Friends with Net Benefits: the Investment Canada Act and State Owned Enterprises

ROBERT SROKA*

SYNOPSIS

This paper evaluates the net benefit test of the Investment Canada Act as it pertains to the investment review of acquisitions by foreign State Owned Enterprises in Canada's resource sector. Through a literature review, followed by a comparative analysis of Canadian and international acquisition examples and investment review frameworks, the paper leads to a law reform proposal for modifying the net benefit test.

I. INTRODUCTION

This project examines the framework surrounding foreign investment by state-owned enterprises (SOEs) in Canada's resource sector, with a particular focus on the net benefit test (NBT) of the *Investment Canada Act* (ICA)[1] and SOE investment originating from China. More specifically, the

* Robert Sroka is a PhD and LLM student at the University of Michigan. He holds a BA and JD from the University of British Columbia, as well a LLM from the University of Calgary. He is called in both British Columbia and Alberta.

research problem addresses whether the current framework best balances the inherent competing interests in foreign investment review and maximizes net benefit to Canada, with specific regard to resource sector acquisitions of SOEs, and asks whether a revised review standard would better fulfil this objective. In addition to more lengthy guidelines on SOE transactions,[2] the basic policy considerations behind the NBT, which will be explained later in full, are:

> - the effect of the investment on the level and nature of economic activity in Canada;
> - the degree and participation by Canadians;
> - … productivity, efficiency, technological development, product innovation and variety;
> - competition in Canada;
> - the compatibility with national industrial, economic and cultural policies; [and]
> - Canada's ability to compete in world markets.[3]

Generally, complaints with the status quo concern the complete discretion possessed by the Minister of Industry (and in practice, the Prime Minister's Office) to decide approval and attach conditions based on the above noted set of policy considerations without providing any public reasons as to why a decision was made.[4] In turn, both investors and potential acquisition targets are left committing significant resources to unclear targets veiled by considerations of political expediency.

This lack of clarity and certainty, combined with the risks of arbitrary decision-making, may effectively depreciate Canadian assets as prospective acquirers are dissuaded by the opportunity costs of the process, which in turn reduces the range of potentially competitive bids. In the context of SOEs, these impacts are compounded by a more stringent review process with correspondingly weaker probabilities of success, and, even if success is attained, costlier conditions for approval. Accordingly, I argue that with a modified NBT Canada can introduce greater clarity and certainty to the

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[1] *Investment Canada Act*, RSC 1985, c C-28 (1st Supp) [ICA].

[2] Industry Canada, "Investment Canada Act Guidelines", (Ottawa: 7 December 2012), online: <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2> [ICA Guidelines].

[3] Competition Policy Review Panel, "Consultation Paper 3 Investment Policies" (5 November 2007), online: <http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/00014.html> [Competition Policy Review Panel].

[4] Upon rejection there is a second opportunity to offer additional "representations and undertakings [to] demonstrate the 'net benefit' of the investment", effectively an exercise in trial and error. See Industry Canada, "An Overview of the *Investment Canada Act* (FAQs)" (Ottawa: 8 March 2013), online: <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html#q8>.

review process and remove much of the scope for arbitrariness, while still setting a high bar for review.

After this introductory section, I will move to a history of foreign investment review in Canada and an evaluation of the current the ICA and NBT in detail. This will be followed in section III by a survey of the literature on Canadian foreign investment review and select major Canadian transactions relevant to the SOE and resource context. Next in section IV, I examine the broader literature focused on foreign investment and SOEs, including sovereign wealth funds, with a particular focus on Chinese SOEs and the corresponding sub-literature. From there, I move in section V to an overview of and comparison with the American and Australian review regimes, as well as select major transaction reviews from both countries. Finally, I offer a reform proposal prior to a short conclusion.

II. FOREIGN INVESTMENT REVIEW IN CANADA: THE FOREIGN INVESTMENT REVIEW ACT

Out of concern over foreign ownership of major businesses in Canada and increasing nationalist sentiment, the early 1970s saw the passing of the *Foreign Investment Review Act* (FIRA).[5] Prior to the FIRA, no large scale regulation of foreign investment existed in Canada and estimates pegged over one-third of enterprise in the country as being controlled by foreign, mostly American, entities.[6] This led to a perception of Canada becoming a "branch plant" economy where Canadian businesses did not evolve beyond subsidiary status, as well as less favourable tax revenue outcomes for government and forced capital flight out of Canada.[7]

The FIRA regulated three investment types made by a "non-eligible" person: acquisition of control, expansion of existing "non-eligible" investment, and new "non-eligible" business.[8] These investment forms triggered the requirement for the proponent to demonstrate that the investment would be of significant benefit to Canada. The predecessor of the modern NBT, like the current NBT, placed the affirmative burden on the applicant to show significant benefit and provided a similar laundry list of factors that could be considered in the decision, including:

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[5] *Foreign Investment Review Act*, RSC 1973, c C-46.

[6] Barry J O'Sullivan, "Canada's Foreign Investment Review Act Revisited" (1980) 4:1 Fordham Intl LJ 175 at 177 [O'Sullivan].

[7] *Ibid* at 178-79.

[8] *Ibid* at 181.

> (a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including ... the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
> (b) the degree and significance of participation by Canadians in the business enterprise . . . and in any industry or industries in Canada of which the business enterprise . . .would form a part;
> (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
> (d) the effect of the acquisition or establishment on competition within any . . . industries in Canada; and
> (e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by . . . any province likely to be significantly affected by the acquisition or establishment.[9]

If the similarities were not already obvious, in writing on the FIRA prior to the ICA's creation, O'Sullivan commented that:

> the test of significant benefit is so vague that decisions may be made on almost any basis whatsoever - including a political basis. Since the test is not a clear-cut one, the review process is turned into more of a negotiating session between the government and the investor, rather than a rigid application of rules. Under the FIRA, then, Canada has a chance to shape what benefits it can expect from a given investment proposal.[10]

Unlike its successor however, the FIRA came with an administrative review agency. Although the Foreign Investment Review Agency was intended to be an independent tribunal, its recommendations were subject to final ministerial approval.[11] This veto power made outcomes potentially hostage to political incentives where the review agency's decision failed to provide political cover, even if this was rare in practice. Further, the body of decisions surrounding the FIRA is only of limited use in the SOE context. With the FIRA being a creature of concerns over American investment, the outward oriented SOEs of modern times were absent from the equation.

The Investment Canada Act

In 1985, the FIRA was replaced with the ICA by the Mulroney government and the ICA has since been altered at its fringes on numerous occasions. With non-cultural properties, the most recent amendment to the

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[9] *Ibid* at 187.
[10] *Ibid* at 187-88.
[11] *Ibid* at 188.

ICA increased the review threshold to $1 billion for direct acquisition of a Canadian enterprise by an investor from a WTO member party, up from $600 million and $369 million previously.[12] This amount is calculated on new enterprise value (as opposed to book value) basis, with different formulas for targets based on their status of being publicly traded or privately held companies, or mere asset collections.[13] The enterprise value can be deceptive as it is possible for transactions that would not have been reviewable under the previous rules to trigger review under the new formula because of significant liabilities or market capitalization.

Administrative Procedures

In response to a proposed investment, the Minister has 45 days to make a decision, with the unilateral option for a 30 day extension and the ability to secure a further extension with the proponent's consent.[14] The absence of a decision or extension notice within the prescribed timeframes means that the proposal has been approved.[15] The Minister also has the option to reject the investment but offer the proponent 30 days within which to resubmit, with revised undertakings and representations.[16] In making a decision on net benefit, the Minister will on paper consult with the provinces and other federal ministries, although the unadvertised and perhaps crucial decision-making centre is the Prime Minister's Office. With strong trends in recent decades for increased size, stature and centralized control within the Prime Minister's Office, the unofficial reality is that decisions are filtering down through staff members often primarily concerned with political optics.

Eighteen months after a reviewed and implemented investment is approved, the government will conduct a general performance evaluation. This evaluation does not reveal any hard criteria beyond that "investment performance will be judged in the context of the overall results" and that

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[12] Industry Canada, *Investment Canada Act Annual Report 2014-2015* (Ottawa: Industry Canada, 2015).

[13] Osler, Hoskins & Harcourt LLP, Media Release, "Investment Canada Act and Competition Act Quick Reference – 2017" (24 April 2017), online: <https://www.osler.com/en/resources/regulations/2016/investment-canada-act-and-competition-act-quick-re>.

[14] Mathieu Frigon, "The Foreign Investment Review Process in Canada", (Ottawa: Library of Parliament) (21 July 2014), online: <http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2011-42-e.htm> [Frigon].

[15] *Ibid.*

[16] *Ibid.*

substantial consistency with expectations, taking into account "subsequent economic circumstances", will mean no further grounds for monitoring.[17] Most interesting is that the government is provided an easy escape from scrutiny beyond initial performance monitoring through an explicit outlining that an investor will not be held responsible for a failure to meet undertakings that are (very generally) beyond their control.

