MASTER OF PUBLIC POLICY
CAPSTONE PROJECT

Clarity of the Investment Canada Act with Regards to State Owned Enterprises

Submitted by:
Kay She

Approved by Supervisor:
Dr. Tom Flanagan

Submitted in fulfillment of the requirements of PPOL 623 and completion of the requirements for the Master of Public Policy degree

Table of Contents

Acknowledgements **3**
Executive Summary **4**
I. Introduction **6**
II. Background **8**
What is Foreign Direct Investment? 8
Historical Context 9
Rejected Applications under the ICA 15
III. The Emergence of Asian SOE Investments in Canada's Oil and Gas Sector **16**
Considerations surrounding Chinese SOEs 18
The CNOOC-Nexen Deal 20
IV. ICA Amendments in 2013 .... **21**
Expanded Definition of SOE 22
Review thresholds for investments by SOEs 22
Minister can determine whether entity is "non-Canadian," or controlled by a foreign SOE 23
Minister can determine whether there has been an acquisition of control by a SOE . 24
Control of a Canadian oil sands business by Foreign SOE on "exceptional basis" 24
V. Methodology **26**
Background to Australia's Foreign Investment Rules 30
China's Investments into Australia's Oil and Gas Sector 32
VI. Findings **34**
Definition of SOE 34
SOE Threshold for Review 35
Acquisition of Control and Retroactivity 36
Special Treatment of Oil Sands 37
VII. Policy Recommendations **38**
1. Putting percentage threshold or guidelines around definition of SOE 39
2. Striking Retroactivity Provisions 39
3. Providing Reasoning for Special Treatment of Oil Sands 40
VIII. Conclusion **41**
Bibliography **44**

Acknowledgements

I would like to express my deepest gratitude to Dr. Tom Flanagan for supervising this capstone project and guiding me throughout my research and analysis.

This capstone project would not have been possible with the support of my family, friends, colleagues from the Canadian Association of Petroleum Producers, and classmates from the University of Calgary Master of Public Policy Program. The success of this work is just as much yours as is mine.

Executive Summary

In April 2013, the Canadian government passed amendments to the Investment Canada Act (ICA), which, for the first time, explicitly treated foreign State-Owned Enterprises (SOE) within legislation. The ICA amendments were intended to provide clarity and signal future direction of foreign SOE investment in Canada. A clear investment framework for SOEs is critical to attract the capital needed to encourage investment, economic growth and employment opportunities in Canada. Weaknesses in the clarity of the ICA will unnecessarily drive foreign SOE investment away with ramifications for Canada's relations with those foreign countries.

Much of the academic literature on foreign direct investments uses non-restrictiveness as a measure of success to evaluate foreign investment rules. However, this paper focuses on one specific portion of foreign investment rules – SOE provisions. An evaluation of SOE provisions must first understand that the country in question has made a political decision to be restrictive to SOE investors by installing SOE provisions. Therefore, the measure of success for good legislation related to SOEs is not restrictiveness. Rather, clarity is the measure of success for good legislation related to SOEs.

A comparative legislative analysis between Canada and Australia's foreign investment rules reveals some weaknesses of the ICA amendments in providing a clear investment framework for SOEs. In order to begin addressing these issues of clarity, this paper recommends putting a percentage threshold or guidelines around the definition of SOE, striking the retroactivity provisions within the ICA, and providing reasoning as to

why oil sands will only be acquired by SOEs on an "exceptional basis" only. This would help create certainty for SOE investors that the deals they strategically and deliberately craft in accordance with legislation will receive approval.

I. Introduction

In April 2013, the Canadian government passed amendments to the Investment Canada Act (ICA), which, for the first time, explicitly treated foreign State-Owned Enterprises (SOE) within legislation. The proposed amendments had been announced concurrently with the approval of two significant foreign SOE acquisitions of Canadian companies in the oil and gas sector: CNOOC-Nexen Inc. and Petronas-Progress Energy. Over the course of the second half of the 20th century, Canada has benefited from foreign investment, which allows the country to raise capital to grow businesses and reap the economic benefits. Canada, characterized by an abundance of oil and gas resources, requires significant foreign investment in order to raise funds for its large-scale capital-intensive energy projects.

Investments from foreign SOEs are not a new phenomenon in Canada. But within the last decade, the increase of Chinese SOE investments has raised concerns that foreign SOEs could present risks to Canadian interests, such as the inherent susceptibility of foreign government influence that may be inconsistent with Canadian objectives[1]. The Canadian government responded with the ICA amendments, which intend to provide clarity and signal future direction of foreign SOE investment in Canada. While the Government maintains that Canada welcomes foreign investment, it has created rules for foreign SOEs in order to clarify the nature and scope of foreign SOE investments that will be approved.

[1] Canada, Industry Canada, *Statement Regarding Investment by Foreign State-Owned Enterprises*. (Ottawa: December 7, 2012), online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html

A clear investment framework for SOEs is critical to attract the capital needed to encourage investment, economic growth and employment opportunities in Canada. Weaknesses in the clarity of the ICA will unnecessarily drive foreign SOE investment away with ramifications for Canada's relations with those foreign countries. It may also discourage non-SOE investors from putting their capital into Canada due to lack of confidence in Canada's investment rules and diminished opportunities to profit from their investment when they sell.

This paper investigates whether the ICA amendments have successfully improved clarity in Canada's investment rules. Using Australia's foreign investment rules as a point of comparison, this paper analyzes the strengths and weaknesses of the ICA amendments as they relate to clarity. It also provides recommendations for future reform. A comparative analysis between Canadian and Australian legislations and policies is instructive given the two countries' similarities in governance, economic structure, size, and natural resource base. Both countries currently experience increased interest from Asian, and in particular, Chinese SOEs. Both countries also experience a public backlash against foreign SOE ownership of 'home-grown' companies.

The paper begins with a historical exploration of Canada's investment rules and climate, with a concentration on the most recent Asian SOE activity in Canada's oil and gas sector. Second, it describes the ICA amendments made with regards to SOEs. Third, it outlines the methodology used to compare Canada and Australia's legislations and policies on SOE treatment, and evaluates them on the basis of clarity. Finally, it explores policy implications of the changes, and includes a discussion of possible future reform.

II. Background

What is Foreign Direct Investment?

Foreign Direct Investment (FDI) is defined as a cross-border investment from a resident company in foreign country to a resident company in a home country.[2] Ownership of 10 percent or more of the voting power by the investor is the basic criterion used.[3] A FDI can include the creation of a foreign subsidiary, a merger of companies, a joint venture between companies, or the acquisition of an ownership stake in an existing company. Acquisition has generally been the most controversial form of FDI in the Canadian discourse, whereas joint ventures and minority stakes have generally been more welcomed because the Canadian company is able to retain control but still access foreign funding.

