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STOCKING CANADA'S FOREIGN INVESTMENT REVIEW TOOLBOX: THE FUTURE OF THE *INVESTMENT CANADA ACT*

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Suite aux appels en faveur d'une plus grande « clarté » dans l'application de la Loi sur Investissement Canada par des investisseurs internationaux et des groupes d'intérêts locaux hostiles aux investissement étrangers, et à la lumière de récents développements qui ont vu l'application de la Loi se libéraliser et devenir plus restrictive simultanément, les auteurs évaluent les réformes proposées à la lumière de la législation en matière d'investissement étranger de certains des plus importants partenaires commerciaux du Canada. Les auteurs en viennent à la conclusion que (i) renverser le fardeau du présent test afin d'exiger que le Ministre démontre qu'un investissement présente un « désavantage net » pour le Canada, et (ii) publier les détails non-confidentiels des engagements pris auprès du gouvernement pour qu'un investissement soit approuvé, aideraient à clarifier l'application de la Loi, sans enlever au Canada sa capacité d'attirer le capital étranger. Les auteurs notent qu'il importe par-dessus tout de cesser d'exiger davantage d'engagements, lesquels sont de plus en plus détaillés. L'adoption d'une telle proposition ne nécessiterait aucun changement législatif ou procédural.

Amid calls for greater "clarity" in the Investment Canada Act from international investors and from local elements wary of foreign investment, and in light of recent events that have both liberalized and made more restrictive the application of the ICA, the authors critically assess proposed reforms in light of the foreign investment regimes of some of Canada's leading trading partners – concluding that (i) reversing the onus of the current test to require the Minister to show the investment would likely be of "net harm" to Canada, and (ii) publishing non-confidential details of undertakings upon which approved investments are conditioned, would provide clarity, without harming Canada's

interest in attracting investment capital. Above all, however, the most urgent need is to stop the trend toward more numerous, and more detailed, undertakings – a move that requires no legislative or procedural changes at all.

1. Introduction

The *Investment Canada Act* ("ICA"),[2] enacted in 1985, provides a regulatory framework for the Government of Canada to review significant foreign investments. The ICA aims to ensure that acquisitions of control of Canadian businesses by non-Canadians will likely be of "net benefit" to Canada[3] when exceeding specified financial thresholds.[4] Acquisitions of control of Canadian businesses (those located in Canada, even if already foreign-owned) that do not meet financial thresholds for review are subject to an administrative notification.[5] In addition, as of 2009, any investment (including minority investments not amounting to acquisitions of control) may be subject to national security review, even where it fails to meet the necessary thresholds for "net benefit" review under the ICA.

Over the 25+ years that the ICA has been in force, the Minister of Industry has reviewed and approved over 1,650 applications for review, processed over 12,500 notifications, and effectively denied only two proposed foreign acquisitions.[6] The implementation of the ICA in 1985 signalled a change in Canadian policy, replacing the 1970's more protectionist *Foreign Investment Review Act* ("FIRA") with a statute that raised thresholds for review, changed the applicable standard of review from "significant benefit" to "net benefit" to Canada, and improved the efficiency of the review process. Although there had been calls to abolish the FIRA, Canada is a small, open economy living in the shadow of both a colonial past and a much larger economic neighbour to the south. Consequently, as a practical matter, there is an enduring protectionist element in Canadian politics (as in most countries in the world) that is generally wary of commitments by foreign owners to make appropriate capital investments and create jobs in Canada. Abolition of foreign investment review altogether was not then, and is not now, politically realistic. The passage of the ICA was, in that context, meant to send a message to the investment community that Canada welcomes (most) foreign capital.

In the early days of the ICA, accordingly, while it is quite possible that certain investments were never proposed because of the prospect of ICA review or were quietly abandoned during that process, it appeared to the public as though all applications for review by the Minister of Industry were approved, most on the basis of the investors' stated plans for the business and without legally binding undertakings (in our experience, undertakings were the exception, rather than the rule, at least before 2000 or so, for all but the most significant investments).

Accompanied in the 1980s (with the *North American Free Trade Agreement*) and the 1990s (with the World Trade Organisation) by a general trend toward deregulation and the liberalization of international capital flows generally, the ICA came to be viewed by those in Canada who are wary of foreign investment as little more than a "rubber stamp", and by foreign investors as an additional regulatory cost – annoying, but not a serious impediment to doing business in Canada. Indeed, the Act had little if any public profile.

A string of bids for high-profile Canadian companies in the past decade or so, however, has given new prominence to the Act. China's MinMetals' bid for Noranda in 2004 arguably breathed new political life into the Act.[7] Subsequent acquisitions of the Hudson's Bay Company (founded in 1670, and almost 200 years older than Canada itself), Dofasco, Stelco, Inco, Falconbridge, Alcan and other iconic Canadian companies, the sale of the assets of the bankrupt Nortel to various non-Canadian buyers, and most recently a bid for the Toronto Stock Exchange by the London Stock Exchange (withdrawn without a decision under the ICA), have led many to express heightened concern that the ICA lacks the necessary tools to protect Canada from a "hollowing out" of its corporate boardrooms, amid fears that we will become a "branch plant economy" without control of our own resources and economic destiny.[8]

For example, cheering the first-ever (public) rejection by the Minister of Industry under the ICA in 2008, Scott Hand, the chief executive officer of Inco until it was acquired in 2006 by a Brazilian company, Vale, argued that Canada's unwillingness to shield strategic industries despite other countries' judicious exercise of this right makes "Canada [...] a Boy Scout playing among other countries who play hardball."[9]

Despite increasing attention to these concerns in the media, the trend toward economic liberalization has continued through Canada's participation in international investment agreements, through sectoral liberalization of foreign investment restrictions in some areas, and through 2009 amendments to the ICA that increased general thresholds for review, while also eliminating lower thresholds for review in three sensitive sectors under the Act (transportation, financial services and uranium mining).[10] The countervailing trend toward increased media scrutiny of individual investment decisions, however, continues to give voice to a variety of protectionist concerns, and arguably has led to the more restrictive enforcement of the ICA through ever-increasing demands for more, and more detailed, binding commitments by investors ("undertakings"), and the necessity to enforce those undertakings.[11]

For those who share the widely-held view of the authors of the Competition Policy Review Panel's 2008 *Compete to Win* report that "Canada benefits from openness to the world and that attracting greater foreign investment is in Canada's economic interest,"[12] a series of recent events under the ICA could give

cause for concern. The 2007 publication of guidelines for investment by State-Owned Enterprises ("SOEs"), the 2009 establishment of a national security review process, the initiation of legal proceedings to enforce undertakings given in respect of a foreign investment by the United States Steel Corporation,[13] and the rejection of proposed acquisitions in two high-profile cases since 2008, combined with the above-noted "undertaking creep" in respect of routine applications, each appear to signal a potential increase in the restrictiveness of Canada's approach to foreign investment.

In our view, many of those events can be understood largely in the context of increasing investment flows by foreign state-owned enterprises (that might make decisions based on political directives, not necessarily on the basis of economic efficiency), the post-9/11 realities of heightened national security concerns globally, and factors unique to each of the ATK/MDA, BHP/PotashCorp and USX/Stelco cases. The Canadian government asserted in the aftermath of BHP/PotashCorp that Canada "remains committed to maintaining an open climate for investment"[14] and, with the possible exception of "undertaking creep", this appears to be largely true.

With increased public profile for the ICA, however, calls for reform and increased clarity in the ICA review process have come from advocates on both sides of the debate. Those who see openness to foreign investment as crucial to Canada's growth and success in a global economy would clarify the provisions of the Act to limit the potential role of protectionist motivations. On the other hand, those concerned with a "hollowing out" of corporate Canada would have the Act revised to provide the Government with more explicit power to reject foreign investments that do not conform to "objective" criteria.