The Net Benefit Test

The NBT is not particularly complex. For proposed investment from SOEs and non-SOEs, regardless of WTO membership status of the originating party's territory, the core of the test is the same, with the Minister of Industry needing to be satisfied that the transaction is likely to be of net benefit to Canada. The Minister may consider the following factors:

> (a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
> (b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;
> (c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
> (d) the effect of the investment on competition within any industry or industries in Canada;
> (e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
> (f) the contribution of the investment to Canada's ability to compete in world markets.[18]

Guidelines and Statements on Assessment of Net Benefit for SOEs

The government introduced SOE guidelines in 2007, in response to public and media attention paid to foreign investments in the resource sector,

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[17] ICA Guidelines, *supra* note 2.
[18] *Ibid*, s 20.

including a bid by a Chinese SOE for mining giant Noranda,[19] as well as more general concerns over potential long term detrimental effects on the Canadian economy due to the "adverse effects on the efficiency, productivity and competitiveness" of SOE acquisitions.[20] These guidelines were updated in 2012 and the government provided a new statement on SOE investment. The SOE guidelines defined a SOE as "an enterprise that is owned, controlled or influenced, directly or indirectly by a foreign government."[21] Any proponent of a reviewable investment is required to disclose their controlling party and any state ownership or control, whether or not the state role is direct or indirect.[22]

For all deemed SOEs, the proponent will have to address their vulnerability to state guidance in their proposal and undertakings as well as show how their operations will be both transparent and commercial in nature (as opposed to being driven by non-commercial interests).[23] The guidelines include example undertakings such as placing Canadians in positions of senior management or as independent members on the board of directors, incorporation in a Canadian jurisdiction and listing of the target business on stock exchange in Canada.[24]

In terms of review, the policy is for the Minister to determine net benefit in accordance with the already existing general principles under the ICA. Additionally, the review process will go into detail on projected commercial impacts, which include:

- …export;
- …process[ing];
- the participation of Canadians in its operations in Canada and elsewhere;
- the impact of the investment on productivity and industrial efficiency in Canada;
- support of on-going innovation, research and development in Canada;

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[19] Stikeman Elliott LLP, Media Release, "State-owned investors face greater scrutiny in Canada" (18 December 2007), online: <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/10528.htm>.
[20] Industry Canada, Press Release, "Statement Regarding Investment by Foreign State-Owned Enterprises" (07 December 2012), online: <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html> [SOE Statement].
[21] ICA Guidelines, *supra* note 2.
[22] *Ibid*.
[23] *Ibid*.
[24] *Ibid*.

- and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.[25]

The December 2012 "*Statement Regarding Investment by Foreign State-Owned Enterprises*" (the Statement) reinforced and highlighted that the enterprise must be free from political interference, comply with the laws of Canada, and make broadly "positive contributions to the productivity and industrial efficiency of the Canadian business".[26] The Statement made clear that SOE acquisitions of Canadian holdings in oil sands would be deemed of net benefit only on an exceptional basis.[27] These additional burdens for SOEs have translated into lengthier and more contentious review processes.[28] The Statement must be understood in the context of it being delivered on the same date as the government's approval of two major energy sector acquisitions by SOEs that this paper will address later: Nexen by the China National Offshore Oil Company (CNOOC) and Progress Energy by Malaysian giant Petronas.

The following spring, the government in its omnibus budget bill amended the ICA to reflect the new guidelines and the Statement. The amendments included a formal definition of SOE to the following:

> State-owned enterprise means
> (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.[29]

However, no further interpretation has been given regarding what constitutes direct or indirect control,[30] seemingly leaving some uncertainty and considerable leeway for the government to make determinations as it

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[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] Torys LLP, Media Release, "Petronas/Progress Energy: Investment Canada Continues to Make Headlines" (29 October 2012), online: <http://www.torys.com/insights/publications/2012/10/petronasprogress-energy-investment-canada-continues-to-make-headliness> [Torys].
[29] ICA, *supra* note 1, s 3.
[30] McCarthy Tetrault LLP, Media Release, "Challenges for State-Owned Enterprises Arising From Proposed Amendments to the Investment Canada Act" (8 May 2013), online: <http://www.mccarthy.ca/article_detail.aspx?id=6285> [McCarthy Tetrault].

pleases. This is further amplified with the amendments which implement a means for the government to make retroactive determinations of SOE control. Practitioners have noted that this could lead to the Minister deeming a company otherwise considered a "Canadian business"[31] under the ICA as an SOE and have warned that such a step breeds major uncertainty.[32]

Guidelines on Acquisitions of Oil and Gas Interests

The ICA guidelines have also been created for certain energy sector acquisitions. With the threat of a "natural resources grab" ever present, special guidelines are to be expected.[33] However, as opposed to directly addressing concerns about foreign governments taking control of potentially strategic assets, the guidelines provide more practical guidance from a transactional perspective, namely how "who" holding "what" will be viewed through the ICA lens.

Of note, mere exploratory interests that are not currently capable of producing revenue are not considered businesses under the ICA and thus are not subject to notification or review.[34] However, while proven reserves or deposits with "economically recoverable quantities"[35] will be viewed as a business once recovery for production has started, this would still seem to leave a minor potential regulatory gap. Here, a foreign state-controlled Canadian number company could acquire exploration rights prior to

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[31] Canadian business means a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business; ICA, *supra* note 1, s 3.

[32] McCarthy Tetrault, *supra* note 30.

[33] The Library of Parliament's 2011 research publication on foreign investment defines a "natural resources grab" as where "a foreign investor tries to acquire a company strictly for its natural resource assets while shedding all value-added activities associated with it." The paper goes on to further highlight "The Special Place of Natural Resources in Foreign Investment Review", noting that natural resources bring with them unique issues in terms of inherent supply limitation, nation-state specificity creating unusual bargaining clout, and ability to separate or tie together value-added opportunities via vertical control and integration or lack thereof. See Frigon, *supra* note 14 at 8.

[34] "ICA Interpretation Note No. 4 – Business" highlights that the exemption for exploration and pre-production operations applies the same with mineral extraction outside of oil and gas as well. However, a mine or extraction operation that has been closed is classified as a "business". See Industry Canada, "Investment Canada Act Interpretation Notes", (6 May 2011), online: <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00067.html>.

[35] *Ibid.*

development of production and prospectively avoid the ICA, including the amendments concerning retroactive determination of SOE control discussed above. This being said, with the provinces having significant control of resource tenure, as well as the approval process for extraction, federalism can provide a strong brake. When combined with the breadth of more proven and development ready options that outward state directed investment will have globally, any gap may simply not be that attractive to SOEs or their respective states, although this may be a future subject worthy of inquiry beyond speculation.

National Security Review

Although a somewhat separate concept from the NBT, the national security review is important to understanding the Canadian review framework. Introduced via amendment to the ICA in 2009[36] and recently expanded upon with new Guidelines, national security review can be seen as a fleshing out of, and compliment to, the NBT. Whereas previous to the 2009 amendment, a supposed national security threat would be encompassed under the more general calculations of net benefit, the national security regulations formalized a process for both identification of certain "threats" and their assessment and review.[37] Procedurally, a national security concern arising out of Canadian investments by foreign parties will be identified to the Minister of Industry by the security services.[38] The Minister will decide whether to send the investment to cabinet for potential review, the standard being whether the investment "could be injurious to national security" and cabinet in turn will have the ability to decide on whether to order a formal review.[39] Upon such order, the review will formally be conducted by the Minister of Industry, in concert with the Minister of Public Safety, and then submitted via a report with recommendations to cabinet.[40]

The 2016 Guidelines detailed nine factors the Minister may take into account in assessing investments under the national security framework,

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[36] Further amendments to the national security review regulations were made in 2015, but mostly concerned procedural timelines, namely providing the government "with the flexibility to extend time periods for the review". See *Regulations Amending the National Security Review of Investments Regulations*, Canada SOR/2015-311.

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*

although criteria beyond these nine were not precluded from consideration. These factors are:

- The potential effects of the investment on Canada's defence capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- Involvement in the research, manufacture or sale of goods/technology identified in Section 35 of the Defence Production Act;
- The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on Canada's international interests, including foreign relationships; and,
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.[41]

These new Guidelines have provided a degree of clarity and transparency to the national security review process, but leave outstanding issues as to how impact is measured, the relative impact and valuation of concerns, and thresholds of acceptable risk.

In the first potential opportunity to evaluate the Guidelines' operation however, the government declined to even trigger the national security review process for the takeover of Norsat, a defence technology contractor, by a large private Chinese firm, a transaction that sparked the US Department of Defense to announce a review of all Norsat contracts.[42] Speaking on the decision to not proceed with an ICA national security review, Prime Minister Justin Trudeau outlined that "[i]n this case, our very effective national-security agencies made a professional determination that there were no significant national-security concerns about this particular transaction and it didn't need

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[41] ICA Guidelines, *supra* note 2.