The general consensus amongst economists is that FDI is good for both the foreign and home countries. FDI encourages economies of scale and scope, improves productivity through lowered cost of capital and increased capital investment, facilitates integration into multi-national supply chains, and drives innovation in a company's processes, management, and use of technology.[4] However, there are considerations of real or perceived negative impacts on the home country's national security, political sovereignty, and long-term economic development.[5] [6] Canada, characterized by its thin

---

[2] OECD, *OECD Factbook 2013: Economic, Environmental and Social Statistics*, doi: 10.1787/factbook-2013-34-en (2013).
[3] Ibid.
[4] Philippe Bergevin and Daniel Schwanen, *Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick*, No. 337 (Toronto: C.D. Howe Institute, 2011) at 2.
[5] Theodore H. Moran, *Chinese Foreign Direct Investment in Canada: Threat or Opportunity?* (Canadian Council of Chief Executives, March, 2012) at 17, online: CCCE http://www.ceocouncil.ca/wp-

domestic capital markets and abundant natural resources that are highly capital-intensive to extract, needs FDI in order to access a much greater pool of potential investors and tap into global capital markets. In contrast, restriction of free flow of FDI has a negative impact on the value of Canadian assets, which deters growth of those assets with reverberations on economic development.[7]

Historical Context

The history of foreign investment review in Canada reveals the tension between economic nationalism (support for domestic control of the economy) and economic globalization (support for international interdependence for increased economic benefits). In the late 19th century, the United Kingdom provided the majority of foreign investment in Canada in order to finance railroads, utilities, and government bonds.[8] The decades after World War I saw American multi-national corporations play an increasingly prominent role in the development of the mining and newsprint industries via their Canadian subsidiaries. C.D. Blythe and E.B. Carty noted in 1956 that "no other nation as highly industrialized as Canada has such a large proportion of industry controlled by non-resident concerns."[9]

---

content/uploads/2012/03/Chinese-Foreign-Direct-Investment-in-Canada-Theodore-H-Moran-March-2012.pdf

[66] This paper focuses on investment unrelated to cultural and historical enterprises, which introduces an entirely different set of concerns that deserve specific analysis.

[7] Bergevin and Schwanen, "Reforming the Investment Canada Act," 3.

[8] C.D. Blythe and E.B. Carty, "Non-Resident Ownership of Canadian Industry" (1956) *Canadian Journal of Economics and Political Science*, 451.

[9] Ibid.

The Royal Commission on Canada's Economic Prospects in 1957 expressed concern over massive non-resident ownership and control over certain industries such as oil and gas, mining, and manufacturing. Of the $2,559 million foreign investment in the oil and gas industry, $2,380 million came from the U.S.[10] However, the Commission also acknowledged Canada's status as a "debtor nation,"[11] whereby the growth of Canada would have been much slower without large foreign capital investment, predominately from the U.S. and the U.K. The Commission recommended several conditions that would protect the Canadian interest, which included the employment of Canadians in senior management and on corporate boards,[12] a requirement that has trickled down to current day legislation.

The switch from a Conservative to Liberal government led by Lester B. Pearson in 1963 brought with it a sense of strong economic nationalism from the federal government, spearheaded by Pearson's Minister of Finance, Walter Gordon. In 1967, the Pearson Government appointed a task force to study "the implications of the present level of foreign control for Canada's long-run prospects for national independence and economic growth."[13] Chaired by University of Toronto Professor Mel Watkins, the report, titled *Foreign Ownership and the Structure of Canadian Industry* ("Watkins Report") stated similar concerns to that of the Royal Commission, the highlight being excessive U.S. control. The Watkins Report noted that annual FDI flows

---

[10] Canada, *Final Report of the Royal Commission on Canada's Economic Prospects* (Ottawa: Royal Commission on Canada's Economic Prospects, 1957) at 385.
[11] Ibid., 380.
[12] Ibid., 392.
[13] Canada, Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canada Industry* (Ottawa: Government of Canada, 1968) at 64 (Chair: Mel Watkins).

had increased almost six-fold between 1945 and 1964, also, that 80 per cent of that amount came from the United States.[14] American ownership remained concentrated in the same industries identified by the Royal Commission a decade earlier, such as oil and gas, mining, and manufacturing.[15] The Report suggested the creation of an "upper limit" on foreign dominance, although it acknowledged there was no consensus on what the "upper limit" should be.[16] Conditions were also suggested to protect the Canadian interest such as import limitations, research and development quotas within the country, and transfer pricing regulations. The Report's most historically important recommendation was the creation of a special agency to "coordinate mandatory policies with respect to multinational enterprise, collection and dissemination of information to keep surveillance of foreign owned enterprises."[17]

In 1968, Pierre Elliot Trudeau was elected to lead the federal government. His platform was economically nationalistic and he directed his Minister of Finance, Herb Gray, to conduct a study on possible actions to address foreign investment concerns. "Foreign Direct Investment in Canada" (the "Gray report") was released in 1972 and reiterated the Trudeau Government's belief that foreign control of Canadian companies threatened Canadian nationalism, and that such problems were "likely to assume even larger proportions in the years ahead unless effective measures are adopted to deal with them."[18] The Gray report proposed three policy alternatives: 1) the foreign

---

[14] Ibid., 6.
[15] Ibid., 9.
[16] Ibid., 363.
[17] Ibid., 395.
[18] Herb Gray, *Foreign Direct Investment in Canada* (Ottawa, Government of Canada, 1972) 5.

investment review process; 2) the key sector policy; and 3) the minimum nationality requirements. The Report favored the first alternative, citing:

> (vi) A more effective means of dealing with remaining problems of foreign direct investment would be through flexible administration on a case by case basis;
> (vii) Such intervention can justifiably be restricted to foreign controlled firms;
> (viii) Administrative intervention would be most effective if carried out within the framework of well-defined industrial strategy.[19]

The ability of the government to intervene would come from legislative authority to block investments if they were not seen to provide economic value or align with government objectives. The Report recommended some factors that should be considered in the review process such as plans for Canada-based R&D expenditures, Canadian managerial and board involvement, opportunities for equity participation by Canadians, and, in the case of natural resources, the degree of processing. These factors would eventually become considerations of a "significant benefit to Canada" litmus test. The Report also cautioned on some sensitive issues such as the injection of uncertainty into business decisions and whether government intervention would be able to identify and extract benefits at an economically efficient level. On May 4, 1972, Minister Gray introduced a bill to the House of Commons based on his report. The bill died on the floor when parliament was dissolved for a general election. Trudeau was narrowly re-elected with a minority government and the nationalistic New Democratic Party (NDP) held the balance of power. Dependent on NDP support for their political survival, the

---

[19] Ibid., 439.

Trudeau Government pushed through a revised bill and passed the Foreign Investment Review Act (FIRA) in 1973.

FIRA represented a major shift in Canadian commercial policy, as it was the first legislation that directly regulated foreign investments.[20] A review agency was created to assess whether proposed foreign acquisitions was of "significant benefit to Canada". Critics were quick to point out that the Act was opaque, subject to broad political discretion, and inadequately addressed foreign acquisition concerns. Charles J. McMillan wrote in 1972, "it appears that successive federal and provincial governments have pursued what amounts to a national policy least likely to increase the advantages of foreign investment within a market economy, namely a policy of non-intervention of any kind, except in cases calling for ad hoc crisis legislation motivated by political values."[21]

The investment-deterring effect of the review process, combined with large-scale government-funded purchases of multi-national assets and the creation of Crown corporations, led to a decline in foreign ownership from 35 per cent in 1971 to 22 per cent in 1985.[22] Years of unrealized growth potential due to the Trudeau Government's economically nationalistic policies, combined with a deep global recession during the early 1980s, boosted the popularity of parties in the U.S., U.K., and Canada that supported neoliberal policies, such as privatization and encouraging foreign trade and

---

[20] Other countries such as the U.S. have much more stringent disclosure laws, anti-trust laws, and regulated agencies than Canada.
[21] Charles J. McMillan, "After the Gray Report: The Tortuous Evolution of Foreign Investment Policy." *McGill Law Journal*: 20. 218.
[22] John Baldwin, Guy Gellatly and David Sabourin. *Insights on the Canadian Economy: Changes in Foreign Control under Different Regulatory Climates: Multinational in Canada* (Statistics Canada, 2006), 5, online: http://publications.gc.ca/Collection/Statcan/11-624-M/11-624-MIE2006013.pdf

investment. In Canada, the Progressive Conservative Party led by Brian Mulroney won a landslide victory in the 1984 election and began to reorient Canada's policy on FDI.