Jointly, these variously motivated calls for review have prompted promises by the federal government to review and clarify the foreign investment regime.[15] While a parliamentary committee was tasked with an investigation of measures to increase the transparency and effectiveness of the ICA, its review was terminated by the dissolution of Parliament in March 2011, with the call of a federal election. As a result, whether and how the ICA should be reformed remains an open question.

Calls for "clarity", however, appear to mean different things to different people. This paper will explore alternative approaches to, and mechanisms for, foreign investment review and contemplate the best direction forward for Canada in the increasingly complex world of international investment and competition. A thorough review of motivations for reform, in light of the strengths and weaknesses of Canada's current approach to foreign investment and the various mechanisms employed by some of Canada's leading trade partners, suggests to us that any decision to reform the ICA should be taken with caution. In particular, whether motivated by protectionist tendencies or a desire

for more open investment, the government will need to carefully balance the perceived gains against potential risks in any attempt to "clarify" the provisions of the Act in order to ensure that "reforms will be of 'net benefit' to Canada."[16] Given investors' continued and arguably increasing interest in Canadian natural resources and businesses, the largely non-interventionist track-record of the Act (with only two rejections in 26 years), and the flexibility offered by the current "net benefit" analysis, we argue that the only changes that should be made are those that can provide greater comfort to investors without significantly impeding Canada's flexibility to evaluate "each bid on its own merits."[17]

2. The ICA and Catalysts for Change

In order to evaluate the relative advantages of conflicting calls for review, we need to understand the perceived benefits and related consequences of each proposal within the specific context of the Canadian economy.

One of the complicating factors in the debate over the ideal scope for the ICA is the failure of advocates on either side to take a firm position on the economic benefits of foreign investment: many traditional proponents of free markets appear to have been stirred by nationalist feelings in recent years, while those who traditionally prioritize protection of Canada's national champions still recognize benefits to both inward and outward foreign investment. For example, Ian Telford, chairman of Goldcorp Inc., found himself "very conflicted" in the aftermath of the BHP/PotashCorp decision, commenting that: "As a long time proponent of free markets it pains me to see governments interfere in the movement of capital. However, as a proud Canadian.... I agree with the decision and I am very pleased that Canadians will continue to have the opportunity to invest in these unique Canadian assets for decades to come."[18] On the other hand, in calling for a more strict and transparent review process, the federal New Democratic Party ("NDP" – since May, 2011, Canada's Official Opposition in federal politics) emphasized that it was "not opposed to foreign investments, but [wanted to] make sure they're the right kind – the kind that brings in new investments and creates new jobs."[19]

This ambiguity has been reflected in the decisions of the ruling Conservative government in recent years. Despite previously resisting calls to intervene in the takeovers of companies like Alcan and Inco, regularly campaigning other Group of 20 leaders to resist protectionism, recently eliminating foreign ownership restrictions on satellite operations, and overturning a CRTC decision interpreting "control" of a telecommunications carrier in what it viewed as an overly restrictive manner,[20] some of the most prominent opposition to the blocked BHP and ATK transactions came from within the Conservative government's own ranks.[21]

In our view, calls for reform have been motivated by a set of complicated and sometimes conflicting concerns that challenge the government's ability to put

forward a clear and consistent message to foreign investors that Canada welcomes their investment. In early 2011, the House of Commons Standing Committee on Industry, Science and Technology (the "Industry Committee") was tasked with considering the pros and cons of proposals for increased transparency and predictability in the ICA review process. Matters to be considered by the Industry Committee included: "public hearings for all reviewable transactions, [...] publication of the undertakings upon which Ministerial approval is conditioned, [...] amendments to the "net benefit" test, [and] the publication of case summaries and guidelines to help investors gain insight into what is currently perceived by some to be a 'black box' of bureaucratic and Ministerial discretion."[22] The manner in which undertakings should be used within Canada's foreign review process was one element of Canada's current system of review that was not explicitly put before the Industry Committee for consideration, but in our view could usefully be examined. While the Committee's work has not resumed, it remains possible that these issues will resurface in Canada's 41st Parliament.

Although each of these proposed changes allegedly speaks to the transparency and predictability of the Act, it is important to acknowledge that, as pointed out above, the terms transparency, accountability and effectiveness can mean different things to different people. As such, it will be of critical importance in any future reviews of the Act to carefully analyze what is being sought by the variety of calls for increased ICA "clarity" in order to distil a defensible and desirable set of objectives for reform.

Motivations for increasing the clarity of the ICA review process could theoretically include:

- Comforting foreign investors that Canada welcomes foreign investment, thereby better competing for inward foreign investment flows;
- Reducing potential repercussions for Canadian outward investors who wish to invest in countries that may make reciprocity-based investment decisions based on the rejection or conditioning of their own nationals' investments; and
- Building a strong and competitive Canadian economy capable of providing (high quality) jobs, attracting new investment, and creating a demand for Canadian goods and services.

Whether or not increasing the clarity of the Act would help or hinder each of these goals will depend on the specific mechanisms employed. While some find it axiomatic that the lack of public reasons given by the Minister when accepting or rejecting an application for review "has added to perceptions that the review process is arbitrary and politicized and thereby tarnishes Canada's

reputation as a capital-friendly host country,"[23] there is a strong argument to be made that the opposite is true.

Given the enduring protectionist sentiments of a vocal minority in Canada, the idiom "the less said the better" may well be the best advice for those tasked with enforcing the Act. The benefits of free capital flows and competition in the global economy are over-whelming, but intangible. The loss of C-suite jobs as a result of a given takeover is tangible, and not directly linked to the growth of Canadian companies that themselves invest abroad (giving rise to C-suite jobs of their own). By focussing more attention on individual cases, increased transparency risks discounting the benefits from free capital flows generally and focussing only on the short-term negatives of the investments at hand.

The flexibility given to the Minister to evaluate proposed transactions based on his or her own weighing of the various "net benefit" factors has arguably resulted in far fewer rejections of investments over the 25 years under the ICA than would a more rigid and transparent review process.[24] A journalist for the *Financial Post* argues that "there is an upside in having an unpredictable [...] process that gives Canada maximum flexibility and control over foreign investment in its entirety and allows the evaluation of each bid on its own merit, perhaps taking into account the cumulative impact of foreign investment from any given area or in any given sector."[25] When combined with greater protection for investor confidentiality and the potential for relatively quicker and less expensive reviews than might be involved in a more legalistic review process, it appears to us that the flexibility of the current review process has bolstered Canada's reputation as a capital-friendly host country, rather than tarnished it, and has, overall, been to Canada's "net benefit".

In fact, despite arguing strongly that the current ICA process is "opaque and cloaked in secrecy" and recommending that secrecy be rooted out, one author ultimately suggests that the ICA's currently undefined national security provisions be accompanied by a set of public criteria that "need not be cast in stone or constrain the federal government unnecessarily in its decision-making."[26] He argues that the adoption of such a list, which would provide greater clarity in assessing national security concerns, is the best approach, as any attempt to adopt a concise, workable and consistently applied definition of national security would "both reduce the government's flexibility in addressing security issues in specific cases and, potentially, open the system up to endless litigation."[27] Applying the same logic to the current list of "net benefit" review factors suggests that the current approach may in fact be the best approach – if one is to review foreign investments at all.

While the ability to negotiate with investors and to approve transactions subject to conditions constitutes a flexible feature of the review process, the tendency toward "undertaking creep" has caused it simultaneously to become

a glaring weakness in the Canadian system, leading some to go so far as to refer to Canada as an emerging "banana republic".[28] As will be discussed in greater detail below, it should, however, be possible to reverse the tendency toward undertaking creep without significantly detracting from the Minister's flexibility under the Act or losing the benefit of this tool (used in moderation) in the review process to ensure that Canada is not an "international boy scout" made victim by politically-motivated investment decisions from abroad.