[42] Robert Fife & Steven Chase, "Trudeau says National Security Not Jeopardized in China Takeover of Norsat", *The Globe and Mail* (27 June 2017), online: <https://www.theglobeandmail.com/news/politics/trudeau-says-chinese-takeover-of-tech-firm-is-fine-despite-pentagon-concerns/article35475650/>.

to go through further reviews."[43] Thus it seems that despite issuing ICA Guidelines only months prior, in practice the government continued the tradition of operating outside of the formal framework on an ad-hoc basis at the direction of the Prime Minister's Office, even though the public reasoning for the decision to not formally review was seemingly based upon criteria present in the ICA Guidelines.

Canadian Investment Review Literature

The bulk of the Canadian-focused literature, whether it comes from the worlds of academia, policy or legal practice, is favourable to both reform of the ICA and investment by SOEs in Canada. Yet the best starting point is perhaps not with the ICA or SOEs at all, but rather with an evaluation of the predecessor FIRA. In the most cited work on the topic, O'Sullivan explores the economic nationalist sentiment that led to the FIRA's passing, as well as the mechanics of the legislation itself.[44] He is inconclusive on the success of the FIRA regime, noting that the FIRA neither damaged Canada's international trade relationships, nor was a definitive solution.[45] His judgments, however, are based from the economic nationalist perspective that informed the FIRA itself, which substantially contrasts with both the present-day review framework and to a lesser extent, the perceived broader problems with Canadian foreign investment review (historical fears of being too permissive versus modern thoughts of being too restrictive).[46]

Dawson is far more critical of the FIRA, arguing that it cast too large of a net through its low review thresholds. In turn, Dawson believes the low review thresholds caused significant wait times, which when accompanied with administrative costs and performance requirements "had a chilling effect on investment".[47] With regard to the ICA, Dawson takes a more positive tone towards both foreign direct investment and the NBT, but acknowledges the potential for a similar chilling effect while seeing the need for SOEs to receive

[43] *Ibid*.
[44] O'Sullivan, *supra* note 6.
[45] *Ibid*.
[46] *Ibid*.
[47] Laura Dawson, "Potash and BlackBerries: Should Canada Treat All Foreign Direct Investment the Same?" (2012) [unpublished, archived at Macdonald-Laurier Institute] at 3 [Dawson].

additional scrutiny.[48] However, this openness to differential treatment does not extend more broadly to investment in different sectors.

In June 2008 the government's Competition Policy Review Panel report challenged the OECD's consistent assertion that Canada was among its most investment restrictive members.[49] Still, in addition to proposing raised thresholds and a national security component, the Panel recommended changes to the NBT itself, including reversing the onus whereby instead of making proponents demonstrate that the acquisition would be of net benefit, the government would have to show the investment to be "contrary to Canada's national interest" to reject the transaction.[50]

Most others take harsher positions towards the ICA and NBT however. Bergevin and Schwanen (echoed by Deveau and Calof),[51] argue strongly against the NBT in its current form, citing subjectivity, lack of clarity and the inappropriateness of the test in certain situations. While the authors do not directly address SOEs, they conclude that the test needs to be reformed or replaced.[52] Bradford goes somewhat further, if into the past, and highlights that the ICA has really evolved into a remake of the FIRA as a "black box of unknowns".[53] Globerman, commissioned to study the ICA by the Competition Policy Review Panel, likewise concludes that the ICA's review process failed to enhance the net benefits of inward foreign direct investment to Canada.[54] He also suggests that increased review thresholds, a general lowering of administrative costs, and a refocusing towards national security, show promise in rectifying some issues.[55]

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[48] *Ibid* at 6, 14.
[49] Industry Canada, "Compete to Win" (Ottawa: Industry Canada, 2008) at 29 [Compete to Win].
[50] *Ibid* at 32.
[51] Denise Deveau, "Does the net benefit test make the grade?", *Financial Post* (23 May 2013), online: <http://business.financialpost.com/driving-competition/does-the-net-benefit-test-make-the-grade>.
[52] Phillipe Bergevin & Daniel Schwanen, "Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick" (2011) [unpublished, archived at CD Howe Institute] [Bergevin & Schwanen].
[53] Joe Bradford, "Investment Canada Act: We've seen this movie before" *Canadian Lawyer* (31 March 2014), online: <http://www.canadianlawyermag.com/5065/Investment-Canada-Act-Weve-seen-this-movie-before.html>.
[54] Steven Globerman, "An Evaluation of the Investment Canada Act and its Operations" (2008) Competition Policy Review Panel, "Research Paper Summary" [unpublished, archived at ResearchGate], online: <https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Steven_Globerman.pdf/$FILE/Steven_Globerman.pdf>.
[55] *Ibid* at 5, 66-67.

In a similarly conceived and directed publication, Moran uses a survey of global and Canadian acquisitions by Chinese SOEs to argue that fears of a Chinese lock-up of Canadian resources are unsubstantiated.[56] Instead of reviewing and blocking potential Chinese SOE bids for Canadian resource assets based on a net benefit assessment, Moran advocates moving the substance of review to a national security test. Paying considerable attention to BHP Billiton's failed bid for Potash Corporation, Moran questions the wisdom of denying takeovers in strategic resource sectors by non-SOEs where the only viable alternatives for acquisition are SOEs.[57] The article, aimed most directly at policymakers, is especially useful for its comparison of the relative merits of an SOE review system premised on national security concerns as opposed to the economic, competition and industrial-focused NBT.

Writing from a Chinese perspective after the CNOOC acquisition of Nexen, Woo comes to some analogous conclusions to Moran, setting out that discrimination against SOE investment is not only undesirable, but threatens Canada's appeal as a destination for foreign investment more generally.[58] Woo further criticises moves by the Canadian government to add review barriers to SOE investment as disproportionate to the risk posed by such investments, arguing instead that since the risk factor "of SOEs boil down to security issues – however defined – the proper mechanism for assessing those risks is the national security provision of the ICA rather than a separate set of guidelines for SOEs that merely reiterate the net benefit test."[59] Further, while the national security provision may be the more appropriate forum for review, aggressive implementation of national security review cannot be allowed to be used as "a pretext for protectionism or as an excuse for jingoism."[60]

Finally, the hard political science perspective of Hale examines the federal government and media response where Canadian resource companies came under foreign control with the objective of isolating what balance and policy objectives a seemingly "new" (as of the 2000s) consensus on foreign investment represents.[61] Hale somewhat interestingly concludes that his case

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[56] Theodore Moran, "Chinese Foreign Direct Investment in Canada: Threat or Opportunity?" (2012) [unpublished, archived at the Canadian Council of Chief Executives].
[57] *Ibid*.
[58] Yuen Pau Woo, "Chinese Lessons: State-Owned Enterprises and the Regulation of Foreign Investment in Canada" (2014) 7:1 China Economic J 21 [Woo].
[59] *Ibid* at 35.
[60] *Ibid*.
[61] Geoffrey Hale, "The Dog That Hasn't Barked: The Political Economy of Contemporary Debates on Canadian Foreign Investment Policies" (2008) 41:3 Can J Political Science 719.

studies represent a larger move away from industrial policy towards neoliberalism.[62]

Major ICA Reviews of Canadian Transactions

BHP Billiton and Potash Corporation

The first major red flag[63] that ICA approval was not a formality in the resource sector came with BHP Billiton of Australia's bid for Potash Corporation.[64] This $38 billion proposed transaction was the second rejection under the ICA and concerned a private firm from one of Canada's closest friends, ironically enough aiming to takeover a Canadian SOE.[65] Here, the Harper government responded in large part to opposition to the deal from the Government of Saskatchewan, a political ally, despite the fact that Potash was projected to be a drag on Saskatchewan's budget.[66] Potash was deemed to be a strategic asset that could only be entrusted to a private or foreign entity if, in the words of a prominent Harper-era cabinet minister, "it would be developed in a way that brought growth and returns to the province's tax base."[67] BHP's troubles also arose from focusing its lobbying efforts on the federal government, and thus not properly negating the significant provincial dissent that came to the forefront.[68]

SINOPEC and Daylight Energy

Prior to the flashpoint SOE transactions concerning CNOOC and Petronas, considerable attention was paid to Sinopec's acquisition of Daylight Energy. In addition to being one of China's largest companies, Sinopec is found in some lists as one of the largest companies in the world. The bid for

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62 *Ibid.*
63 The quashing of aerospace technology firm McDonald Detweiler's takeover by Alliant Techsystems (an American company) was the first rejection under the ICA; see Oliver Borges, "Investment Canada Act: Minister of Industry Blocks Acquisition of MDA by Alliant Techsystems" (12 May 2008), online: <http://www.mccarthy.ca/article_detail.aspx?id=3996>.
64 Stockwell Day & Michael Yang, McMillan LLP, Media Release, "Asian Foreign Investment in Canada: Moving Forward" (June 2012), online: <http://www.mcmillan.ca/mobile/Asian-foreign-investment-in-Canada-moving-forward> [Day].
65 *Ibid.*
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*

$2 billion gained significant attention, being framed in a statement from Prime Minister Harper outlining that Canada "welcomed investment by China and other countries, so long as the acquisitions were economic in nature and don't have other strategic and political connections."[69] Still, the relatively small nature of the assets involved lessened the prospective strategic impacts and the deal was approved.