The Mulroney Government passed the Investment Canada Act[23] (ICA) in 1985, which repealed FIRA and implemented a more globally open approach to foreign investments. Contrary to FIRA, the ICA narrowed its scope of review by increasing the review threshold for investors and the condition for approval shifted from "significant benefit" to Canada to a "net benefit". It is noteworthy that the criteria used to determine a "net benefit" are substantively the same as those previously used by FIRA (aside from a "national security" consideration added in 2009).

The acquisition of several large Canadian firms in 2006 and 2007[24] led to renewed public concern about foreign takeovers. The federal government released SOE guidelines on December 7, 2007 to address concerns about foreign SOE investment in Canada, namely that they should operate according to sound principles of corporate governance and commercial orientation.[25] The Conservatives appointed the Competition Policy Review Panel in 2008 to provide recommendations on foreign investment policy. Noting "concern in many quarters about diminished control and influence by Canadians over the domestic economy," the Panel nonetheless emphasized the need to capitalize on global competition by "harnessing it for Canada's benefit

[23] *Investment Canada Act*, RSC 1985, c. 28 (1st Supp.).
[24] Falconbridge was sold for $24.1 billion in 2006, with Alcan sold for US$38 billion in 2007 and Inco for $19.4 billion the same year.
[25] Canada, Industry Canada, "Guidelines -- Investment by state-owned enterprises -- Net benefit assessments," *Investment Canada Act Guidelines* (Ottawa: December 7, 2012) online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned

rather than seeking to insulate or protect the country from it."[26] The Panel's report noted that, despite recent large acquisitions, for many years Canada had been underperforming relative to its OECD peers in attracting foreign capital.[27]

The Government responded to the Panel's recommendation in 2009 with amendments to the ICA to introduce a national security clause to align with global practices, improve transparency through an annual report encompassing its approved investments, and raising the general review threshold to encourage investments.[28] However, the Government did not accept the Panel's key recommendation to embrace the Australian model that puts the onus on the Minister to demonstrate why an investment would be "contrary to Canada's national interest", as opposed to a "net benefit" evaluation that had to be positively demonstrated by the investor.

Rejected Applications under the ICA

The first and only official rejection of a foreign ownership acquisition under the ICA occurred when Ottawa blocked an attempt by MacDonald, Dettwiler and Associates Ltd. to sell its space division to U.S. defense firm Alliant Techsystems Inc. in 2008. Ottawa reasoned that the core technology of the space division was too "strategically

[26] Canada, Competition Policy Review Panel, *Compete to Win: Final Report of the Competition Policy Review Panel*, (Ottawa, Competition Policy Review Panel, 2008) 15.
[27] Andrea Mandel-Campbell, *Foreign Investment Review: How Canada Stacks Up*, (Ottawa: Conference Board of Canada, 2008) 2.
[28] Canada, *Budget 2009: Canada's Economic Action Plan,* (Ottawa: Government of Canada, January 27, 2009) 178. Online: http://www.budget.gc.ca/2009/pdf/budget-planbugetaire-eng.pdf

important”[29] to be acquired. In 2010, Ottawa conditionally rejected BHP’s takeover of Potash Corp., a Canadian company based out of Saskatchewan, which produces about a quarter of the world’s potash, a key ingredient for fertilizer. At $38.9 billion (U.S.), the Australian company would have initiated one of the largest takeovers ever in Canada, but the deal was blocked due to negative Canadian public opinion and opposition from the Government of Saskatchewan.[30] The Saskatchewan government argued that the proportion of potash produced by Potash Corp. relative to world supply qualified the company to be of “strategic importance” to Canadians, and therefore, should not pass the “net benefit” test in the ICA. The Federal government left the door open for BHP to re-apply in its 30 days review period with new undertakings. However, BHP did not re-apply for approval.

III. The Emergence of Asian SOE Investments in Canada’s Oil and Gas Sector

The increasing prevalence of Asian state-owned investments in Canadian assets within the past decade has been matched by increasing trepidation from the Canadian public. Simultaneously, resource-rich provincial governments continue to solicit international investments for their capital-intensive resource extraction projects. The issue of Chinese investments has most recently moved into the forefront of public

---

[29] Although the term “strategically important” is not entrenched in any federal government legislation or policies, it was championed by the Saskatchewan government as a factor of national security and Canadian resource ownership.

[30] Simone Collins, “*Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?”*, 32 Nw. J. Int'l L. & Bus. 141 (2011), 158, online: http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss1/4

attention with the Chinese National Offshore Oil Corporation's (CNOOC) takeover of Nexen, a Canadian company with assets in Alberta's oil sands.

In the energy resources sector, foreign investment in Canadian energy assets has been a necessary source of funding for large-scale capital-intensive energy projects. U.S. and European resource companies have been investors in Canadian energy projects for more than the past fifty years. Recent trends within the past decade show an emergence of Asian investors in the Canadian market. Alberta's oil sands proves to be the primary reason for investment, but shale gas is increasingly the new attraction for foreign investors.[31] While Chinese SOE investments received special attention in the press in light of the CNOOC-Nexen application, SOE investments are not a new phenomenon in Canada. Canada has a record of allowing state-owned companies to take over oil assets. Before the Nexen acquisition, state-owned companies such as Statoil, KNOC, TAQA North, Petro-China and CNOOC were already invested in the oil sands to various degrees.

Even before the announcement of the CNOOC-Nexen takeover, the Canadian public had been wary of Chinese foreign investment in the oil and gas industry. Harris Decima conducted a telephone survey of 1000 Canadians in February 2012 on this issue and found that only one in ten Canadians feel that Chinese companies taking a majority controlling interest and/or taking over an existing Canadian owned operation is a good

[31] Bergevin and Schwanen, "Reforming the Investment Canada Act," 3.

thing.[32] Public opinion against Chinese SOE investments became stronger as the CNOOC-Nexen deal became more prominent in the media. This public opposition played an important role in the outcome of the CNOOC-Nexen deal and subsequent policy changes by the federal government.

Considerations surrounding Chinese SOEs

Is the Canadian public's trepidation of Chinese SOEs based on misperceptions or realistic possibilities? Margaret Cornish frames the discussion the following manner:

> Would foreign policy activity be any different if China's resource companies were entrepreneurial rather than state-owned? Would it be less successful? The issue is not so much the ownership of these SOEs as the coincidence of interest between the firms and the state[33]….
>
> To the extent the purpose and behavior of Chinese SOEs correspond to that of foreign investors, they should be treated in a like manner. To the extent that the ways in which they differ pose risks to Canada and local communities, even potentially, remedies should be considered.[34]

Critics of Chinese SOEs argue that they are established to serve a "Chinese government industry policy aimed at leapfrogging global economic powers."[35] Chinese SOEs have access to state capital, which cannot be accessed by other companies and therefore runs counter to free-trade principles. The Chinese competitive advantage comes from lowered wages and possibly unethical treatment of workers, as well as

[32] Harris Decima, *Press Release: Canadian Views on Chinese Investment In Canada Vary Based on the Situation.* (Harris Decima, February 8, 2012) 2, online: http://www.harrisdecima.ca/sites/default/files/releases/2012/02/09/hd-2012-02-09-en1310.pdf
[33] Margaret Cornish. *Behaviour of Chinese SOEs: Implications for Investment and Cooperation in Canada*. (Ottawa: Canadian International Council and Canadian Council of Chief Executives, February 2012) 16. ISBN 978-0-9866175-5-3.
[34] Ibid. 5.
[35] Duanjie Chen, "China's State-Owned Enterprises: How much do we know? From CNOOC to its siblings," (June 2013) 6:19 *University of Calgary School of Public Policy Research Paper*, 1, online: http://policyschool.ucalgary.ca/sites/default/files/research/china-soes-final

alleged currency manipulation, which also skew the free market playing field in a way that disadvantages Canadian and other entrepreneurial (non-SOE) investors.[36]

