouraging foreign investment due to its overly protectionist character and the uncertainty created by its lack of transparency, predictability and timeliness in decision-making. It is observed that foreign direct investment (FDI) has, in general, been beneficial to the economy in terms of increased productivity, innovation and economic growth. The ICA represented a significant improvement over FIRA but in the 23 years since its enactment, has itself come in for criticism that it too requires significant updating and amendment in today’s economy where FDI is recognized to be beneficial and many countries are actively engaged in encouraging it.

The ICA in International Context:

While the ICA represented a substantial improvement over FIRA, Canada remains an exception, internationally, in its approach to foreign investment review with Australia being the only other country to engage in the blanket screening of foreign investment. However, Australia’s legislation differs from the ICA in that it authorizes the blocking of a foreign acquisition only where the government is satisfied that the investment would be contrary to Australia’s “national interest”. This is in contrast to the ICA which places the burden on the foreign investor to demonstrate that the proposed investment is likely to be of “net benefit to Canada”. The United States investment review policy is more typical of foreign investment review standards in other countries in that it focuses on the question of whether a given acquisition constitutes a threat to the “national security” interests of the United States. The study notes that under the ICA the net benefit may be limited to economic considerations whereas, under the laws of other countries, there appears to be greater flexibility in terms of their laws being more broadly based on considerations related to national security or national interest.

Identified Negatives of the ICA:

The paper identifies a number of shortcomings in the process and content of the ICA. These include the requirement in virtually every case for foreign investors to provide undertakings to offset perceived negatives arising from the loss of Canadian ownership, when in fact there is strong evidence that FDI is in general positive for the Canadian economy. The ICA is seen as having significant weaknesses in the areas of transparency, predictability, timeliness of decision-making and overbroad scope of its coverage. Cultural business reviews exhibited these same deficiencies but have proven to be even more problematic due to the characterization as cultural under the Act of any

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Canadian business in respect of which there is even the slightest element of cultural activity, no matter how small or peripheral to the main business. The Act imposes notification requirements in regard to below-threshold acquisitions and new business establishments to no apparent purpose. In light of the fact that no non-cultural business acquisition reviewed under the Act in its 23 years of operation the ICA has been disallowed, it does not appear that the ICA has provided much, if any, protection against the foreign takeover of key Canadian businesses. There is also no useful purpose being served by the Act's direction that, in reviewing transactions, the Minister should consider its likely effect on competition, as the Competition Bureau independently and effectively reviews all such transactions from that perspective and Investment Canada conducts no independent investigation of its own in that regard.

Identified Positives of the ICA:

The positives are, by contrast, fewer in number. These include the fact that there have been no disallowances of non-cultural business acquisitions in over 1,500 reviewed cases and only three disallowed cultural cases in 101 such transactions in 23 years. It was noted that Investment Canada had adopted a pragmatic approach in dealing with instances of non-compliance with undertakings in changed business circumstances. Investment Canada's good reputation in terms of its maintenance of confidentiality and its avoidance of its process becoming political were also seen as positives. Finally, it was concluded that it is likely the review process has generated some, if non-material, net benefits for Canada, although, in the absence of publicly available information of the cases reviewed, it is unclear how significant these benefits have been.

Recommendations:

This research led to the conclusion that if the review of foreign investment is to be continued, that ought to be under significantly modified conditions than those currently contained in the ICA. In this regard, it was concluded that the ICA review process could be improved by limiting its scope to 'exceptional circumstances', such as: the review of foreign investments from the perspective of national security concerns; the review of investments by foreign State-owned enterprises; and the scrutiny of very large investments (the research paper suggests a threshold of \$1 billion). The paper also suggests that reviews of cultural investments (excepting the establishment of new businesses) should be dealt with under a separate process to be administered under the aegis of Canadian Heritage.

Other recommended changes include increased public disclosure of cases dealt with under the Act and the greater use of guidelines and other advisory materials to increase the transparency and predictability of its operations, procedures and outcomes. The paper recommends that the Act's test for foreign investment be changed so as to require the Minister to determine that a proposed acquisition is likely to be contrary to Canada's national interest before taking action to disallow such an investment, effectively reversing the present onus on the foreign acquirer to demonstrate that the acquisition is likely to be of net benefit to Canada.

The paper also recommends that present obligation under the Act of non-Canadians to notify Investment Canada in regard to below-threshold acquisitions and new business establishments be eliminated. Other suggestions include: removal of the

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present ministerial discretion to extend reviews beyond 45 days; exemption from the review process of acquisitions of businesses which are already foreign-controlled; eliminating the effect of a proposed acquisition on competition as a criteria for allowance or disallowance under the Act; exclusion of the value of any non-Canadian assets in determining whether the Act's review thresholds have been exceeded; reconfiguring the coverage of cultural reviews under the Act to exclude businesses in which the activities in the cultural sector are marginal to overall business activity; that the right of the Minister to require the review of new business establishments by non-Canadians in a cultural area be removed from the Act; and deletion from the Act's purpose clause of Investment Canada's former role in promoting investment in Canada to reflect its changed responsibilities.

Each of these recommendations for change is consistent with the views of a majority of the surveyed legal practitioners.