This transaction, perhaps because of Sinopec's place in China's political economy, generally drew more attention than the parade of other SOE acquisitions in the energy sector in the years leading up to 2012. These included Abu Dhabi National Energy Company's purchase of PrimeWest, IPIC (also of Abu Dhabi) and Nova, Sinopec's subsequent investment in Syncrude by taking over ConocoPhillips' position, Korea National Oil Corporation and Harvest Energy, Norway's Statoil and North America Oil Sands as well as Thailand's PTT Exploration into Statoil's stake.[70]

Petronas and Progress Energy

Obviously however, the conversation in recent years about SOE investment in Canada's resource sector is centred on the CNOOC-Nexen and Petronas-Progress Energy transactions, forever paired through their eventual approval on the same day. These two investments signalled the climax of SOE investment in Canadian energy. Beginning with the latter, in June 2012 Malaysia's national oil and gas company Petronas announced a prospective takeover of Calgary's Progress Energy. From its namesake twin-tower headquarters in Kuala Lumpur, Petronas at the time held energy interests in more than 30 countries. The Petronas bid, originally for $5.5 billion, was in short order increased to $5.9 billion[71] after a rival made its own acquisition attempt.[72] In reviewing the transaction, the government did not provide its decision until mere minutes before the deadline on October 19th, with the

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[69] Mike Coates, "Daylight Falls on the Oilsands", *Canadian Business* (3 November 2011), online: <http://www.canadianbusiness.com/business-strategy/daylight-falls-on-the-oilsands/>.
[70] Torys, *supra* note 28.
[71] Bennett Jones LLP, Media Release, "Petronas Decision Signals Feds' Caution on SOE Investment Reviews" (8 November 2012), online: <https://www.bennettjones.com/Publications%20Section/Updates/PETRONAS%20Decision%20Signals%20Feds%20Caution%20on%20SOE%20Investment%20Reviews> [Bennett Jones].
[72] "Petronas submits new bid for Progress Energy", *Canadian Broadcast Corporation* (20 November 2012), online: <http://www.cbc.ca/news/business/petronas-submits-new-bid-for-progress-energy-1.1209092> [CBC].

Minister of Industry outlining with no further detail that he was "not satisfied that the proposed investment is likely to be of net benefit to Canada."[73]

Despite speculation that the rejection centred on the transaction's own merits, there were rumours that Petronas and the government had been very close to reaching a settlement on approval[74] when Petronas attempted to force the government's hand by not consenting to an extension of the review given that the government wished to concurrently decide the Petronas transaction with the later developing CNOOC bid for Nexen.[75] Perhaps judging that its approval odds were superior as a Malaysian SOE in an isolated $6 billion transaction than by having its fate paired with a Chinese SOE in a $15 billion transaction, Petronas pushed for an expedient resolution. While the government may have called Petronas' bluff at first instance, the company knew that even in the event of rejection it would have a further 30 days to provide additional undertakings or revise its deal to alter the outcome. Even at the time of its initial rejection, the deal was considered by well-informed observers to have a realistic opportunity to eventually gain approval.[76]

However, there was some indication that Petronas had underestimated the government relations aspect of ICA review considering the wide ultimate discretion that cabinet has.[77] More troubling may be that the procedural reality means that lobbying efforts can have a measurable impact in the assessment of a supposedly objective test early on. Although lobbying is commonplace in Canadian politics, lobbying attempts to influence a subjective policymaking process (under the guise of ICA "consultations") as opposed to swaying the interpretation of how a set bar should be raised or lowered in a particular instance, are of questionable compatibility with an objective standard aimed at maintaining a level playing field for investment.

Petronas may seem far less potentially strategically threatening than Sinopec or CNOOC, simply because of its country of origin. It is true that Malaysia is a middling regional power in Southeast Asia with a historically pro-Western bent. However, aspects of Petronas' operations touch upon red flags typically associated with SOEs, namely corruption.[78] Both Petronas and

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[73] Bennett Jones, *supra* note 71.

[74] Torys, *supra* note 28.

[75] *Ibid.*

[76] Bennett Jones, *supra* note 71.

[77] *Ibid.*

[78] Vaughn Palmer, "A $700-Million Corruption Cloud Engulfs Malaysian Prime Minister", *The Vancouver Sun* (5 August 2015), online:
<http://www.vancouversun.com/news/vaughn+palmer+million+corruption+cloud+engulfs+m

the Malaysian government have been implicated in numerous corruption scandals before and since the Progress Energy transaction, despite formally substantial efforts to control the country's rampant and ingrained corruption.[79] As the contributor of up to 45 percent of Malaysia's budget revenues at the time of its Progress bid,[80] Petronas is difficult to separate from the Malaysian government, which has been effectively controlled by one party for decades.[81] Most recently, the government has been embroiled in a scandal that saw some (US) $700 million transferred from a state-owned investment fund to the personal accounts of the Prime Minister.[82] From a Canadian perspective, the risk of corruption, especially highlighted in this latest scheme,[83] would be asset stripping and skimming of proceeds. Such a distortion may threaten the market orientation of the acquisition and in turn the health of the venture, along with corresponding jobs, revenues and benefits down the Canadian economic chain.

Eventually, in December 2012, approval was granted by the Ministry of Industry after Petronas made "additional representations and…further undertakings".[84] These were rumoured to include a Canadian stock listing that would incur local regulatory oversight,[85] and the appointment of independent investors to the Progress board.[86] Indeed, the period subsequent

alaysian+prime+minister/11265838/story.html>; Qishin Tariq, "Petronas Senior Manager Acquitted of Bribery", *The Star* (16 March 2015), online: <http://www.thestar.com.my/news/nation/2015/03/16/court-petronas-bribery/>.

[79] *Ibid*; Lydia Nathan, "Petronas Signs Corruption-free Pledge to Become Graft-free", *The Malaysian Reserve* (15 June 2017), online: <https://themalaysianreserve.com/2017/06/15/petronas-signs-corruption-free-pledge-to-become-graft-free/>.

[80] Niluksi Koswanage & Emily Kaiser, "Petronas Chafes at its Role as Malaysia's Piggy Bank", *Reuters* (2 July 2012), online: <http://www.reuters.com/article/us-malaysia-petronas-idUSBRE86105420120702> [Koswanage].

[81] Warren Bell, "As Scandal Rocks Malaysian Government, BC pushes LNG Deal with State-owned Gas Giant", *National Observer* (15 July 2015), online: <http://www.nationalobserver.com/2015/07/15/opinion/scandal-rocks-malaysian-government-bc-pushes-lng-deal-state-owned-gas-giant>.

[82] "Scandal in Malaysia", *The Wall Street Journal* (5 July 2015), online: <http://www.wsj.com/articles/scandal-in-malaysia-1436113149>.

[83] *Ibid*.

[84] CBC, *supra* note 72.

[85] Manirajan Ramasamy & Barry Porter, "Petronas to offer Progress relisting to win Canada's support: Source", *Bloomberg News* (21 November 2012), online: <http://business.financialpost.com/news/energy/petronas-to-offer-progress-relisting-to-win-canadas-support-source?__lsa=0a54-2b46> [Ramasamy & Porter].

[86] *Ibid*.

to the approval saw Progress double employment in its Calgary office, maintain its local top management and gain access to almost four times as much capital on an annual basis to make further acquisitions,[87] with the company poised to invest many billions more in Canadian natural gas. Yet the ensuing years have only served to underline corruption concerns with the Malaysian government.

CNOOC and Nexen

The more politically contentious of the two reviews, CNOOC and Nexen, could arguably have commenced with another transaction; CNOOC's $2.1 billion acquisition of OPTI Canada, a relatively small oil sands player with strong pre-existing ties to CNOOC, in November 2011. Nexen had already taken a 15 percent interest in its oil sands joint venture[88] and with the company continuing to struggle,[89] CNOOC stepped in to acquire the whole.[90] As the bankruptcy or major restructuring of OPTI was expected, CNOOC's OPTI acquisition was not seen in a particularly negative light and thus its review and approval under the ICA garnered far less scrutiny than CNOOC's subsequent Nexen proposal.

The following July saw CNOOC's bid for Nexen at a price over 60 percent of its traded value, equating to just over $15 billion, the largest ever transaction between Canadian and Chinese parties.[91] In a relatively quiet time of the year for media, the CNOOC proposal was able to drive the following Canadian news cycle. The Canadian government meanwhile largely deferred comment with leaked reports of a cabinet split on how to handle the proposal,[92] and public polling showing opposition to the deal was countered

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[87] Yadullah Hussain, "Progress Energy's great push to be first in Western Canada", *Financial Post* (10 April 2014), online: <http://business.financialpost.com/commodities/energy/progress-energys-great-push-to-be-first-in-western-canada/wcm/35291ec5-4eb7-4dd9-9335-b57ecc4c7c78>.

[88] "OPTI Sells 15% Stake in Joint Venture to Nexen", *Financial Post* (17 December 2008), online: <http://bit.ly/2vSVNq3>.