Cornish agrees that the interests of the Chinese state and those of its globalizing companies, especially resource companies, are strongly aligned. However, indicators show that the SOEs pursue their own interests fairly independently.[37] Canadian transfer pricing regulations and other laws are designed to protect Canada from many of the perceived SOE threats, such as the threat that in a period of global scarcity of some commodity, the Chinese state might order SOEs to ship the product from Canada to China at prices below the prevailing price in Canada. Furthermore, such behavior would be contrary to the corporate interest of the SOE and hurt their global reputation and position.[38]

Regardless of where one stands on risks associated with Chinese SOEs, it is undeniable that they represent a major untapped source of capital investment. The relative scale of the capital available for overseas investment, the interest in resource assets, and the importance of trade with China all make this a critical issue for Canada.[39] In the case of Australia and Canada, natural resources are increasingly attractive for investments both from SOE and entrepreneurial firms. Investments in Canadian resources by Chinese SOEs offer an opportunity to Canadian firms (and governments) to

[36] Ibid.
[37] Ibid., 16.
[38] It would require the SOE to sub-optimize it own goals and performance putting at risk its corporate and financial integrity by undermining the good name and relationships that take decades to establish. These SOEs are contending for global position and leadership. It would entail direct reputational damage amongst buyers, suppliers, service providers to say nothing of attracting lawsuits, security investigations, etc.
[39] Cornish, "Behavior of Chinese SOEs." 5.

accelerate and integrate existing supply chains, managerial networks, and sources of technology. At the same time, Canada is in a position to assist Chinese resource SOEs to demonstrate that they are able to successfully operate in an OECD-level regulatory system for environmental protection, labor standards, and health and safety.

The CNOOC-Nexen Deal

In September 2012, CNOOC offered a $15 billion bid for 100 percent takeover of Nexen. Nexen was a Canadian company headquartered in Calgary, with a majority of Canadian directors on its board. Nexen has worldwide assets that include 3.3 percent of Canada’s oil sands reserves. More than half of Nexen’s production occurs outside Canada in the North Sea and Gulf Coast. Nexen uses steam-assisted gravity drainage techniques, which is used in many other in-situ oil sands sites. The small percentage of Canadian assets and the lack of core technology did not qualify Nexen to be a company of “strategic importance” to Canada.

While the CNOOC-Nexen deal was being evaluated, the review period for the Petronas-Progress Energy deal came to an end. The deal was a 50-50 joint venture between a Malaysia SOE, Petronas, and Progress Energy, a major developer of shale gas in northern British Columbia and Alberta. Ottawa rejected the deal on a Friday close to midnight. Presumably, the Federal government was planning to set new precedents with the CNOOC-Nexen decision and, therefore, did not want to rule on the Petronas-Progress Energy deal until after. The fact that Ottawa announced the rejection on a Friday close to midnight when the stock markets were closed for the weekend demonstrated that Ottawa was careful to not shock investors and drive their investments away.

On December 7, 2012, the federal government approved both the CNOOC-Nexen and Petronas-Progress Energy acquisitions. The approval of the CNOOC-Nexen deal itself deviated from Prime Minister Stephen Harper's approach to the state control in the private sector, and was also met with public opposition as discussed earlier in the paper. However, the decision was made more politically palatable with the new changes to the ICA. Harper's considerations for the approval had much to do with the need for the oil and gas sector to access Asian markets. While there was no written quid pro quo in terms of guaranteed Asian market access or buying contracts in exchange for the Nexen acquisition, Harper would have sent negative signals to Asian businesses had he not approved the deal. Columnist Doug Saunders posed the idea of possible "protectionist retaliation"[40] from China if Harper did not approve the deal. As discussed earlier, Canada has a history of allowing SOE acquisition of oil sands. To suddenly reject a Chinese SOE deal on the table would have been embarrassing for the Chinese government and hurt the Canada-China economic and political relationship.

IV. ICA Amendments in 2013

Concurrent with the approvals, the federal government also announced new legislative amendments. The amendments to the ICA received royal assent in April 2013

[40] Doug Saunders, "Suddenly, everyone's an economic nationalist", *Globe and Mail*, (December 1, 2012) online: http://www.theglobeandmail.com/commentary/ suddenly-everyones-an-economic-nationalist/article5858413/

and the amended regulations were published in the Canada Gazette for comment but have not been registered yet (as of August 2013). The amendments regarding SOEs specifically are as follows:

Expanded Definition of SOE

Previous to the amendments, a SOE was defined as an enterprise that is "owned, controlled or influenced, directly by a foreign government." Furthermore, the definition was found only in the guidelines and there was no mention of the term "SOE" within legislation or regulation. Guidelines do not have the force of law as legislation or regulation. The current SOE definition is entrenched in legislation and is as follows:

> (a) the government of a foreign state, whether federal, state or local, or an agency of such a government;
> (b) an entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or
> (c) an individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency.[41]

It is important to note that no guidance has been provided as to the concept of direct or indirect influence.

Review thresholds for investments by SOEs

Acquisitions are subject to review under the ICA if they meet certain financial thresholds. Acquisitions under the threshold only need to be submitted as a notification to the Government containing basic information. Non-SOE investments will see a raised

[41] *Investment Canada Act,* 3.

threshold from $344 million threshold in asset value to eventually a $1 billion threshold in enterprise value over a four-year period. Asset value refers to the book value of a business according to its financial statements. Enterprise value captures the value of a business that may reside in intangible assets that are typically not recognized on a balance sheet. These intangible assets are characteristic of service and knowledge-based industries, such as telecommunications, that are gaining importance on the world stage. SOE investments are subject to the existing $344 million threshold in asset value. The increased threshold for review for non-SOEs signals a clear preference for private foreign investment over investment by SOEs. This is consistent with the Prime Minister Harper's agenda for less government influence, whether Canadian or foreign, in the private sector.

Minister can determine whether entity is "non-Canadian," or controlled by a foreign SOE

The ICA applies when a "non-Canadian" establishes a new "Canadian business" or acquires control of a "Canadian business". The ICA lays out tests and presumptions to determine whether an entity is "Canadian." For example, some characteristics of a "Canadian" corporation are that Canadians own the majority of its voting shares and four-fifths of the members of its board of directors are Canadian citizens ordinarily resident in Canada. A "Canadian" investment is not under the purview of the ICA.

With the 2013 amendments, the Minister has the power to determine that an entity which meets the tests and presumptions of a "Canadian" corporation can still be declared not "Canadian" if the Minister finds evidence that the entity is controlled in fact by a SOE. Similarly, the Minister has the authority to declare a foreign investor to be controlled in fact by a SOE. An entity that qualifies as “Canadian” in the ICA could be determined by the Minister to be “non-Canadian” based on “any information…made available to the Minister.” This determination can be made retroactive to April 29. 2013.

Minister can determine whether there has been an acquisition of control by a SOE

The ICA establishes presumptions regarding when control is acquired. Generally, a minority investment or less than one-third of the voting shares of a corporation is not considered an acquisition of control and thus would not be reviewable under the Act. However, notwithstanding these provisions, the Minister may conclude based on "any information and evidence" made available that the SOE will acquire control in fact. This determination can be made retroactive to April 29. 2013.