3. Globalization and Foreign Direct Investment

In our view, as a starting point for any review, the government should establish a firm position with respect to the desirability of foreign investment in Canada. This will permit policy makers to prioritize potentially conflicting goals such as attracting foreign investors to Canada and protecting national champions. While one might argue that a lack of clarity in the ICA review process (particularly with respect to the scope and relative weight to be attributed to the "net benefit" factors set out in section 20 of the ICA) allows for undue politicization of the Act,[29] this risk should be carefully weighed against the likelihood that the current, essentially political, review process is less interventionist than would be a more legalistic one. The following evaluation of the benefits of foreign direct investment ("FDI") suggests that this payoff should not be overlooked. ICA interference in foreign investment must remain the (rare) exception to the rule.

In the Organization for Economic Cooperation and Development's ("OECD's") 1976 *Declaration on International Investment and Multinational Enterprises*, OECD member countries recognized that "international investment is of major importance to the world economy and has considerably contributed to the development of their countries."[30] Whereas international investment (the flow of financial capital across international borders for investment purposes) generally includes passive "foreign portfolio investment", FDI is defined to involve some control over the underlying asset, whether through greenfield investment or an acquisition of control of an existing business.[31] Under the ICA, an acquisition of control, whether direct or indirect, by a non-Canadian is subject to "net benefit" review and notification,[32] although any foreign investment that could be considered "injurious to national security" may be subject to review regardless of the percentage voting interest of the target that will be acquired.[33]

Despite the prominence in Canadian media and political discussions of concerns that increased FDI will lead to a hollowing out of corporate Canada whenever a prominent Canadian company is in play (a tangible event), economic evidence suggests that "the benefits of foreign investment far out-weigh any real or imagined drawbacks" and that foreign takeovers "have actually increased head office activities in Canada in recent years, because foreign firms

typically find it to their advantage to keep such activities geographically close to their Canadian operations."[34] In fact, while inward FDI as a percentage of Canada's GDP has held relatively steady at just over 30 percent – the same percentage as in 1970 – Canada's share of global inward FDI has fallen precipitously from 15.7 percent in 1970 to only 3.4 percent in 2007.[35] As a result, Canada's outward FDI has exceeded inward FDI levels since 1997 and some argue that "Canada is actually punching below its weight in terms of global FDI inflows," particularly where FDI is measured in terms of performance relative to potential.[36] These statistics suggest that much of the political and media debate postulating a "hollowing out" of Canadian corporations is based on impression rather than dispassionate analysis.

As traditional views of FDI as an instrument of exploitation and threat to national sovereignty are increasingly abandoned in recognition of the benefits of FDI as an engine for economic growth, the potential costs of restrictive investment practices become more onerous – albeit intangible and therefore more difficult to attribute to any particular inward investment. There is extensive empirical evidence demonstrating that outward FDI benefits include integration in global supply chains, expanded reach of Canadian firms in foreign markets, repatriated profits and royalties, and increased demand for domestic higher-value head-office activities (*e.g.*, product design and engineering).[37] The recognized importance of both inward and outward FDI lends support to the argument that Canada must be careful to avoid restrictive measures on inward FDI that could result in retaliation by foreign host economies that would limit outward FDI opportunities. The best approach for achieving this result is, however, subject to the same debate as that surrounding the attraction of inward FDI generally: flexibility in the review process may be as or more beneficial than added clarity where the ultimate goal is to permit maximum flows of foreign investment, whether inward or outward, so long as efficiency rather than foreign political concerns will guide the decisions of the investor.

Faced by the fallout of the ongoing global economic downturn of 2008, the World Trade Organization ("WTO"), the OECD and the United Nations Conference on Trade and Development ("UNCTAD") have worked together with G20 Leaders and other member countries to help ensure that gains in the liberalization of trade and investment will not be lost as a result of the economic stresses currently faced by countries around the world. In a November 2010 report, these international bodies warned that, in the face of current economic challenges, using protectionist trade or investment restrictions to combat the multiple and intensifying economic pressures would "only complicate the task of finding and implementing more lasting solutions to those problems."[38] The same reasoning can be applied with respect to the more general debate regarding the extent to which inward FDI should be controlled or restricted under the ICA and in Canada:

> "Efforts to further restrict inward FDI in order to "protect" Canadian firms from being taken over by profitable foreign competitors sidestep the more fundamental question of why the Canadian firms are in need of "protection" and the underlying reasons for that situation."[39]

Recognizing that "[t]he persistence of high levels of unemployment, macroeconomic imbalances, rising food prices and geopolitical tensions create conditions that are favourable to growing protectionist sentiment," G20 Leaders have committed to resist all forms of protectionism in trade and investment until at least 2013 (and to roll back any new protectionist measure that may have arisen) in an attempt to promote economic progress and narrow the development gap.[40] While applauding the fact that the majority of investment policy measures taken during the most recent reporting period demonstrated continued efforts to "eliminat[e] restrictions to international capital flows and improv[e] clarity for investors", the three international organizations have highlighted the need for increased vigilance to prevent protectionism from gaining ground.[41]

With this in mind, and with calls for increased "clarity" echoing at both national and international levels, Canada must remain mindful of the potential for inconsistency in the use of this word. Whereas the OECD seeks clarity in the form of reduced restrictions on FDI and improved predictability for investors, some advocates for reform in Canada seek to increase the scrutiny of foreign investment, thereby increasing the incidence of intervention and reducing predictability for investors.

Indeed, the OECD's FDI Restrictiveness Index, updated in 2010, already ranks Canada as highly restrictive, due in large part to Canada's explicit FDI screening process and prior approval requirements. In describing its methodology, the OECD admits, however, that it aims only to capture regulatory restrictiveness on paper, and that "no attempt is made to appraise the overall restrictiveness of the regulatory regime as it is actually implemented."[42] Thus, for the OECD, the introduction of a more rigid or legalistic review system may actually be perceived as increasing Canada's hostility to FDI, even if the motivation for the reforms is a desire to increase the transparency of the process. As such, attempts to respond to international calls for clarity should be treated with the same caution as national ones. The flexibility to permit maximum flows of efficiency-driven foreign investment should not be sacrificed in a blind search to improve "clarity" for its own sake.

It seems to be widely accepted as a matter of international opinion that FDI inflows are worth competing for as a key driver of global economic growth.[43] Seen in that light, Canadian policy makers need to concentrate their efforts on further liberalizing Canadian FDI policy and bolstering Canada's image as

a welcoming destination for foreign investment "or risk putting Canada at a competitive disadvantage to other jurisdictions that have clearly defined FDI objectives."[44]

In the global competition for inward FDI, some governments offer investment incentives such as reduced tax rates or relaxed regulatory standards that entail direct costs and risk encouraging rent-seeking behaviour by foreign investors. While such distortions can be harmful, it is important to recognize that restrictive measures designed to protect national firms can lead to equally harmful rent-seeking behaviour on the part of those national firms, characterized by rigidities and inefficiencies in the national market. In addition, restricting inward FDI, even in case of national champions, removes the discipline that the threat of takeover by foreign investors imposes on managers of Canadian companies whose poor performance is reflected in falling share prices; raises the cost of capital by constraining the amount available within the Canadian economy; and reduces spill-over benefits from foreign investment, including increased competition and exposure to more efficient technologies and management techniques.[45]

Working from the presumption, therefore, that very few transactions should be rejected under any "net benefit" analysis, we are in a better position to prioritize conflicting policy goals and motivations for reform in evaluating the best set of tools for foreign investment review under the ICA. We turn now to examine various approaches to foreign investment adopted by some of Canada's leading trade partners, and to evaluate proposed reforms in light of those approaches. This will help us to better determine what set of policies, tools and mechanisms will best serve Canada's national interest going forward.