[89] "CNOOC Wraps up Opti Deal to Expand in Oil Sands", *Reuters* (28 November 2011), online: <http://ca.reuters.com/article/businessNews/idCATRE7AR1B020111128>.

[90] *Ibid.*

[91] Jason Roy, "An Event Study Analysis of the Nexen-CNOOC Takeover: Implications for the Canadian Market" (2013) [unpublished, archived at the University of Ottawa Department of Economics] at 15 [Roy].

[92] Charles Burton, "Canada's China policy under the Harper government" (2015) 21:1 Can Foreign Policy J 45 at 52 [Burton].

by support for the acquisition from Alberta's premier and much of the country's business establishment.[93]

By the end of August, CNOOC formally made an application for ICA approval and three weeks later the deal was approved by Nexen shareholders.[94] Public statements from the Prime Minister highlighted the imbalance in the Sino-Canadian trading relationship in China's favour as well as the need for that to change.[95] Still, with mixed signals prevailing, the government simply twice deferred the decision to push the limits of the ICA review period in a review process that became not so much an application package being reviewed, but an *ad hoc* (and perhaps FIRA-style) negotiation.[96] Finally, on December 7th, the Minister of Industry announced the transaction's approval.[97] Prime Minister Harper's statement on the approval was careful to underline that "[i]t is important that Canadian and also foreign investors understand that this is not the beginning of a trend but rather the end of a trend."[98]

The transaction and review process should be seen against the backdrop of both a series of acquisitions of large Canadian resource companies in the 2000s as well as already existing joint ventures between SOEs and domestic energy players, and in turn as a signal on whether these partnerships in the oil sands could evolve into controlling relationships.[99] Hale describes the CNOOC bid as "deeply intertwined in broader political and economic debates over the growing power of foreign SOEs" as well as the specific debate on how to treat Chinese investment in particular.[100] Here, there was a public debate between realists espousing the net benefit of Chinese investment,

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[93] Roy, *supra* note 91 at 16.
[94] *Ibid* at 17.
[95] *Ibid.*
[96] Ramasamy & Porter, *supra* note 85.
[97] Roy, *supra* note 91 at 18.
[98] Mike Coates, "The Unpredictable Evolution of Canadian Investment Policy", *Policy Magazine* (April/May 2013), online: <http://hkstrategies.ca/uncategorized/the-unpredictable-evolution-of-canadian-investment-policy-2/> [Coates]; However, this was not the end of review for the transaction as Nexen's considerable assets in the US required CFIUS approval. Almost three months later this hurdle was cleared and resulted in the eventual removal of Nexen from a controlling interest in its Gulf of Mexico holdings.
[99] Geoffrey Hale, "CNOOC-Nexen, State-Controlled Enterprises and Canadian Foreign Investment Policies: Adapting to Divergent Modernization" (2014) 47:2 Can J Political Science 349 at 365.
[100] *Ibid.*

moderates hedging between openness to foreign capital but wanting to limit that capital to positions short of effective control, and those simply opposed.

This latter category emphasized concerns central to investment (including absence of reciprocity for prospective Canadian investment and lack of remedies for CNOOC's commitments) as well as those beyond the direct scope of investment (human rights, espionage, China's politically influenced economy and reputation for corruption).[101] Still, Hale noted that the concurrent review of the Petronas bid for Progress Energy served as a moderating force, focusing attention on an objective standard for SOEs as opposed to a standard for SOEs based on national origin.[102] While the concurrent stream was perhaps a negative for Petronas, it was of benefit to CNOOC.

For its part, CNOOC learned lessons from previous review processes[103] to frame its deal in the best possible terms, effectively cornering the government to either approve the transaction on the objective standards of the NBT which CNOOC, advised by leading Canadian lobbying and law firms,[104] had gone to pains to meet, or demonstrate that a rejection was politically driven. CNOOC's offerings included a commitment to move their head office for non-Chinese operations to Calgary, a public listing on the Toronto Stock Exchange, as well as maintaining Nexen's management, its 3,000 employees and community contributions.[105]

The government's response and the split within cabinet can also be seen as being informed more by competing foreign policy approaches towards China – pro trade and investment accompanied by warming relations and engagement on one hand, versus voicing concerns about human rights combined with suspicion of Chinese ambitions, business practices and espionage.[106] Balance was the order of the day, with the Harper government's position attempting to show that Canada was still open to foreign investment in the energy sector, but if that investment came from a SOE and it was an

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[101] *Ibid* at 365-66.
[102] *Ibid.*
[103] Namely the failed acquisition of Potash Corporation in Saskatchewan by BHP Billiton.
[104] Hill & Knowlton Strategies, Media Release, "H+K Canada wins again with CNOOC" (12 December 2014), online: <http://hkstrategies.ca/old-news/hk-canada-wins-again-with-cnooc/>.
[105] Claudia Cattaneo, "Two years in Nexen deal still a tough swallow for state-owned CNOOC", *Financial Post* (13 December 2014), online: <http://business.financialpost.com/news/energy/two-years-in-nexen-deal-still-a-tough-swallow-for-state-owned-cnooc?__lsa=0a54-2b46>.
[106] Burton, *supra* note 92 at 52.

attempt to gain a controlling interest, there would be additional thresholds to meet and the investor would face correspondingly lessened prospects of approval. Yet despite considerable reservations, the government also apparently wanted to avoid perceptions that it had acted arbitrarily by approving the transaction as evaluated by the existing rules, while still effectively closing the door to further transactions.

The entirety of the CNOOC-Nexen review process highlighted the *ad hoc*, political and somewhat arbitrary nature the decision-making outcomes of the NBT can foster. Net benefit is clearly driven by more than an objective analysis of benefit to the national interest and extends to net benefit of political outcomes for the governing party. Likewise, instead of policy informing the baseline of an objective test, which in turn would be applied to a fact-set to determine outcomes, the government's maneuverings saw the facts in this instance (and other instances) develop the policy outcome.

However, with the benefit now of several years' hindsight to evaluate the transaction, the clear reality is that CNOOC has not done well out of its acquisition of Nexen and is widely viewed to have overpaid.[107] Calgary and the oil sands have suffered from a decline in oil prices and CNOOC has shut down the Long Lake oil sands project that was the original spearhead in its Canadian investment.[108] The time elapsed has also shown that CNOOC has not kept certain commitments it made as part of its bid and the breaking of those commitments has not met consequences. CNOOC fired much of Nexen's top management in late 2014 and brought in replacements from China in order to "better align" Nexen with CNOOC.[109] This was followed up with hundreds of layoffs in both front office and operational positions over 2015 and 2016.[110] CNOOC has likely escaped greater scrutiny for the

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[107] Kyle Bakx, "China Not Exactly Striking it Rich in Canadian Oilpatch", *Canadian Broadcast Corporation* (21 April 2016), online: <http://www.cbc.ca/news/business/china-oilsands-alberta-oilsands-investment-1.3545401>.

[108] *Ibid*.

[109] Dan Healing, "Nexen Inc lays off four executives in sweeping shakeup initiated by CNOOC Ltd", *National Post* (26 November 2014), online: <http://business.financialpost.com/news/energy/nexen-inc-lays-off-four-executives-in-sweeping-shakeup-intiated-by-cnooc-ltd?__lsa=0a54-2b46>.

[110] Amanda Stephenson, "300 Laid Off as Nexen Reorganizes", *Calgary Herald* (17 March 2015), online: <http://calgaryherald.com/business/energy/300-calgary-employees-laid-off-as-nexen-reorganizes>; Ian Bickis, "350 Nexen Workers Losing their Jobs Amid Investigation into Oilsands Blast", *Toronto Star* (12 July 2016), online: <https://www.thestar.com/business/2016/07/12/350-nexen-workers-losing-their-jobs-amid-investigation-into-oilsands-blast.html>.

simple reason that these could be viewed as legitimate business moves considering the underperformance of the Nexen portion of CNOOC as well as the significant turmoil experienced across the Alberta energy sector.

Yet, should further controlling acquisitions by SOEs of Canadian resource assets materialize, those bidders may have to bear the burden of CNOOC's less than stellar track record in the event they are not already scared off by the post-Nexen SOE regulations and CNOOC's subpar return on Nexen. This being said, the current government appears more open to Chinese investment than the previous one,[111] leaving space for a new cost-benefit analysis of a new Prime Minister's Office to emerge with different outcomes, albeit within the same old *ad hoc*, arbitrary, and politically-based decision-making process.

III. PERSPECTIVES ON FOREIGN INVESTMENT AND SOEs

Much of the conversation on foreign investment review policy as it pertains to the resource sector can be viewed through the lens of tension between nationalist and liberal perspectives. Wilson explains resource nationalism as a mercantile approach on the part of a state endowed with natural resources to direct the resource development path in support of certain national objectives that it "would not otherwise obtain if exploitation was left to international market processes."[112] Simply, this perspective puts forth that since non-renewable resources are by their very nature scarce, the state needs to maximize domestic returns beyond what would be achieved by global markets. These efforts can include price controls or propagation of cartels with like-minded producers,[113] the creation of national resource

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[111] Andrew Scheer, "Free Trade with China Doesn't put Canadian Interests First", *The Globe and Mail* (6 July 2017), online: <https://www.theglobeandmail.com/opinion/free-trade-with-china-doesnt-put-canadian-interests-first/article35571538/>.