Control of a Canadian oil sands business by Foreign SOE on “exceptional basis”

Prime Minister Harper released the CNOOC-Nexen approval along with a policy statement on the future direction of foreign SOE investment in Canada, with special attention on Canada’s oil sands. He states:

> The Canadian oil sands are of global importance and immense value to the future economic prosperity of all Canadians. While the vast majority of global energy deposits are state-controlled, Canada's oil sands are primarily owned by innovative private sector businesses. If the oil sands are to continue to develop to the benefit of all Canadians, the role of private sector companies must be reinforced…
>
> However, given the inherent risks posed by foreign SOE acquisitions in the Canadian oil sands the Minister of Industry will find the acquisition of

control of a Canadian oil sands business by a foreign SOE to be net benefit to Canada on an exceptional basis only.[42]

It is curious that oil sands are singled out while other capital-intensive energy sources such as natural gas and liquefied natural gas sectors remain open for full SOE acquisition.

Table 1: Comparison of SOE Provisions Before and After 2013 Amendments

	Before 2013 Amendments	After 2013 Amendments
Definition of a SOE	In the ICA guidelines, a SOE was defined as an enterprise that is "owned, controlled or influenced, directly by a foreign government".	Entrenched in legislation, a SOE is defined "the government of a foreign state… or an agency of such a government." It also now includes an entity or individual that is "controlled or influenced, directly or indirectly" by a government or agency of such a government.
Threshold for SOE investment to come under ICA purview	$344 million threshold in asset value (same for SOE and entrepreneurial investments)	Entrepreneurial investments will see a raised threshold from $344 million threshold in asset value to eventually a $1 billion threshold in enterprise value over a four-year period. Threshold for SOE investments stay at $344 million threshold in asset value.
Minister may determine entity is controlled in fact by a SOE	The ICA general rules establish presumptions regarding when control is acquired. If the application does not meet the presumptions, there is no requirement of a "net benefit" review under the ICA.	The Minster may determine (retroactively) that an entity is in fact not a Canadian-controlled entity, and is actually controlled by a SOE, and thus falls into the purview of the ICA. The Minister may also determine that a foreign entrepreneurial investor is actually controlled by a SOE.
Minister can determine whether there has been an acquisition of	The ICA general rules establish presumptions regarding when control is acquired.	For a SOE, these rules need not be applied if the Minister concludes (retroactively) based on "any information and evidence" made available to him that the SOE will

[42] *Statement Regarding Investment by Foreign State-Owned Enterprises*.

control by a SOE		acquire control in fact.
Acquisition of control of oil sands		In a policy statement, Prime Minister Harper stated that the acquisition of control of a Canadian oil sands business by a foreign SOE would be found to be a net benefit to Canada on an exceptional basis only.

V. Methodology

Much of the academic literature on FDIs uses non-restrictiveness as a measure of success to evaluate foreign investment rules.[43] The evaluations are commonly premised on the assumption that foreign investment typically results in benefits for both the home and host countries. The assumption is exemplified in the Organization of Economic Cooperation and Development (OECD)'s Investment Restrictiveness Index, which measures statutory restrictions on foreign direct investment in 55 countries, including all OECD and G20 countries, and covers 22 sectors. It uses four criteria on restrictiveness:

1. Foreign equity limitations;
2. Screening or approval mechanisms;
3. Restrictions on the employment of foreigners as key personnel; and
4. Operational restrictions, e.g. restrictions on branching and on capital repatriation or on land ownership.[44]

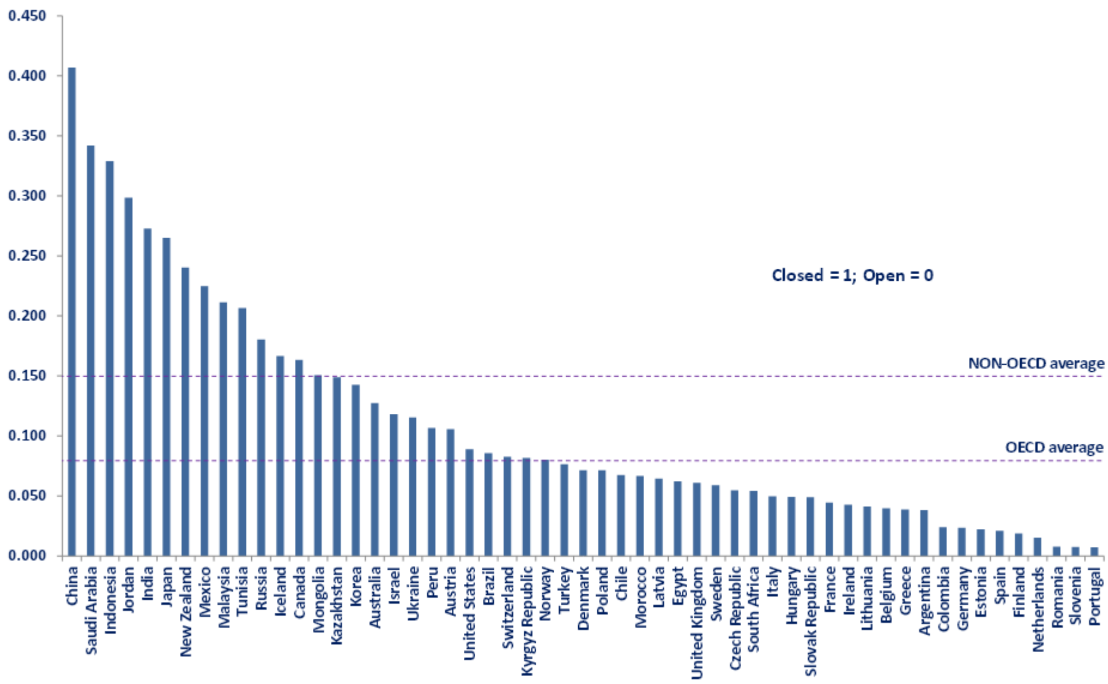
The FDI Index is not a full measure of a country's investment climate. Other factors that affect a country's investment climate include informal obstacles, entry barriers such as

[43] For examples, see Collins, "*Recent Decisions under the Investment Canada Act" and* Bergevin and Schwanen, *Reforming the Investment Canada Act* .
[44] OECD, "FDI Regulatory Restrictiveness Index", *OECD Publishing*, online: http://www.oecd.org/investment/fdiindex.htm (2013).

state ownership in key sectors, the size of its market, the established business and political relationship between foreign and home country, and geographical distance.

Nonetheless, FDI rules are a critical determinant of a country's attractiveness to foreign investors and the OECD Restrictiveness Index is commonly used as a basis in foreign investment scholarly works. Furthermore, unlike geography, FDI rules are something which governments have control over, and indicate a political appetite for restrictiveness. In 2012, Canada's rules ranked marginally more open than the non-OECD average, but were considerably less open than the OECD average.

Figure 1: OECD FDI Restrictiveness Index, 2012[45]



[45] Ibid.

While the Index can illuminate strengths and weaknesses of statutory provisions related to restrictiveness, this paper concentrates on one specific portion of legislation – SOE provisions. An evaluation focused of strengths and weaknesses of SOE provisions must first understand that the country in question has made a political decision to be restrictive to SOE investors by installing SOE provisions. In the case of Canada, the Government aims to incent non-SOE investors by increasing their thresholds for review, making the process more stringent for SOEs, and making a policy statement that SOE takeover of oil sands companies would only be approved on an "exceptional basis" going forward. Therefore, the measure of success for good legislation related to SOEs is not restrictiveness. Rather, clarity is the measure of success for good legislation related to SOEs. Clarity is critical in order to create certainty for SOE investors that the deals they strategically and deliberately craft in accordance with legislation will receive approval. SOE confidence in successful ICA navigation will have positive impacts on the relationship between the home and host country, as well as keep the confidence of entrepreneurial investors who can rely on SOEs to continue to contribute to Canada's capital market and reap the economic advantages.