4. A Survey of Global Approaches to FDI

In a consultation paper entitled *Sharpening Canada's Competitive Edge*, the Competition Policy Review Panel describes the treatment of foreign investment in countries other than Canada as follows:

> Like Canada, most countries around the world have mechanisms in place, whether formal or informal, to review at least some elements of foreign investment. While investment flows have increased, and the economic importance of foreign investment has been accepted, most nations are sensitive to the control of the more strategic elements of their domestic economy. As such, most governments retain a degree of control over who invests and controls firms active in these strategic sectors.[46]

As such, while the mechanisms employed may differ significantly, the treatment of foreign investment in most countries shares key characteristics including laws or policies enacted to protect national security interests and lists

of strategic sectors in which foreign investment requires government review and approval, sometimes based on financial thresholds or tied to specific levels of control which frequently prohibit foreign control.

A comparison of Canada's regime with those of some of Canada's leading trade partners demonstrates the spectrum of options employed for controlling FDI. While certain countries, for example the Netherlands and the United Arab Emirates ("UAE") do not employ a formal review process, one report notes that "the Netherlands restricts entry into certain sectors such as public utilities, and the UAE restricts the extent of ownership in all sectors without a review."[47] The informal mechanisms of control employed in the Netherlands and the UAE highlight the risks of attempting to compare the processes in any two countries based on any specific tool. Thus, where any individual mechanism used in the systems below appears attractive or preferable to an approach take in Canada, it will be important to analyze whether Canada's overall framework provides the same checks and balances necessary to support its use.

In order to evaluate how FDI is screened by Canada's trading partners, we examine the scope of investments subject to review, the criteria for review, the nature of the decision-making process (legalistic or political) and the extent to which conditional approval (undertakings) is provided for in each case.

a) Australia

On the whole, the review process in Australia is similar to that in Canada. Australian investment policy is set by the national treasurer and administered by the Foreign Investment Review Board ("FIRB") in accordance with the provisions of the *Foreign Acquisitions and Takeovers Act 1975* ("FATA").[48] As in Canada, Australia's approach is administrative rather than legalistic, involving opportunities for negotiation throughout the review process and permitting the use of undertakings or conditions to ensure that a foreign investment is in Australia's "national interest".[49] As a result, the rejection of foreign investment is as rare as in Canada, with a recent decision to prohibit the Singapore Exchange Limited's proposed acquisition of the Australian securities exchange constituting only the second formal rejection involving a substantial Australian business under the regime in the past decade.

The first involved the rejection of Shell Australia Investments Limited's proposed acquisition of Woodside Petroleum Limited in 2001. As noted above, but to a lesser extent than currently occurs in Canada, the Treasurer sometimes imposes conditions, rather than block a proposal outright, to ensure that foreign investment is in Australia's national interest (*e.g.*, Sinosteel/Murchison Metals in 2008, or Minmetals/OZ Minerals in 2009). Most notably, from a Canadian perspective, the FIRB imposed the following list of conditions on Billiton as a condition of approval to acquire Broken Hill Properties (BHP), then, as

now, one of Australia's largest mining companies: (1) that BHP Limited remain an Australian company (under the Australian Corporations law and by maintaining a listing on the stock exchange in its original name); (2) that subsidiaries in the Minerals, Petroleum, Steel and Services businesses remain under the control of BHP Limited so long as they form part of the BHP Billiton Group (the "Group"); (3) that the headquarters of BHP Limited and global headquarters of the Group be in Australia, with that location acknowledged in all public documents and announcements; (4) that the CEO and CFO of BHP Limited reside in Australia; and (5) that the majority of scheduled board and executive meetings in any calendar year occur in Australia and that the Board of directors of BHP Limited be elected in accordance with a specified procedure.[50] Interestingly, these undertakings are perpetual, with prior approval of the Australian Treasurer required if BHP Limited wishes to vary the conditions. They also rendered it impossible for BHP to give similar undertakings to the Canadian government in respect of its proposed acquisition of PotashCorp.

Australia's scope for review is wider than Canada's in three main respects: the financial threshold for review is generally lower and control is defined more broadly;[51] methods of acquiring control include not only acquisitions but also "arrangements" related to the directorate of a corporation or to the control of an Australian business;[52] and, in addition to providing notification regarding the acquisition of Australian businesses, foreign persons must notify the government and get approval prior to acquiring an interest in certain types of real estate.[53]

Unlike in Canada, Australia's test for review is a "negative" test with the onus on the national treasurer to establish that a rejected acquisition or arrangement by a foreign investor would be "contrary to the national interest". Despite this reversed onus, the Australian test incorporates a clear discretionary element to the extent that the term "national interest" remains largely undefined. Whereas the ICA sets out six specific factors that will be taken into account in determining whether an investment will likely be of "net benefit" to Canada, no such specific guidance is provided in the FATA. Australia's *Foreign Investment Policy* does, however, set out five factors to be weighed in assessing the "widely held community concerns of Australians", including the character of the investor and the impact of the investment on national security, competition, other Australian government policies (including tax), the economy and the community.[54]

Due to the inclusion of national security in this list, Canada's scope of review with respect to security issues is broader than that of Australia as any investment by a non-Canadians is subject to national security review (regardless of whether "net benefit" review thresholds are met), whereas Australian national security is merely one factor to be considered where a transaction is otherwise reviewable

under FATA. The opposite is true, however, for investments by foreign governments and SOEs, as all direct investments by foreign governments or their related entities in Australia are reviewable as a matter of policy, regardless of whether review thresholds under FATA have been met,[55] whereas state-owned interests are merely one factor to be considered in a Canadian "net benefit" review.

With little guidance provided by either country regarding the weight to be attributed to the various factors under consideration, the review processes are ultimately similar and, in the rare cases where foreign investment has been rejected, the governments have each faced criticism alleging politicization of the decisions compounded by a lack of clarity in their respective review processes.[56]

b) United States

The United States is considered by the OECD to be relatively welcoming of foreign direct investment in that, unlike Canada and Australia, it does not have a threshold-based review mechanism for large foreign investment proposals. While a few explicit limitations on foreign ownership exist in specific industries such as airlines, marine shipping, media, communications, and fishing, "the United States generally grants all investors national treatment status, [with] foreign investors [...] treated no differently from domestic investors."[57]

The United States does, however, engage in a national security review process under the Exon-Florio Amendment to the *Defense Production Act of 1950* ("Exon-Florio"). Under Exon-Florio, which was substantially revised in 2007, the President of the United States and the Committee on Foreign Investment in the United States (the "CFIUS") have the power to block any foreign investment or acquisition believed to threaten national security, assuming no other laws (apart from the *International Emergency Economic Powers Act*) would be adequate to protect against the threat.

While applications for review are voluntary under Exon-Florio, the CFIUS can review transactions that are not voluntarily notified of the investors' own accord. In addition, failure to notify the CFIUS of a foreign acquisition could result in the transaction being unwound post-closing if the CFIUS were to determine that national security issues were at stake. Reviews must be completed within 30 days of a transaction being notified, unless an additional 45 day extension is required in order to undertake a more extensive investigation.

As in Canada, the term "national security" is undefined, however guidelines specify that the two main bases on which transactions will be reviewed include the nature of the United States business over which foreign control is being acquired (*e.g.*, if related to national defence, government contracts, critical energy, communications or transportation infrastructure, *etc.*) and the identity of the foreign person that is acquiring control (*e.g.*, foreign governmental-controlled entities).[58] Although an acquisition by an SOE is identified as a

stand-alone national security consideration, the guidelines address circumstances which may lessen its significance in a particular transaction. Similar to Canada's statutory list of "net benefit" factors, *Exon-Florio* provides a statutory list of factors for consideration by the CFIUS and the President in determining whether a transaction poses a national security threat. Thus, although the United States' review process appears less restrictive than Canada's to the extent that it only reviews foreign investment as a result of national security concerns, the process by which it undertakes this review is fairly similar to that employed under Canada's "net benefit" analysis.