[112] Jeffrey Wilson, "Resource Nationalism or Resource Liberalism? Explaining Australia's Approach to Chinese Investment in its Minerals Sector" (2011) 65:3 Aus J Intl Affairs 283 at 285 [Wilson].

[113] Christopher Gilbert, "International Commodity Control: Retrospect and Prospect" (1995) World Bank Policy Research Working Papers, cited in *ibid* at 285.

companies and ownership controls,[114] and activities to increase or develop new downstream sectors.[115]

The liberal alternative on the other hand, allows the flowing hands of free (or mostly free) market capital to determine outcomes. Traditionally, resource sector foreign investment was viewed as providing the investment receiving country benefits in terms of capital, market access, extraction technology, and technical knowledge.[116] A trend has also been noted in managing risk through vertical integration – the foreign vertically integrated firm will be able to absorb shorter term market flows that a smaller domestic and single sector exposed firm may not, providing a form of certainty and stability.[117]

The perceived risks are, however, likewise present and are often viewed as shadowing the justifications for resource nationalism. These include loss of control, subsequent loss of jobs or lessened pressure to maintain jobs in a foreign territory, the loss of higher value economic activities derived from midstream, downstream and corporate activities, as well as reduced income tax revenues. The possibility that sub-optimal business outcomes will ensue relative to when the resource is locally owned and isolated from potentially subsidizing other aspects of an integrated supply chain, is also a pertinent concern.[118] With the aforementioned possibility for downstream and corporate head office jobs to be consolidated offshore, a revenue regime designed for a current reality may be exposed to a shift in business model.

Still, despite the potential for negative impacts in certain instances and macroeconomic risks, the general consensus is that foreign direct investment is broadly beneficial to the recipient country.[119] Since the demise of the National Energy Program, this liberal consensus (although not without notable exceptions – such as Russia and Venezuela) has more often than not

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[114] David Mares, "Resource Nationalism and Energy Security in Latin America: Implications for Global Oil Supplies" (2010) [unpublished, archived at Rice University], cited in Wilson, *supra* note 112 at 285.
[115] Theodore Moran, "New Deal or Raw Deal in Raw Materials?" (1971) 5 Foreign Policy 119, cited in Wilson, *supra* note 112 at 285.
[116] Peter Drysdale & Christopher Findlay, "Chinese Foreign Direct Investment in Australia: Policy Issues for the Resource Sector" (2009) 2:2 China Economic J 133 at 141 [Drysdale & Findlay].
[117] *Ibid* at 143.
[118] *Ibid*.
[119] Greg Golding, "Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move Towards Xenophobia or Greater Openness?" (2014) 37 Seattle UL Rev 533 at 535 [Golding].

generally extended to Canada, as well as the United States and Australia, the two extended examples that this paper will later evaluate.

Chinese State-Owned Foreign Investment

As this paper focuses on state-owned foreign investment, the obvious question is whether there is something unique to state-driven investment, and in particular Chinese SOE investment, that diverges from the consensus on foreign direct investment in general. Here, despite the narrowed parameters, the answers are similar. Of course, the practical reality of SOE investment is that Chinese SOEs are perceived as a more significant security threat – after all, the national conversation was not particularly bothered when Norwegian SOE Statoil purchased North American Oil Sands Corporation in 2007.[120] Considering China's geopolitical position, ambitions and the volume of Chinese SOE investment in the natural resources sector, the special attention is warranted – there is no other comparable source of SOE investment that can compete on both these levels.

Structurally, control of China's SOEs is delegated by the State Assets Supervision and Administration Council (SASAC) and SOEs are separate legal entities from the state with operational independence.[121] On its face, this formal autonomy seems to share much in common with Canadian Crown corporations, although Chen strongly underlines perceived differences between the two, namely that Chinese SOEs are "aimed at creating a government monopoly or dominance" in certain strategic industries and "obtain a competitive edge over private rivals" with their growth often exceeding that found in the private sector.[122]

The SASAC is able to exert macro-control through regulation, in particular the *Interim Regulations on Supervision and Management of State-owned Assets of Enterprises*.[123] This includes the appointment or removal of

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[120] Dina O'Meara, "Statoil Buys North American Oil Sands for $2.2B", *Toronto Star* (27 April 2007), online: <https://www.thestar.com/business/2007/04/27/statoil_buys_north_american_oil_sands_for_22b.html>.

[121] Golding, *supra* note 119 at 540.

[122] Duanjie Chen, "China's State-Owned Enterprises: How Much do we Know? From CNOOC to its Siblings" (2013) [unpublished, archived at the University of Calgary School of Public Policy] at 8.

[123] *Interim Regulations on Supervision and Management of State-owned Assets of Enterprises*, (promulgated by the State-owned Assets Supervision and Administration Commission of the State Council, May 27, 2003) Decree No. 378 (China), arts 17-22.

management, the ability to nominate board directors, ensure how state voting rights are instructed,[124] as well as have say in "major matters".[125] These major matters include foreign investments, although here any Chinese firm (public, private or a joint venture with a foreign firm) requires approval from two state bodies – the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MoC).[126] Both bodies evaluate the investment proposals on a number of commercial and economic levels, with the former especially focusing on the investment's compatibility with Chinese industrial policy.[127] Once the NDRC and MoC approve, a further review from the State Administration of Foreign Exchange occurs, stemming from China's outward currency controls.[128] This layering of internal bureaucracy, each representing a potentially competing interest and fiefdom, helps sustain arguments that Chinese SOE investment cannot be seen as the state acting with one strategic voice and accordingly, that SOE capital should be treated no different than other foreign capital.

On this particular subject, Du sets forth that despite some legitimate concerns, the "fear factor" on the part of countries receiving investment is considerably in excess of the appropriate grounding for such concerns.[129] Expanding on this sentiment from a more case centric view, Zhang demonstrates through CNOOC's attempted acquisition of Unocal in the US (discussed in greater detail later) and the European Union's antitrust scrutiny of Chinese SOE transactions, how counterproductive regulatory responses can arise from overstated suspicions of Chinese SOEs.[130] Zhang further outlines that many Chinese SOE investments are far more potentially detrimental to China than the countries of investment due to squandering of assets arising from the poor governance and lack of transparency that plagues many SOEs.[131]

This discussion can be seen as being extended in Drysdale's analysis of Chinese flows of SOE investment into Australia's resource sector, which

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[124] *Ibid.*

[125] *Ibid.* "Major matters" are covered in arts 22-24.

[126] Golding, *supra* note 119 at 541.

[127] *Ibid* at 542.

[128] *Ibid.*

[129] Ming Du, "When China's National Champions Go Global: Nothing to Fear but Fear Itself?" (2014) 48:6 J World Trade 1127.

[130] Angela Zhang, "Foreign Direct Investment from China: Sense and Sensibility" (2013) 34:3 Nw J Intl Law & Bus 395.

[131] *Ibid.*

argues that Chinese SOE investment in Australian resources is quite beneficial to Australia.[132] Cornish makes similar points in the Canadian context, namely that SOEs are misunderstood and should be treated the same as any other foreign investor to the extent they act in such a manner.[133] Backed by her own literature review comparing Chinese SOEs to non-state foreign investors on a number of fronts, Cornish believes that Canada will be missing a substantial economic opportunity, as well as an opportunity to have a certain degree of influence over these SOEs, should it fail to provide similar treatment.[134]

IV. SOE INVESTMENT REVIEW REGIMES

The Organization for Economic Cooperation and Development (OECD) conducted a 2015 study on the foreign investment review regimes of its members, looking at the existence and structure of regimes, as well as more specifically examining the treatment of SOEs.[135] Interestingly, most states were viewed as treating private foreign investment the same as SOEs and only seven of forty-six countries party to the OECD Declaration on International Investment and Multinational Enterprises were deemed to have "specific restrictions" in the context of the Declaration.[136] These measures can be seen as respecting certain sectors or being more blanketing.[137] Australia, Canada, Russia and the United States were identified as having "rules specifically addressing inward investments by foreign [SOEs]". [138] The American and Australian regimes are further detailed below.