The scope of this paper is not to evaluate the extent to which FDI generates economic benefits, or to the extent to which Canada's foreign investment rules should be restrictive. Furthermore, the scope of this paper is not to determine to what extent there should be specific restrictions on SOEs. Rather, the scope of this paper concentrates on the extent to which Canada's legislative and policy provisions on SOEs provide clarity and certainty for potential investors. There are issues related to clarity outside of SOE provisions in the Act that also affect clarity and certainty for potential investors. For example, the “net benefit” test has been critiqued as broad and opaque. However, the focus of this paper is narrowed to only SOE provisions. Other issues of clarity in the Act are outside the scope of this paper and deserving of separate attention.

This research employs a comparative legislative analysis in order to reveal strengths and weaknesses related to clarity of Canada’s SOE provisions. It uses Australia’s foreign investment legislation as a comparative case study. Similar to the OECD FDI Restrictiveness Index, this paper’s focus on statutory provisions is not a full measure of a country’s investment climate. Between Canada and Australia, salient factors that could differentiate a country’s investment climate, in particular to Chinese SOEs, include geographical distance for shipment times, federal-provincial resource control, and expediency for environmental and regulatory approvals. Nonetheless, as discussed earlier, statutory provisions is a critical element for SOE investors to seek clarity and certainty.

The intensive analysis of two cases may reveal more than the superficial statistical analysis of many, especially when the two countries described have close comparable characteristics. Canada and Australia have similar styles of government, economic structure, and size. Both countries have a large natural resource base and compete in the global market for capital in order to develop their natural resources. Both countries are currently experiencing increased interest from foreign, and in particular, Chinese SOEs. Both countries are also experiencing a public backlash against foreign SOE ownership of ‘home-grown’ companies, which the governments have been responsive to. The table below shows a list of the relevant legislations, regulations, polices and guidelines that will be used for the comparative analysis.

Table 2: Legislations, Regulations, Policies and Guidelines Used for Analysis

	Canada	Australia
Legislation	Investment Canada Act, last updated in April 2013	Foreign Acquisitions and Takeovers Act, last updated December 2012
Regulation	Regulations Respecting Investment in Canada, last updated in June 2013	Foreign Acquisitions and Takeovers Regulations, last updated March 2013
Policies and Guidelines	Guidelines — Investment by state-owned enterprises — Net benefit assessment, last updated December 2012 Policy statement regarding investment by foreign State-Owned Enterprise, December 2012	Australia's Foreign Investment Policy, last updated March 2013 Principles Guiding Consideration of Foreign Government Related Investment in Australia – press release, February 2008

Background to Australia's Foreign Investment Rules

Similar to Canada, the introduction of legislation specifically targeted towards foreign investment in Australia began with a wave of economic nationalism in the mid-1960s that saw a restrictive approach to foreign exchange controls, foreign investment policy, and trade barriers due to perceived threats of sovereignty. This restriction is estimated to have resulted in a misallocation of investment in Australia and a decline in capital productivity of 30 per cent over the period.[46] The Foreign Acquisitions and

[46] Austl, Commonwealth, Treasurer, *Foreign Investment Policy in Australia – A Brief History and Recent Developments* (Canberra, 2000) 63, online: http://archive.treasury.gov.au/documents/195/PDF/round5.pdf

Takeovers Act[47] (FATA) was created in 1975 and began as a restrictive set of foreign investment policies with complex economic benefit tests and required Australian equity participation for foreign investment in resource sectors. The Foreign Investment Review Board (FIRB) was established in 1976 as an advisory body to the government on foreign investment policy.

The trend at the end of the 1980s was to move away from ineffective protectionist policies as a response to the growing evidence of benefits from foreign investment. As Australia moved towards a framework of wider policy liberalization, corporate and financial regulations were improved to minimize business barriers. This economic globalization approach focused on competitiveness and resulted in a strong rate of growth. In 1996, the Australian Government designed a schedule of reviews of legislation that impose costs on business, which included FATA. Australia's commitment to other Asia Pacific Economic Cooperation (APEC) countries in 1996-1998 to break foreign investment barriers pushed a review of the screening system for foreign investment in 'non-sensitive' sectors. In 1999, Australia and New Zealand cooperated to make a number of changes that would facilitate investment between the two countries.

Parallel to the Canadian Government's objectives, Australia aims to balance the benefits of foreign investment with the concerns about foreign ownership of Australian assets. Generally, smaller investments are exempt from notification while larger proposals that reach a threshold are notified and approved unless determined to be "contrary to the national interest." This differs from Canada in that the onus is on the

[47] Foreign Acquisitions and Takeovers Act 1975 (Cth).

Government to prove that the application would have negative implications for the national interest. In Canada, the investor has to make the case that the application is in the “net benefit” for Canada.

The FIRB’s main functions are to examine foreign investment applications in Australia against criteria set out by Government policy and make a recommendation to the Government. It is important to note that the Board's functions are advisory only. Responsibility for the Government's foreign investment policy and for making decisions on proposals rests with the Treasurer. Major proposals are generally in the public domain and the FIRB accepts third party submissions in its considerations. After examination of whether the application conforms to the requirements of the foreign investment policy, a conclusion is reached. In cases where the application does not conform, the Government has the power to block a proposal. If an application is rejected, the investor and the public are informed of the reasons in order to inject transparency into the decision.

China’s Investments into Australia’s Oil and Gas Sector

The trade relationship between China and Australia is expected to become Australia’s most important overall economic relationship, according to Peter Drysdale and Christopher Findlay from the Australian National University. China’s strategy to acquire mineral resources has made Australia an attractive target with its lucrative mining and natural gas sector. According to FIRB, Chinese FDI amounted to almost A$10billion from 2005-1007, of which 80 percent was in minerals and resources.[48]

The intensification of Chinese foreign investment in Australia has been met with a public opinion and policy backlash not unlike the Canadian situation. The public response was exacerbated by the high-profile takeover bid of Rio Tinto by Chinalco in 2008 and Sinosteel's investments in Western Australia's iron ore companies in 2007.[49] The Australian government responded with a press release titled "Principles Guiding Consideration of Foreign Government Related Investment in Australia" in 2008 to specifically address foreign government related investments. It reflects the assumption that "investors with links to foreign governments may not operate solely in accordance with normal commercial considerations and may instead pursue broader political or strategic objectives that could be contrary to Australia's national interest."[50] It outlines six criteria for evaluating proposed investments by foreign government and their agencies:

1. An investor's operations are independence from the relevant foreign government.
2. An investor is subject to and adheres to the law and observes common standards of business behavior.
3. An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned.

[48] Peter Drysdale and Christopher Findlay, "Chinese foreign direct investment in the Australian resource sector," in *China's New Place in a World in Crisis: Economic, Geopolitical and Environmental Dimensions*, ed. Ross Garnau et al. (ANU E Press, July 2009), 358.
[49] Ibid., 379
[50] Austl, Commonwealth, Treasurer, *Media Release: Principles Guiding Consideration of Foreign Government Related Investment in Australia (*Brisbane: 17 February 2008) online: http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&DocType=0

4. An investment may impact Australian Government revenue or other policies.
5. An investment may impact on Australian's national security.
6. An investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.[51]

The issues of foreign government investments have also recently been addressed in in Australia's Foreign Investment Policy, updated in March, 2013.

VI. Findings

Definition of SOE

While Canada's legislation uses the term "SOE," Australia uses the different term of "foreign government investor," However, both terms aim to address investors that are under the control of foreign governments. Canada's definition is found completely within legislation, while Australia's definition is broadly outlined in legislation and further detailed under its policy. The biggest difference between Canada and Australia's definition of a SOE is that Australia uses a percentage threshold of aggregate interests from foreign governments in order to define an investor as a SOE. Australia's policy states:

> Foreign government investors include:
> - a body politic of a foreign country;
> - entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of **15 per cent or more**;
> - entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of **40 per cent or more**; or

[51] Ibid.

- entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.[52]

Australia's definition puts a percentage threshold in order to make clear which entities would be SOEs. The provision for both one single foreign country and more than one foreign country (points 2 and 3 respectively) clarifies the grey area for entities that are owned by several different foreign governments with an aggregate stake of more than 15 % but no individual foreign government holds more than a 15% interest. While point 4 gives the Australian government space to maneuver should they find an investment to be controlled by a foreign government that does not meet the first three criteria, the percentage threshold gives investors a clearer idea of what constitutes a SOE. This differs from the Canadian legislation, where there is no percentage threshold and the wording "controlled or influenced, directly or indirectly" is ambiguous and unclear for investors to understand if they would be considered a SOE.

SOE Threshold for Review

Australia's Foreign Investment Policy stipulates that all SOEs "must notify the Government and get prior approval before making a direct investment in Australia, regardless of the value of the investment."[53] Furthermore, SOEs also "must notify the Government and get prior approval to start a new business or to acquire an interest in land, including any interest in a prospecting, exploration, mining or production

[52] Austl, Commonwealth, Treasurer, *Australia's Foreign Investment Policy*, (Canberra: Australian Government Publishing Service, 2013) at 2, online: http://www.firb.gov.au/content/_downloads/AFIP_2013.pdf
[53] Ibid. 15.

tenement… [SOEs] should also notify for review, if they have any doubt as to whether an investment is notifiable."[54] Canada's review threshold remains at C$344 million in asset value. The Canadian regulations outline how to calculate asset value of transaction. With respect to the oil and gas sector, the large-scale capital-intensive nature of projects essentially means that most if not all oil and gas investments from SOEs will trigger the threshold for review.

In Australia's case, the grant of a new petroleum title to a SOE will require FIRB approval. This includes the conversion of an exploration title to a retention or production title, or of a retention title to a production title. For example, a SOE who has successfully acquired assets for exploration would need to make a second application if or when they decide they develop the project. This secondary application process creates significant uncertainty for a potential SOE investor as their right to upgrade exploration investment into production activities is contingent on a future decision by the Government.

Acquisition of Control and Retroactivity

Unlike the Canadian legislation, there are no provisions within Australia's laws that give the Government the power to determine that a SOE will acquire control in fact of a 'home-grown' entity based outside of legislated presumptions regarding when control is acquired. As discussed earlier, a minority investment or less than one-third of the voting shares of a corporation is presumed to not be an acquisition of control and

[54] Ibid.

thus, would not be reviewable under the ICA. In Australia, since it states all SOE investments have to be reviewed by the Government, this is not an issue. There is no legislative provision for the Australian government to retroactively determine that a SOE investment actually acquires control of the home-based entity and force them to reapply for an approval of an investment that has already been made. There is also no legislative provision for the Australian government to retroactively deem an investor to be a SOE and force them to reapply for an approval of an investment that has already been made.

Special Treatment of Oil Sands

Both Canada and Australia have non-legislative supporting documents to help the public understand and navigate their approach to SOE investments. Both documents are similar in that they outline the approach Government is taking towards SOEs, considerations for a "net benefit" test (in Canada's case) or a "not contrary to the national interest" test (in Australia's case), and possible undertakings for SOE proposal approval.

Unlike Canada, Australia does not have a policy statement that singles out one resource from SOE acquisitions. As discussed earlier, Canada's policy states, "given the inherent risks posed by foreign SOE acquisitions in the Canadian oil sands the Minister of Industry will find the acquisition of control of a Canadian oil sands business by a foreign SOE to be net benefit to Canada on an exceptional basis only." While it is clear that oil sands are a resource that is not to be acquired by SOEs, it is less clear why the resource is singled out. This creates uncertainty for investors who do not know if other resources will be off-limits in the future, and if there is an ownership threshold that triggers the off-limits. Is there a percentage of foreign government ownership in the oil sands that has been exceeded to threaten national interests? What is the likelihood of other resources, such as potash or natural gas, following into the 'exceptional basis' category?

VII. Policy Recommendations

A comparative legislative analysis of Canada and Australia's legislation and polices reveals strengths and weaknesses related to clarity of SOE provisions from both countries. While both countries' legislations give themselves broad political discretion on investment decisions, Australia's SOE provisions overall provide more certainty for SOE investors to understand the process they must undertake to successfully apply for approval. The definition of a SOE is better understood in Australia due to the percentage thresholds stated. There is no statutory premise for the Government to retroactively deem an investor to be a SOE and force them to reapply through the more stringent SOE review. This creates a more certain environment to attract investors. Furthermore, it is clear that all SOE investments regardless of value must be reviewed by the Australian Government. This sidesteps the potential issue in the Canadian legislation where, for example, a SOE investor who plans to make a minority investment into a Canadian company is then deemed to have control in fact, and must apply under the ICA for approval. This issue of uncertainty is only exacerbated if the Government deems control retroactively. The SOE guidelines and policies for both countries are similarly helpful for investors to strategically and deliberately craft deals that meet the “net benefit” or not “contrary to national interest” test, and receive approval. It is important to note, however, that Australia’s requirement for secondary government approvals when converting an exploration investment into a production activity creates significant uncertainty for a potential SOE investor as their right to upgrade is contingent on an unknown future decision by the government. In Canada, SOE investors are not obligated to apply through the ICA review process when converting from an oil and gas exploration to production activity.

Lack of clarity in regards to Canada’s SOE provisions may be addressed through the following considerations by the Canadian government:

1. Putting percentage threshold or guidelines around definition of SOE

The current provisions that define a SOE as an entity “controlled or influenced, directly and indirectly” are broad and unclear. One way to address this using the Australian example is to put a percentage threshold of aggregate interests from foreign governments in order to create parameters around the term for greater clarity. Other parameters may be introduced through guidelines to provide clarity.

2. Striking Retroactivity Provisions

If the process for screening potential SOE investments is good and aligned with the objectives of the ICA, there should be no reason why retroactive provisions are needed. The attention of the Government should focus on a SOE review process that encapsulates a well-reasoned definition and threshold for SOEs, as well as a comprehensive “net benefit” test and national security considerations. Once there is full confidence in the SOE review process, it will be unnecessary to have retroactive provisions. Furthermore, the other amendments made provide ample discretion for the Minister to extend the SOE review process to investments that generally would not be under ICA purview under established rules and presumptions. This broad capture of investments would do well to funnel into a strong SOE review process.

Not only are retroactive provisions unnecessary, they may be harmful to the objectives of the ICA of encouraging foreign investments. Once an investment has been made, it is difficult and destructive to ‘un-make’ it. It takes substantial time and effort for a SOE to raise the necessary capital, structure the deal, and notify shareholders among other tasks, to successfully complete an investment. To force a quick divestment would interfere with commercial performance, and jeopardize the political relationship between Canada and the foreign country in question. The Canadian business who has already accepted the investment would also be put in a precarious position with regards to its stakeholders, employees, and any operations that may be underway. A SOE investment application that the Government is unsure of is better off rejected in the first place, than precariously chanced to be reviewed on second thoughts later. While it is reasonable for the Minister to have broad discretion to assess applications, the retroactive provisions gives grounds for the Government to respond ad hoc to the public palpitations of the day, in a manner that is disproportionately disadvantages Canada’s benefits from needed foreign investment.

3. Providing Reasoning for Special Treatment of Oil Sands

If the Government used a threshold of foreign government ownership on a certain Canadian resource in order to determine that oil sands are to be acquired by SOEs on an "exceptional basis" only, it would be prudent to share that threshold or reasoning with the public. This will allow investors to better understand if other Canadian resources are in danger of falling into the "exceptional basis" only category. To not further explain the reasoning for special treatment of oil sands leaves the public to believe that the reason was a purely political one done to assuage public backlash from the CNOOC-Nexen deal.