Whereas Canada appears only to have invoked its national security provisions in relation to one transaction to date,[59] the *Exon-Florio Act* is used much more often. Enacted in 1988, the Exon-Florio Act was not aggressively enforced (and impacted very few deals) until two proposed acquisitions – the attempted purchase of Unocal by the China National Offshore Oil Corporation ("CNOOC") in 2005, and that of P&O Steam Navigation Company's port operations by Dubai Port Worlds ("DPW") in 2006 – prompted popular interest and political concerns, with calls for improved transparency and effectiveness ultimately resulting in the enactment of the *Foreign Investment and National Security Act of 2007* (FINSA). Whereas only 25 investigations were triggered between 1988 and 2007 (13 of which involved the withdrawal of investment proposals and only one of which was actually prohibited),[60] there were 35 detailed CFIUS investigations in 2010 alone, 6 of which were withdrawn (with an additional 6 withdrawn during the preliminary 30 day review period, prior to detailed investigations being launched).[61] As a matter of practice, accordingly, a bureaucratic infrastructure has developed in Washington which is not dissimilar to the Investment Review Division of Industry Canada, with dozens of investigations undertaken annually and negotiations over undertakings for most of those that raise potential issues.

Interestingly, in the wake of the global financial crisis, significant changes to the United States economy and the emergence of cash-rich sovereign wealth funds, debates surrounding the impact of foreign investment continue to occupy the American business press. While the United States has typically promoted a very open foreign investment policy, "Exon-Florio provides extremely broad discretionary authority to suspend and unwind [...] transactions without much of a procedural protection to foreign investors."[62]

c) France

France, despite being among the global leaders in both inward and outward FDI, has been accused by some of adopting "a pattern of global investment mercantilism [by] erecting barriers to inward FDI and M&As in many forms at the state and firm level, while seeing its firms practice strong outward FDI and

acquisitions."[63] Despite its formal investment regime being "among the least restrictive in the world",[64] France has permitted French companies to create significant barriers to inward investment through the use of dual shares, voting caps, golden shares and other "control-enhancing mechanisms", including those introduced in 2005 by the poison pill legislation known as the "Danone Amendment".[65] Investment is further limited by special rules and ownership restrictions in the communications, banking and aerospace sectors, as well as by public monopolies related to atomic energy, railways, coal, explosives and certain postal services.

In 2005, the French government introduced Decree No. 2005-1739, a reform law that lists eleven specific sectors in which foreign acquisitions, irrespective of size or nationality, are subject to prior notification, screening and authorization by the Ministry of Economy, Finance and Employment (who may seek additional input from other ministries, such as the Ministry of Defence).[66] Under the Decree, opposition to foreign investment is justified based on public order, public safety or national defence, although parties can mitigate such concerns by agreeing to one or more conditions to the approval of a transaction.

A review is conducted in any of the eleven sensitive sectors if a non-EU investor will acquire control or more than one third of the capital or voting rights of a firm whose corporate headquarters are located in France, or a branch of such a firm.[67] Investors who are unsure of whether a proposed transaction is subject to review may request an opinion from the Ministry, but "failure to apply for a national security review when required can result in criminal and civil penalties."[68] Once a complete application is submitted, the transaction is considered to be automatically approved if a response is not received from the Ministry within two months. Informal communications between the Ministry and the investor may help to facilitate the approval of a transaction through the negotiation of undertakings. Rejections by the Ministry may be appealed to French administrative courts, and will be overturned if an investor can demonstrate that French law was misapplied.[69]

d) United Kingdom

The United Kingdom, a global financial centre hosting a significant number of foreign-owned subsidiaries, generally does not discriminate between nationals and foreign individuals in the formation and operation of private firms. As in the United States, the only formal mechanism for reviewing foreign investments in the United Kingdom is one related to national security. Under the *Enterprise Act 2002*, the United Kingdom's Business and Enterprise Secretary of State may intervene where any transaction (whether foreign or not) raises concerns related to national security, plurality of media or stability of the United Kingdom financial system, or where a merger involves a United Kingdom

government contractor possessing information "relating to defence and of a confidential nature."[70] Given the general applicability of the Act, there are no mandatory notification requirements. Where a transaction is completed without notification, however, the government has up to four months to decide if it is necessary to intervene.

It may be possible to avoid a national security intervention notice altogether by consulting directly with the Ministry of Defence and negotiating acceptable undertakings prior to an official Commission review. Since the merger provisions came into force in 2003, the Secretary of State has only issued national security-related intervention notices for seven mergers, each of which involved the protection of sensitive information associated with military programs, and all but one of which were also subject to an anti-monopoly review.[71]

One place where a distinction is drawn between nationals and foreigners is in the *Industry Act* of 1975.[72] The Act permits the Secretary of State to prohibit a takeover of important manufacturing by a non-resident if it would be against the national interest. It does not appear, however, that this provision has ever been used. There is no notification requirement in relation to these provisions, but the Secretary of State may act of his or her own accord where any change of manufacturing control threatens the national interest.

Informally, the United Kingdom government uses veto rights provided by "golden shares" to prevent foreign investment in specific companies important to British interests (*e.g.*, BAE Systems, Rolls-Royce, British Energy, etc.). Despite findings by the ECJ that golden shares are only acceptable in specific circumstances and subject to strict conditions, the United Kingdom continues to use golden shares on the grounds of national security in certain strategic areas.[73]

The U.K. government has been relatively welcoming to SOEs, as evidenced by the fact that all United Kingdom ports are now owned by Dubai Ports World, after the same company withdrew from the United States following significant opposition to its proposed acquisition of six major United States seaports in 2006. The United Kingdom's economy appears to have benefitted significantly from this relatively unfettered openness to foreign capital, with the chief executive of United Kingdom Trade & Investment claiming that "[London] is to all intents and purposes foreign-owned – and it's all the better for it."[74]

5. Selecting the Right FDI Tools for Canada

Unlike most of its trading partners surveyed above, Canada's broad-based investment review process targets all investments, not just those in particularly sensitive sectors. In addition, the overlap between the "net benefit" review and the national security provisions provides a double layer of protection that is likely unnecessary in many sectors. While Australia also employs a broad, financial threshold-based review process, its trade and investment agreements

with the United States and New Zealand implement a much higher threshold in all but seven sectors,[75] suggesting that it is following the lead of its more liberal international counterparts. In our view, Canada should consider moving in the same direction by eliminating its general review and maintaining foreign ownership review only for industries of particular concern.

In practice, faced with the threat of a double-dip recession and in light of the political sway of vocal protectionist elements in Canadian politics, such a significant change to the ICA is unlikely to be politically feasible in the near future. Even if such a change is impossible to implement, however, there are other changes that Canada could make to significantly improve both its attractiveness as a host for foreign investors and its transparency for those concerned about the effectiveness of the Act – without sacrificing the Minister's flexibility under the current system.

First, as noted above, while rejecting very few investments, Canada has extracted an ever-increasing numbers of undertakings for a wide variety of investments across a broad spectrum of sectors. With alarm bells already sounding in response to the more than 30 legally binding undertakings required in the US Steel case, undertaking creep reached a new extreme in the PotashCorp case, with BHP's failed bid allegedly including a long and extensive list of commitments totalling more than $1 billion in pledges.[76] Although undertakings serve a valuable purpose to the extent that they permit the Minister to negotiate with investors, in turn permitting the Minister to approve a maximum number of investments while still ensuring a "net benefit" to Canada, such benefit is now in our view outweighed by the negative impression that foreign investors are developing of Canada as a "banana republic".[77] This risks ultimately reducing valuable FDI inflows and harming Canada in the long run, irrespective of any more visible short-term benefits that Canada may be able to secure from individual investors.