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[132] Peter Drysdale, "A New Look at Chinese FDI in Australia" (2011) 19:4 China & World Economy 54.
[133] Margaret Cornish, "Behaviour of Chinese SOEs: Implications for Investment and Cooperation in Canada" (2012) [unpublished, archived at Canadian International Council].
[134] *Ibid.*
[135] Yuri Shima, "The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey" (2015) [unpublished, archived at OECD Working Papers on International Investment] [Shima].
[136] *Ibid* at 8.
[137] *Ibid.*
[138] *Ibid.*

United States

Established by executive order in 1975,[139] and with its modern jurisdiction most substantially defined by the 1988 “Exon-Florio Amendment” to the 1950 *Defense Production Act*,[140] the Committee on Foreign Investment in the United States (CFIUS) process has been tweaked, expanded upon, and significantly reformed numerous times in its history.[141] Of most recent note was the publication of formal guidance to potential acquiring parties in 2008.[142] Unlike Australia or Canada, the American framework for foreign investment review is not strictly mandatory or automatically invoked at certain thresholds.[143] Still, with the CFIUS possessing the ability to retroactively undo transactions, avoidance games would not seem to be an overly prudent tactic. In this light, the scope of the CFIUS review is larger than the ICA, as the CFIUS process potentially encapsulates any investment that is not new, or “greenfield”, investment.[144]

Formally, the CFIUS is a multi-agency committee under the Department of Treasury to “review transactions that could result in control of a U.S. business by a foreign person (“covered transactions”) in order to determine the effect of such transactions on the national security of the United States.”[145] Ultimately however, the President has the sole authority “to suspend or prohibit a covered transaction”[146] and in this respect shares obvious parallels to the reality of ICA review in Canada, where little doubt exists that the Prime Minister holds the effective final say on the Minister of Industry’s review decision. Between 1988 and 2006, of the well over 1,500 transactions the CFIUS has been notified of, twenty-five spurred a full investigation.[147] Thirteen of these transactions were withdrawn when the

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[139] United States, *Executive Order No. 11858*, 3 C.F.R. p. 990 (1971-1975).
[140] United States, *Defense Production Act Pub L 81-774*, 50 U.S.C. 2170 (1988) [*Defense Production Act*].
[141] James Jackson, “The Committee on Foreign Investment in the United States (CFIUS)” (2016) (Washington DC: Congressional Research Service) at 1-3 [Jackson].
[142] *Ibid* at 5.
[143] Shima, *supra* note 135 at 22.
[144] Baker Botts LLP, Media Release, “A Guide to Demystify the CFIUS Process” (November 2013) at 5, online: <http://bit.ly/2w21uSG> [Baker Botts].
[145] Department of the Treasury, “The Committee on Foreign Investment in the United States (CFIUS)” (20 December 2012), online: <https://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx>.
[146] *Ibid*.
[147] Jackson, *supra* note 141 at 28.

CFIUS provided notice to the proponent of a second stage of review.[148] Only one of the remaining twelve transactions that went to the President's desk was not provided a green light.[149] This sole rejection came in 1990 with the acquisition of Seattle-based manufacturer of aerospace parts Mamco by China National Aero Technology and Export Corporation, an SOE. Stemming from worries over the Chinese government being able to avoid export controls and gain access to technology it would otherwise be denied, then President George HW Bush ordered the divestment of Mamco after the transaction had been concluded,[150] demonstrating the retroactive remedies available under the CFIUS framework.

Evoking the NBT, the CFIUS has its own laundry list to consider in national security review.[151] Compared to the ICA framework, the American list focuses far more on national defense interests rather than interests stemming from industrial or economic impact. National defense interests are also not as explicitly separated from industrial or economic policy, but rather entail viewing industrial and economic concerns through a primary and overarching lens of defense. Considering the nature of the US economy, its strategic position and heightened sense of vulnerability to terrorism in the post-September 11th world,[152] this outlook is not surprising. With the world's largest economy, diversified amongst many industrial sectors, the ability for any one transaction to impact the economy or a particular sector is minimized relative to what its impact could be in a smaller economy.

When combined with the US' position of being the de-facto guarantor of security for much of the world and a proponent of the free flow of trade and investment, the strategic impetus seems different. In the aftermath of September 11th which has influenced the development of current criteria,[153] the US may be more conscious of maintaining its strategic military advantage. Compared to Canada, with a less diverse, highly natural resource reliant, and obviously smaller economy (and military), the manifestation of strategic position and priority seems rationally connected to the legislative outcome in the form of CFIUS.

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148 *Ibid.*
149 *Ibid.*
150 Harriet King, "China Ends Silence on Deal US Rescinded", *The New York Times* (20 February 1990), online: <http://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html>.
151 *Defense Production Act, supra* note 140 at §721(f), cited in *Jackson*, *supra* note 141 at 21.
152 *Ibid* at 1.
153 *Ibid.*

As specifically applied to SOEs however, the Department of Treasury guidance document dedicates a section to "Foreign Government-Controlled Transactions" (FGCT), which explicitly includes SOEs in addition to foreign government agencies, government pension funds and SWFs. The document takes the position that a FGCT "does not, in itself, mean that it poses national security risk", explaining that transactions are reviewed holistically on the facts, with overt consideration given to:

> the extent to which the basic investment management policies of the investor require investment decisions to be based solely on commercial grounds; the degree to which, in practice, the investor's management and investment decisions are exercised independently from the controlling government, including whether governance structures are in place to ensure independence; the degree of transparency and disclosure of the purpose, investment objectives, institutional arrangements, and financial information of the investor; and the degree to which the investor complies with applicable regulatory and disclosure requirements of the countries in which they invest.[154]

This list bears considerably more resemblance to Canada's guidelines on SOE investment and the NBT in general than the CFIUS review factors do to the NBT more broadly, although Canada is seemingly more focused on tangible outcomes (such as corporate board representation).

Notable Foreign Investment Reviews in the United States

In practice, the CFIUS has been involved in several notable proposed SOE transactions since the mid-2000s, and these transactions have led to the further evolution of the CFIUS structure. Two of these instances occurred during the second term of the George W. Bush Administration; the Dubai World Ports acquisition of Peninsular and Oriental Steam Navigation Company (Peninsular) and CNOOC's proposed acquisition of oil producer Unocal. A third, CNOOC-Nexen, arose during the Obama Administration. Considering the scope and focus of this paper, this section will discuss the CNOOC involved transactions.

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[154] United States Department of the Treasury, *Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States*, 73:236 Office of Investment Security (8 December 2008).

CNOOC and Unocal

At the time of CNOOC's proposed acquisition of Unocal, oil prices were high, driven in large part by Chinese demand.[155] Against a backdrop of concerns about China's rise as an economic and military challenger to the US,[156] as well as questions about its propensity to follow the norms of global commerce (with accusations of currency manipulation, failure to abide by the conditions of its WTO assent, and state sanctioned theft of intellectual property at the forefront),[157] the bid by CNOOC quickly became a political lightning rod despite Unocal being a relatively insignificant oil company in terms of assets physically located in the US.[158]

Two months prior to the $18.5 billion (USD) CNOOC bid, global petroleum behemoth Chevron had actually made its own bid for Unocal for $16.5 billion (USD). Within weeks of the CNOOC bid, the House of Representatives passed a creative attack on the CFIUS process via an amendment to prohibit the use of the Treasury to approve the sale of Unocal to CNOOC.[159] This amendment came two days prior to the formal CFIUS notice being filed by CNOOC.[160] A bill was then introduced in the Senate two weeks later to explicitly prevent CNOOC from acquiring Unocal,[161] followed closely by Chevron increasing its total bid as well as the cash component of that bid.[162] These legislative events mirrored the public discourse and the advancement of *HR 6/PL 109-58* (requiring the study of Chinese energy policy by the Secretaries of Defense and Homeland Security prior to CFIUS review) to final passage and presentation to the President was accompanied with the withdrawal of the CNOOC bid.[163] Two days after President Bush signed the *Energy Policy Act of 2005* into law, a large piece of

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155 Dick Nanto et al, "China and the CNOOC Report for Unocal: Issues for Congress" (27 February 2006) *Congressional Research Service* at 1 [Nanto].

156 *Ibid* at 1-3.

157 *Ibid* at 10. At the time, Unocal's US Operations Accounted for 1 Percent of American Hydrocarbon Consumption.

158 *Ibid* at 1, 10. Unocal's Exploration and Drilling Activities at the time were concentrated in Southeast Asia and the Gulf of Mexico. Unocal sold its Canadian subsidiary during July 2005 in a $1.8 billion (USD) transaction.

159 Nanto, *supra* note 155 at 1.

160 *Ibid.* The amendment was ultimately struck from the final bill.

161 *Ibid* at 16.

162 *Ibid* at 1.

163 *Ibid* at 16.

legislation that went well beyond the Unocal issue, and Chevron's bid was accepted by Unocal, bringing the saga to an end.

Although this outcome precluded the opportunity to see the CFIUS process further unfold in the CNOOC context, it did provide perspective into the political maneuverings that influenced the outcome. Whereas with the fused legislative and executive power found in the Canadian Westminster system, especially in instances of majority government, it is simple to see the executive driven decision-making process as the competing centres of powers in the American system make cause and effect determinations less clear. In the CNOOC-Unocal instance, President Bush and the executive branch were basically silent on the issue. The eventual inclusion of *HR 6/PL 109-58* was merely one small part of a major energy bill. It may be that the administration and its allies in Congress were far more focused on passing certain core priorities in the bill, as well as maintaining pace on a broader legislative agenda, than the relative noise of a transaction the President would likely have the opportunity to veto if he so chose.[164] Yet in a heavily polarized Congress, the Act passed through the Senate by a vote of 85 to 10.