Implementation of the first and third recommendations could be relatively simple as the Minister would only have to announce the additional guidelines or reasoning in the form of a press release. Any legislative changes such as the second recommendation would be more difficult as it would have to go through the legislative amendment process and pass the House of Commons and Senate in order to receive royal assent. If this change is made during the current Conservative Party majority, this should not be challenging. The bigger consideration for the Conservative Party is managing the perception of backtracking on a provision that was just made this year. Although the policy reasoning behind striking the retroactive provisions is strong, it would not be unusual that the game of politics takes precedence over policy reasoning.

VIII. Conclusion

Recall that Charles J. McMillan wrote in 1972, "it appears that successive federal and provincial governments have pursued what amounts to a national policy least likely to increase the advantages of foreign investment within a market economy, namely a policy of non-intervention of any kind, except in cases calling for ad hoc crisis legislation motivated by political values."[55] McMillan's sentiments, expressed over forty years ago, appear to be just as relevant today in the assessment of the most recent amendments to the ICA with regards to SOEs. Canada has benefited from foreign investment, which allows the country to raise capital to grow businesses and reap the economic benefits. Canada, characterized by an abundance of oil and gas resources, requires an economically globalized approach in order to raise funds for its large-scale capital-intensive energy projects. Regardless of the real or perceived threats to national security, Chinese SOEs represent a major untapped source of capital investment.

The ICA amendments were intended to provide clarity and signal future direction of foreign SOE investment in Canada. However, a comparative legislative analysis between Canada and Australia's foreign investment rules reveals some weaknesses of the ICA amendments in providing a clear investment framework for SOEs. A clear investment framework for SOEs is critical to attract the capital needed to encourage investment, economic growth and employment opportunities in Canada. Weaknesses in the clarity of the ICA will unnecessarily drive foreign SOE investment away with ramifications for Canada's relations with those foreign countries. It may also discourage non-SOE investors from putting their capital into Canada due to lack of confidence in Canada's investment rules and diminished opportunities to profit from their investment when they sell.

McMillan, "After the Gray Report", 218.

Canada would be well served to address these issues of clarity. To start, paper recommends putting a percentage threshold or guidelines around the definition of SOE, striking the retroactivity provisions within the ICA, and providing reasoning as to why oil sands will only be acquired by SOEs on an "exceptional basis" only. This would help to create certainty for SOE investors that the deals they strategically and deliberately craft in accordance with legislation will receive approval. Ultimately, the Government should focus on a SOE review process that encapsulates a clear, well-reasoned definition and threshold for SOEs, as well as a comprehensive and transparent "net benefit" test and national security considerations. Once there is a strong SOE review framework in place, it will be unnecessary from a policy perspective to respond to new SOE investment applications with ad hoc legislative and policy changes.

Bibliography

Austl, Commonwealth, Treasurer, *Australia's Foreign Investment Policy*, (Canberra: Australian Government Publishing Service, 2013), online: http://www.firb.gov.au/content/_downloads/AFIP_2013.pdf

----------, *Foreign Investment Policy in Australia – A Brief History and Recent Developments* (Canberra, 2000), online: http://archive.treasury.gov.au/documents/195/PDF/round5.pdf

----------, *Media Release: Principles Guiding Consideration of Foreign Government Related Investment in Australia (*Brisbane: 17 February 2008) online: http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&DocType=0

Baldwin, John, Gellatly, Guy and Sabourin, David. *Insights on the Canadian Economy: Changes in Foreign Control under Different Regulatory Climates: Multinational in Canada* (Statistics Canada, 2006), online: http://publications.gc.ca/Collection/Statcan/11-624-M/11-624-MIE2006013.pdf

Bergevin, Philippe and Schwanen, Daniel. *Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick*, No. 337 (Toronto: C.D. Howe Institute, 2011).

Blythe, C.D. and Carty, E.B. "Non-Resident Ownership of Canadian Industry" (1956) 22 : 4 Canadian Journal of Economics and Political Science, 429-460.

Canada, *Budget 2009: Canada's Economic Action Plan,* (Ottawa: Government of Canada, January 27, 2009) 178. Online: http://www.budget.gc.ca/2009/pdf/budget-planbugetaire-eng.pdf

Canada, Competition Policy Review Panel, *Compete to Win: Final Report of the Competition Policy Review Panel*, (Ottawa, Competition Policy Review Panel, 2008) 15.

----------, *Final Report of the Royal Commission on Canada's Economic Prospects* (Ottawa: Royal Commission on Canada's Economic Prospects, 1957.

----------, Industry Canada, "Guidelines -- Investment by state-owned enterprises -- Net benefit assessments," *Investment Canada Act Guidelines* (Ottawa: December 7, 2012) online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#state-owned

----------, Industry Canada, *Statement Regarding Investment by Foreign State-Owned Enterprises*. (Ottawa: December 7, 2012), online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html

----------, Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry: Report of the Task Force on the Structure of Canada Industry* (Ottawa: Government of Canada, 1968), (Chair: Mel Watkins).

Chen, Duanjie. "China's State-Owned Enterprises: How much do we know? From CNOOC to its siblings," (June 2013) 6:19 *University of Calgary School of Public Policy Research Paper*, online: http://policyschool.ucalgary.ca/sites/default/files/research/china-soes-final

Collins, Simone. "*Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?"*, 32 Nw. J. Int'l L. & Bus. 141 (2011), 141-164, online: http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss1/4

Cornish, Margaret. *Behaviour of Chinese SOEs: Implications for Investment and Cooperation in Canada*. (Ottawa: Canadian International Council and Canadian Council of Chief Executives, February 2012). ISBN 978-0-9866175-5-3.

Drysdale, Peter and Findlay, Christopher. "Chinese foreign direct investment in the Australian resource sector," in *China's New Place in a World in Crisis: Economic, Geopolitical and Environmental Dimensions*, ed. Ross Garnau et al. (ANU E Press, July 2009), 349-388.

Foreign Acquisitions and Takeovers Act 1975 (Cth).

Gray, Herb. *Foreign Direct Investment in Canada* (Ottawa, Government of Canada, 1972).

Harris Decima, *Press Release: Canadian Views on Chinese Investment In Canada Vary Based on the Situation.* (Harris Decima, February 8, 2012), online: http://www.harrisdecima.ca/sites/default/files/releases/2012/02/09/hd-2012-02-09-en1310.pdf

Investment Canada Act, RSC 1985, c. 28 (1st Supp.).

Mandel-Campbell, Andrea. *Foreign Investment Review: How Canada Stacks Up*, (Ottawa: Conference Board of Canada, 2008) 2.

McMillan, Charles J. "After the Gray Report: The Tortuous Evolution of Foreign Investment Policy." *McGill Law Journal*: 20. 213-260.

Moran, Theodore H. *Chinese Foreign Direct Investment in Canada: Threat or Opportunity?* (Canadian Council of Chief Executives, March, 2012) at 17, online: CCCE http://www.ceocouncil.ca/wp-content/uploads/2012/03/Chinese-Foreign-Direct-Investment-in-Canada-Theodore-H-Moran-March-2012.pdf

OECD, *OECD Factbook 2013: Economic, Environmental and Social Statistics*, doi: 10.1787/factbook-2013-34-en (2013).

----------, "FDI Regulatory Restrictiveness Index", *OECD Publishing*, online: http://www.oecd.org/investment/fdiindex.htm (2013).

Saunders, Doug. "Suddenly, everyone's an economic nationalist", *Globe and Mail*, (December 1, 2012) online: http://www.theglobeandmail.com/commentary/suddenly-everyones-an-economic-nationalist/article5858413/