Perhaps the best approach to ensuring an effective and transparent use of undertakings without forfeiting the ability to guard against potential negative effects of foreign investments would be for the Minister to limit undertakings used to the fewest possible number of critical and enforceable commitments. For example, in the rare cases where intervention were required to ensure the transaction would not be of "net harm" to Canada, maintaining corporate headquarters in Canada, naming Canadians to boards of directors or requiring dual securities listings could serve as powerful and enforceable commitments, leaving investors free to otherwise run the acquired businesses as they see fit.[78]

As noted above, two changes which would assist in combating undertaking creep, while providing comfort to foreign investors and protectionist elements alike, would be to reverse the "net benefit" onus (as suggested in the *Compete to Win* report) and to require the publication of all undertakings. While proper

concessions would need to be made to ensure the confidentiality of investor information, a redacted list of undertakings would permit Canadians to monitor the quality of the undertakings and foreign investors to fairly assess their scope, thereby forcing the Minister of Industry to seek an ideal balance in the number and type of commitments he or she requests. By further requiring the Minister to establish that a contested investment would be "contrary to Canada's national interest" or of "net harm to Canada" (on the basis of the current factors), we could eliminate any presumption that investors must make concessions in order to invest and ensure that only those undertakings necessary to prevent actual harm to Canada would be required. In headline-inducing cases, the result may well be the same, but the result for run-of-the-mill reviewable transactions should be a streamlined review process and fewer, more enforceable, undertakings.

With respect to the remaining issues which were under consideration by the Industry Committee prior to a change of government in the spring of 2011, attempts to further "clarify" the ICA by introducing a more legalistic process would merely risk making the "net benefit" review process more restrictive, significantly lengthen the review process, and subject investors to greater uncertainty, thereby resulting in a greater number of blocked investments and ultimately discouraging foreign investors.

While public hearings would enhance public insight for both investors and Canadians, the lost ability to negotiate and compromise and the likelihood of a much weighed-down review process suggest that the benefits would not be worth the costs. In the same vein, whereas the SOE guidelines were valuable in affirming that consistent standards are applied to investors of all backgrounds, "net benefit" review guidelines could not offer the same added value. Although both Australia and the United States have released guidelines to spell out the factors to be considered in their respective tests, Canada has already done this in section 20 of the ICA. Attempting to further expound upon these terms could simply detract from the government's ability to evaluate each bid for investment on its merits.

In the face of challenging economic times, barring wholesale reform at this time, implementing the changes discussed above should help Canada to clarify its message to foreign investors that it welcomes FDI in all its different forms. Lessening unnecessary barriers to international investment, while maintaining the flexibility to respond to unpredictable challenges, will help ensure that Canada maintains a strong position in the competitive global economy.

Endnotes

[1] Susan M. Hutton, a partner in Stikeman Elliott LLP's Ottawa office, and Megan MacDonald, an associate in that office, are members of Stikeman Elliott's Competition and Foreign Investment Group. The views expressed in this paper of those of the authors alone and do not necessarily represent the views of Stikeman Elliott LLP or its clients. We gratefully acknowledge the assistance of Michael Kilby in assisting with the early stages of this paper. This paper was originally presented to the Canadian Bar Association's Annual Competition Law Fall Conference, October 6, 2011.

[2] R.S.C. 1985, c. 28 (1st Supp.), as amended.

[3] In determining whether foreign direct investment is likely to be of "net benefit" to Canada, the responsible Minister must consider a number of factors specified in section 20 of the ICA, including:

i. the effect of the investment on the level and nature of economic activity in Canada, on employment, on resource processing, on the utilization of Canadian parts, components and services, and on Canadian exports;
ii. the degree and significance of participation by Canadians in senior management of the Canadian business or new Canadian business and in the relevant industry in Canada;
iii. the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
iv. the effect of the investment on competition within any industry in Canada;
v. the compatibility of the investment with national industrial, economic and cultural policies, including objectives enunciated by significantly affected provincial governments; and
vi. the contribution of the investment to Canada's ability to compete in world markets.
vii. For more information on the ICA, see the Industry Canada website at *http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home*.

[4] The ICA also applies to the establishment of new Canadian businesses by non-Canadians. While the rules are generally non-sector-specific, significantly lower thresholds are applied to "cultural" businesses (*e.g.*, books, magazines, newspapers, video and audio recordings, television and radio broadcasting) and a separate review is conducted by the Minister of Canadian Heritage (as opposed to the Minister of Industry for non-cultural businesses). In addition to review under the ICA, additional foreign investment restrictions apply under sector-specific statutes, for example in the telecommunications, broadcasting, transportation, uranium and banking sectors, which act in some cases to preclude foreign acquisitions of control altogether.

[5] The direct acquisition of control of a non-cultural Canadian business by an investor ultimately controlled by citizens of WTO-member countries is Cdn. $330 million for transactions closing in 2012, based on the book value of the assets of the Canadian business (which assets may be located anywhere in the world, including those owned by offshore subsidiaries). A lower Cdn. $5 million threshold applies to the direct acquisition of control of a Canadian business involved in cultural business activities in any capacity (Cdn. $50 million for indirect acquisitions of control). Investments by non-WTO investors are subject to the Cdn. $5 million and Cdn. $50 million thresholds for net-benefit review of direct/indirect investments in all sectors.

[6]The blocked acquisitions include: (1) a Cdn. $1.3 billion proposed acquisition of the information systems and geospatial businesses of MacDonald Dettwiler and Associates Ltd. ("MDA") by US-based Alliant Techsystems Inc. ("ATK") in 2008, and (2) a hostile takeover bid for Potash Corporation of Saskatchewan Inc. ("PotashCorp") by Australia's BHP Billiton ("BHP") in 2010. Stikeman Elliott LLP acted as counsel to ATK and to PotashCorp.

[7]The bid for Noranda by a Chinese state-owned enterprise elicited a good deal of controversy, and the bid was withdrawn. Arguably, the case heightened the profile of the ICA in the Canadian business and political communities, and led to the 2007 guidelines on net benefit assessments for investments by state-owned enterprises ("SOE guidelines"). See *www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html*.

[8]See, *e.g.*, "Is Corporate Canada being 'Hollowed Out'?" *CBC News* (27 May 2007), online: <http://www.cbc.ca/news/background/mergers/hollowed-out.html>.

[9]Jacquie McNish *et al.*, "Ottawa's new hard line: Blocking foreign acquisitions", *The Globe and Mail* (11 April 2008) [McNish], online: <http://v1.theglobeandmail.com/servlet/story/RTGAM.20080410.wmda-ownership11/business/Business/Business/>.

[10]In 2009, amendments to the ICA (the "2009 Amendments") lessened the number of foreign investments in Canada that would be subject to review and Ministerial approval by establishing: (1) that the existing book value threshold for review would be replaced by a $600 million "enterprise value" threshold, rising progressively to $1 billion over a four-year period (note that regulations implementing this change are not yet in force); and (2) that the lower thresholds applicable to three sensitive sectors (financial services, transportation services and uranium production) would be eliminated, leaving only "cultural businesses" subject to a lower threshold and separate "net benefit" review by the Minister of Heritage.
A recommendation by the Panel to shift the onus to the Minister to demonstrate why a contested foreign investment is "contrary to Canada's national interest" was not adopted. The Amendments did, however, address transparency, predictability and reporting under the ICA: by requiring the Minister to justify any decisions to disallow an investment by issuing reasons therefore (either publicly or privately to the investor); by permitting the Minister to disclose administrative information on the review process unless prejudicial to the investor or the Canadian business; and by requiring the publication of an annual report on the operations of the Act.
Most recently, consistent with the Panel's recommendations, Canada removed foreign ownership restrictions applicable to international submarine cables, to earth stations that provide telecommunications services by means of satellites, and to satellites. (Ed. Note: since the time of writing, draft regulations have been proposed which will, when passed, implement the 2009 Amendments. See Regulations Amending the Investment Canada Regulations, (2012) C Gaz I, 1456).