CNOOC and Nexen

Interestingly, the CFIUS inserted itself into CNOOC's acquisition of Nexen. While some have argued that the CNOOC-Nexen acquisition was driven far more by interest in Nexen's interests outside of Canada than any of its Alberta holdings, Nexen's platforms in the Gulf of Mexico were sufficient to invoke the domain of the CFIUS regardless. The CFIUS approved the investment, however there were apparently significant conditions attached, namely that CNOOC could not be the operator of the assets.[165] This meant that CNOOC had to be removed as the decision maker and find a partner to assume the role as necessary.[166] Consistent with the broader national security focus, the perceived issue for CFIUS was not so much economic impact of

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[164] With the decision makers of the CFIUS largely being administration appointees, it follows that the executive branch could sufficiently influence its appointee decision makers to place the matter on the President's desk.

[165] Chester Dawson & Brian Spegele, "How a Chinese Company Slipped on Canada's Oil Sands", *The Wall Street Journal* (22 July 2015), online: <http://www.wsj.com/articles/how-china-slipped-on-canadas-oil-sands-1437616832>; Rebecca Penty & Sara Forden, "CNOOC Said to Cede Control of Nexen's US Gulf Assets", *Bloomberg* (1 March 2013), online: <http://www.bloomberg.com/news/articles/2013-03-01/cnooc-said-to-cede-control-of-nexen-s-u-s-gulf-assets> [Penty & Forden].

[166] Penty & Forden, *ibid*.

resource control, but rather the actual physical control of assets geographically close to military installations.[167] Also, unlike with the ICA where the proponent will make a bid and that bid will either be approved or sent back for revision, the CFIUS will impose conditions for approval specific to that transaction. This provides certainty on what needs to be done on the back-end, but not so much on the front-end, especially with the lack of an official release of previous decisions. Although obviously the ICA process provides no public reasons, a proponent subject to ICA review will have the body of trial and error of previous actions to inform their bid.

Australia

As a prosperous nation with an economy driven in large part by natural resource extraction and with its 23 million people largely concentrated in a few major cities, Australia is a natural peer for Canada. When combined with shared traditions, similar historical development, demographics, political and legal institutions, Australia is likewise the best comparator country for Canada in the context of this paper.

Australia's foreign investment framework stems from the *Foreign Acquisitions and Takeovers Act* 1975 (FATA).[168] As with the ICA, a cabinet minister (the Treasurer[169]) is the formal decision-maker, advised by the Foreign Investment Review Board (FIRB), a "non-statutory" advisory body supported by a secretariat.[170] Unlike the ICA, the FATA and FIRB also respectively govern and review foreign acquisitions of real estate interests.[171]

The FATA has a 30 day review period which can be supplemented by an interim order for a further 90 days.[172] Decisions come with no right of administrative or judicial review.[173] Private foreign investment is subject to review based on thresholds in a similar manner (and with comparable thresholds) to the ICA,[174] but Australia has higher thresholds for certain

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[167] *Ibid*.
[168] *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Australia).
[169] The Canadian equivalent is the Minister of Finance as opposed to the President of the Treasury Board.
[170] Austl, Treasurer, "Australia's Foreign Investment Policy" (1 July 2016) at 2, online: <https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf> [FIRB Policy].
[171] *Ibid*.
[172] *Ibid* at 12.
[173] *Ibid*.
[174] *Ibid* at 3.

countries with which it has a free trade agreement, including China. However, where foreign government owned firms, SOEs and SWFs are concerned, any investment is reviewable.[175] A "foreign government investor" is defined as a "foreign government or separate government entity" holding a "substantial interest" of at least 20 percent (increased from 15 percent), or an aggregate of foreign government or entities from more than one country holding a substantial interest of at least 40 percent.[176] Additionally, the 20 percent threshold is invoked if the combined interests of more than one foreign government investor from the same country breach the threshold.[177] This means that if two SOEs originating from the same state run as separate and directly competitive businesses happen to have interests adding up to over 20 percent, there will be a review triggered without any opportunity for it to be proactively avoided.[178]

Instead of the NBT, Australia's investment regime calls for an evaluation of whether an investment is in the national interest. Framed in similar terms to the NBT, the national interest test takes into account the following factors in all industry sectors: national security, competition, impacts on other Australian government policies, impact on the economy and the community, and "character of the investor". With the final criterion, character includes transparency of operation and regulatory oversight, corporate governance practices, and in the case of fund managers (including SWFs), the investment policy and proposed use of voting rights.[179]

Specific to resource development, the FATA also applies to interests in mining or production tenements, with no caveat for production status found in the ICA. Instead foreign government investors "require approval to acquire a legal or equitable...interest in a tenement or an interest of at least 10 percent of securities in a mining, production or exploration entity"[180] making for a stronger approval requirement than found with non-producing interests in Canada.

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[175] Przemyslaw Kowalski et al, OECD, "*State-Owned Enterprises*" (2013) 147 OECD Trade Policy Papers, OECD Publishing at 19.
[176] FIRB Policy, *supra* note 170 at 3.
[177] *Ibid*.
[178] Malcolm Brennan et al, King & Wood Mallesons, Media Release, "Changes to Australia's FATLA Bill and the Implications for Foreign Government Investors" (3 November 2015), online: <http://www.kwm.com/en/knowledge/insights/changes-to-the-foreign-acquisitions-and-takeovers-legislation-20151102>.
[179] FIRB Policy, *supra* note 170 at 9.
[180] *Ibid* at 5.

Where proposed investments involve SOEs (and more broadly, where the defined "foreign government investors" are concerned), the most recent Foreign Investment Policy sets out that the review will consider the commercial nature of the operation versus any indicators that decisions could be motivated more by political or strategic considerations than prudent business practice.[181] The Policy outlines that the following factors will be considered in whether a proposal is "contrary to the national interest":

- the existence of external partners or shareholders in the investment;
- the level of non-associated ownership interests;
- the governance arrangements for the investment;
- ongoing arrangements to protect Australian interests from non-commercial dealings;
- whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange.[182]

Shadowing a significant rise in certain commodity prices,[183] Australia's resource sector became a significant target for (overwhelmingly Chinese) SOE investment in the mid-2000s, providing a large sample for investment review outcomes. Wilson compiled forty-nine investments with a total value of (AUD) $40 billion by Chinese firms between 2002 and 2010, forty-three of which were made by SOEs.[184] Wilson argues that this trend of investment demonstrated a strategic objective of "increasing the market power of Chinese firms *vis-a-vis* major mining companies and securing lower cost minerals supply independent of them."[185]

Under its previous policies, the FIRB held the position that an investment would be deemed a risk by virtue of potential strategic motivation at the threshold of 15 percent of an existing enterprise or 50 percent of a new one.[186] In the most active subset of the studied period, transactions were approved at a 9 to 1 ratio, and the 15 and 50 rule was not strictly followed in cases where a denial would kill a project (in one such instance, there was an acquisition of a bankrupt firm).[187] Two of four rejections arose from mine locations near remote military sites, while the other two stemmed from violations of the 50 percent rule with the proponents being invited to

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181 *Ibid*.
182 *Ibid* at 10-11.
183 Wilson, *supra* note 112 at 291.
184 *Ibid*.
185 *Ibid* at 295.
186 *Ibid* at 297.
187 *Ibid*.

resubmit.[188] This highlights that despite considerable political and public attention due in part to a high volume of transactions, there was a very strong inclination for approval.[189]

A further four FIRB reviews saw conditional approval, where the Treasurer set out binding legal conditions for the transaction to move forward where there was major potential for non-market driven behaviour or where the transaction was especially large.[190] Of the examples Wilson cites, all occurred in mining transactions and included a requirement for arm's length market output, abstaining from director positions, support for local infrastructure, and a public stock market listing for at least some of the company.[191] This aspect of the process more mirrors the American CFIUS approach of the reviewing body shaping the transaction to meet its review standards instead of the Canadian tack of outlining broad goalposts and certain actions that are more likely to place a deal within those posts, but leaving the specifics to the proponent. However, the conditions do share resemblance to undertakings under the ICA and more generally, Australian parameters in terms of national interest in the first instance obviously resemble Canada's ICA criteria more than the strategic security driven American review guidelines. Comparably speaking though, it is worth noting that despite similarities between the Canadian and Australian frameworks, Canada's is viewed as more restrictive and, considering the volume of SOE investment in Australia relative to Canada, Canada may have lost out on investment ultimately directed to Australia.[192]

On a similar tangent, Wilson deduces that the review process is not engaging in "resource nationalism" as the Australian government is not seeking to leverage the review system for local ownership shares or local value added activities, nor is there evidence of specific targeting by national origin (despite regional fears of China's ever expanding economic and military clout).[193] Combined with a commitment to using the review process to guarantee the normal and free operation of the market as opposed to edging it in a particular direction, Wilson finds Australia's system to be a positive example of resource liberalism.[194]

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[188] *Ibid* at 298.
[189] *Ibid*.
[190] *Ibid*.
[191] *Ibid*.
[192] Golding, *supra* note 119 at 573.
[193] Wilson, *supra* note 112 at 299.
[194] *Ibid* at 299-300.