[11]The United States Steel Company (US Steel) was obliged to commit to some 31 undertakings as a condition of Ministerial approval of its application to acquire Stelco Inc. When US Steel failed to live up to undertakings on employment and production at the former Stelco plants in the midst of the 2008-2009 recession, without adequate explanation (it appeared as though less efficient plants in the United States had been left open) the Canadian Government sued US Steel and requested the court to impose financial penalties under the Act. The case is ongoing and has

survived a constitutional challenge. (see *Attorney General or Canada (AGC) v. United States Steel Corporation et al.*, Federal Court No. T-1162-09).

[12] Competition Policy Review Panel, *Compete to Win* (Canada, June 2008) at 30 [*Compete to Win*], online: <http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf>.

Suggestions under the report included:

- Increasing Canada's threshold for investment review to $1 billion in enterprise value, and applying this threshold to all non-cultural sectors;
- Shifting the onus to the Minister to say why a foreign investment is not in Canada's "national interest", rather than having the investor show why it is of "net benefit";
- Increasing transparency, predictability and reporting (so as to reduce uncertainty for foreign investors); and
- Initiating a comprehensive review of Canada's cultural policies (a review of Canada's policies on investment in book publishing, for example, has since been initiated).

[13] See note 11, *supra*.

[14] Industry Canada, "Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation" (3 November 2010), online: <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/06031.html>.

[15] Euan Rocha, 'Canada to delay changes on foreign investment rules', *Reuters* (15 December 2010), online: <http://www.reuters.com/article/idUSN1516009120101215>.

[16] See Lawson A.W. Hunter and Susan M. Hutton, "Foreign Investment Review in Canada: Be Careful What You Wish For", American Bar Association Business Law Today (19 May 2011) [Hunter & Hutton], online: <http://apps.americanbar.org/buslaw/blt/content/2011/05/article-hunter-hutton.shtml>.

[17] Claudia Cattaneo, "Transparency should be clear both ways", *The Financial Post* (16 September 2011) [Cattaneo], online: <http://www.financialpost.com/todays- paper/Transparency+should+clear+both+ways/5411353/story.html>.

[18] Paul Waldie & Bill Curry, "Potash ruling casts doubt on foreign takeovers", *The Globe and Mail* (30 November 2010) [Waldie & Curry], online: <http://m.theglobeandmail.com/globe-investor/potash/potash-ruling-casts-doubt-on-foreign-takeovers/article1784911/?service=mobile>.

[19] NDP Press Releases, "NDP foreign takeover motion passes with widespread support" (17 November 2010), online: <http://www.ndp.ca/press/ndp-foreign-takeover-motion-passes-with-widespread-support>. The NDP's motion for transparency garnered support from atypical advocates, including Joseph d'Cruz of the University of Toronto's Rotman School of Business who noted that, while not normally sympathetic to NDP policies, "on this one, I think they're on the right track" (Waldie & Curry, *supra* note 18).

[20] For a summary of the government's challenge to restrictions on participation by non-Canadian investors in the telecommunications industry, see: Greg Kane & David Elder, "Canadian ownership "restored": Federal Court of Appeal puts the Wind back in Globalive's sails", *The Competitor* (9 June 2011), online: <http://www.thecompetitor.ca/2011/06/articles/competition/canadian-ownership-restored-federal-court-of-appeal-puts-the-wind-back-in-globalives-sails/>.

[21] See: McNish, *supra* note 9; Shawn McCarthy & Brenda Bouw, "Saskatchewan Premier puts heat on Harper over Potash deal", *The Globe and Mail* (26 October 2010) [McCarthy & Bouw], online: <http://www.theglobeandmail.com/globe-investor/potash/saskatchewan-premier-puts-heat-on-harper-over-potash-deal/article1771727/>.
[22] Hunter & Hutton, *supra* note 16.
[23] Lawrence L. Herman, *Investment Review in Canada – We can do better,* University of Calgary School of Public Policy, Vol. 4, Issue 10 (2011) at 4 [Herman], online: <http://policyschool.ucalgary.ca/files/publicpolicy/Herman%20Invest%20Canada%20online.pdf>.
[24] See Hunter & Hutton, *supra* note 16.
[25] Cattaneo, *supra* note 17.
[26] Herman, *supra* note 23 at 11.
[27] *Ibid.*
[28] Terrence Corcoran, "Saskatchewan as banana republic", *The National Post* (22 October 2010) [Corcoran], online: <http://fullcomment.nationalpost.com/2010/10/22/terence-corcoran-saskatchewan-as-banana-republic/>.
[29] McCarthy & Bouw, *supra* note 21.
[30] See Organization for Economic Cooperation and Development, *Text of the OECD Declaration on International Investment and Multinational Enterprises* (27 June 2000), online: <http://www.oecd.org/document/53/0,3343,en_2649_34887_1933109_119672_1_1_1,00.html>.
[31] See Walid Hejazi, *IRPP Study No. 1: Dispelling Canadian Myths about Foreign Direct Investment* (Institute for Research on Public Policy, 2010) at 5 [Hejazi], online: <http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no1.pdf>.
[32] With the possible exception of a "cultural business"; the takeover of which can be reviewed even if review thresholds are not met.
[33] The ICA defines "acquisition of control" as the acquisition by a non-Canadian of 50% or more of the voting interests of a Canadian business with a rebuttable presumption for the acquisition of between 33⅓% and 50% of the voting shares of a corporation. The acquisition of less than 33⅓% of the voting interests of a Canadian business is deemed not to constitute an acquisition of control.
[34] Hejazi, *supra* note 31 at 1. See also William K. Carroll & Jerome Klassen, *Hollowing Out Corporate Canada? Changes in the Corporate Network since the 1990s*, Canadian Journal of Sociology 35:1 (2010), online: <http://ejournals.library.ualberta.ca/index.php/CJS/article/viewFile/6184/6459>, in which the authors posit that the "Canadian corporate community is more resilient than posited under the thesis of hollowing out," arguing that, while "[s]ome major Canadian firms have fallen from dominance, [...] capital accumulating under Canadian control [concurrently] generates rising stars that take their places, not only in the structure of accumulation but in the elite network of interlocking directorates" (at 24).
[35] Hejazi *ibid.* at 1 & 13. Hejazi attributes much of this decline to the loss of tariff-induced FDI from the United States following the implementation of the Canada-US free trade agreement, as well as to the fact that the elimination of tariffs in North America markets under NAFTA permitted multinationals to consolidate production in a single country (generally not Canada) for export to other nations in the free trade area (at 17-18).

[36] *Ibid.* at 12; Andrea Mandel-Campbell, *Foreign Investment Review Regimes: How Canada Stacks Up* (Conference Board of Canada, April 2008) at 3 [*How Canada Stacks Up*], online: <http://www.conferenceboard.ca/documents.aspx?did=2531>. Note, however, that the Conference Board of Canada more recently argued that Canada receives slightly more than its "fair share" of FDI based on an "inward FDI performance index" designed to capture a country's relative success in attracting global FDI by comparing its share of global inward FDI to its relative share of global gross domestic product ("GDP"). Canada's index has hovered at 1.1 to 1.2 since 1995, suggesting that it attracts slightly more inward FDI than its economic size warrants. (See Conference Board of Canada, *Inward FDI Attraction: Is Canada attracting its "fair" share of inward FDI?* (April 2011), online: <http://www.conferenceboard.ca/hcp/hot-topics/inwardFDI.aspx>.)

[37] Hejazi, *ibid.* at 4 & 11. See also, Conference Board of Canada, *Outward Foreign Direct Investment (FDI) Performance Index* (July 2009) [CBC Outward FDI Index], online: <http://www.conferenceboard.ca/HCP/Details/Economy/Outward-fdi-performance.aspx>.

[38] OECD/WTO/UNCTAD, *Reports on G20 Trade and Investment Measures: Mid-May to Mid-October 2010* (4 November 2010) at 4.

[39] Hejazi, *supra* note 31 at 27.

[40] OECD/WTO/UNCTAD, "Joint Summary on G20 Trade and Investment Measures", *Reports on G20 Trade and Investment Measures: Mid-October 2010 to April 2011* (24 May 2011).

[41] *Ibid.* at 76.

[42] Kalinova et al. (2010), "OECD's FDI Restrictiveness Index: 2010 Update", *OECD Working Papers on International Investment*, NO. 2010/3, OECD Investment Division [OECD Index 2010], online <www.oecd.org/daf/investment>. As a result, many argue that Canada is not nearly as protectionist as the OECD rankings indicate, particularly in comparison with other countries that may frequently employ less-than-transparent tactics to shield their national champions from foreign takeover (see, *e.g., How Canada Stacks Up, supra* note 36 at 1).

[43] See CBC Outward FDI Index, *supra* note 37, and Conference Board of Canada, "Inward Foreign Direct Investment (FDI) Performance Index" [CBC Inward FDI Index], online: <http://www.conferenceboard.ca/hcp/details/economy/inward-fdi-performance.aspx>.

[44] CBC Inward FDI Index, *ibid.* at Preface & 2.

[45] See Hejazi, *supra* note 31 at 9.

[46] L.R. Wilson *et al.*, *Sharpening Canada's Competitive Edge* (Ottawa: Industry Canada, 2007) at 18, online: <http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/sharpening_e.pdf/$FILE/sharpening_e.pdf>.

[47] See "What GAO Found" in United States Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, GAO-08-320 (2008) [GAO Report 2008], online: <http://www.gao.gov/new.items/d08320.pdf>. The Netherlands, recognized by the OECD as having the most liberal trade and investment policies in the world, offers full national treatment to foreign investors outside of these protected sectors. It is notable that the Netherlands attracted $451.5 billion to Canada's $385.2 billion in FDI inflows for 2006, with FDI stock total-

ling 68.2 percent of the Netherland's GDP as compared to 30.4 percent of Canada's. Given that Canada's GDP is currently much larger than that of the Netherlands, this suggests that there is a certain advantage to limiting regulatory barriers to investment.

[48] *Foreign Acquisitions and Takeovers Act 1975*, Act No. 92 of 1975, as amended [FATA], online: <http://www.comlaw.gov.au/Details/C2010C00074>.

[49] Australia's FATA, *ibid.*, provides for the conditioning of undertakings at s. 25 and the blocking of transactions contrary to the national interest at ss. 18 (Acquisitions of shares), 19 (Acquisitions of assets), 20 (Arrangements relating to directorate of corporations), 21 (Arrangements relating to control of Australian businesses), and 21A (Acquisitions of interests in Australian urban land).

[50] See Peter Costello (Treasurer), "Foreign Investment Approval of BHP Limited-Billiton Plc Merger" (4 June 2001), online: <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2001/040.htm&min=phc>.

[51] Foreign persons are required to notify the Australian government before acquiring an interest of 15% or more in an Australian business or corporation valued above A$231 million (indexed annually), or an interest in an offshore company with Australian subsidiaries or gross assets in Australia valued above the same threshold. Under the Australia-US Free Trade Agreement, however, the A$231 million threshold applies only for investments in prescribed sensitive sectors (*e.g.*, media, telecommunications, transport, defence, military, communications security, and nuclear) with a $1005 million threshold (indexed annually) applicable in all other sectors. Once implemented, New Zealand investors will be subject to the same thresholds that apply to United States investors under the recently signed Investment Protocol for New Zealand. For further details, see Australia Treasurer, *Australia's Foreign Investment Policy* (January 2011) [*Australia's Foreign Investment Policy*], online: <http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_(English).pdf>.

[52] FATA ss. 20 & 21. In Canada, a non-Canadian can acquire control of a Canadian business, whether directly or indirectly, only through the acquisition of its voting interests or assets (see s. 28(1) of the ICA).

[53] An "interest" includes buying real estate, obtaining or agreeing to enter into a lease, or financing or profit sharing arrangements. For further information regarding requirements related to real estate, see *Australia's Foreign Investment Policy, supra* note 51 at 3.

[54] For a list of factors included in s. 20 of the ICA see *supra*, note 3. For Australia, see FIRB, "Business Investment", online: <http://www.firb.gov.au/content/other_investment/other_investment.asp>; and *Australia's Foreign Investment Policy, ibid.* at 5-6.

[55] *Australia's Foreign Investment Policy, ibid.* at 2.

[56] Stephen Kirchner, "A failure of political leadership", *The Strait Times* (11 April 2011), online: <http://www.cis.org.au/media-information/opinion-pieces/article/2812-a-failure-of-political-leadership>.

[57] Michael Holden, *The Foreign Direct Investment Review Process in Canada and Other Countries* (Ottawa: Library of Parliament, 2007) at 6 [Holden], online: <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0713-e.pdf >.

[58] See Department of the Treasury, "Office of Investment Security: Guidance Concerning the National Security Review Conducted by the Committee on Foreign

Investment in the United States", online: <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUSGuidance.pdf>. For a summary of the guidelines, see Department of the Treasury, "CFIUS Reform: Guidance on National Security Considerations", online <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/GuidanceSummary_12012008.pdf>.

[59] An attempt by a Belgium-based firm to acquire a Canadian company that owned uranium mines in Namibia. Note that, despite calls by Canada's Research in Motion to review the recent acquisition of Nortel Network Corp.'s wireless assets by a foreign buyer, the government declined to intervene, suggesting that the national security provisions will be applied narrowly.

[60] Holden, *supra* note 57 at 8.

[61] See Department of Treasury, "Covered Transactions", online: <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CoveredTransactions2008-2010.PDF>. (Statistics for 2010 show 6 of 93 notifications withdrawn during the basic review process, 35 subject to an extended investigation, and 6 additional notices withdrawn during investigation.)

[62] James D. Rosener, "Ostensibly Kosher: CFIUS Review of Foreign Investment in U.S. Industries" (22 September 2011), online: <http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2198>.

[63] *How Canada Stacks Up, supra* note 36 at 21.

[64] See "Openness to Foreign Investment" in United States Department of State, *2011 Investment Climate Statement – France* (March 2011), online: <http://www.state.gov/e/eeb/rls/othr/ics/2011/157279.htm#_ednref1>. The OECD has ranked France as less restrictive than each of the United Kingdom, the United States, Australia and Canada in its Restrictiveness Index, while noting that many EU member states have moved up in the rankings due, at least in part, to more systematic accounting for intra-regional liberalization in the 2010 update. (See OECD Index 2010, *supra* note 42 at 16).

[65] *How Canada Stacks Up, supra* note 36 at 20. US-based PepsiCo's unsolicited interest in the takeover of French dairy champion Groupe Danone in 2005 inspired significant political opposition, with protests eventually leading the government to enact this protective poison pill legislation.

[66] Sectors or activities defined as sensitive for the purposes of a national security review relate to: gambling and casinos; private security; pathogens or toxins; wiretapping and mail interception; information technology security; information systems security; dual-use (civil and military) items and technologies; cryptology services; national defence secrets; military or war materials; and defence contracts.

[67] GAO Report, *supra* note 47 at 56. Note that less stringent review requirements are applied to EU-based investors.

[68] *Ibid.* at 55.

[69] It should be noted that Ministerial decisions under the ICA's "net benefit" test are potentially subject to judicial review by the Federal Court and, as such, must be made on the basis of the factors listed in the statute.

[70] See Chapters 2 and 3 of the *Enterprise Act 2002*, c. 40, available online at <http://www.legislation.gov.uk/ukpga/2002/40/contents>.

[71] For a list of intervention notices and a link to related documents describing associ-

ated undertakings, see Department for Business Innovation and Skills, "National Security Mergers", online: <http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/national-security-mergers >.

[72] See Part II of the *Industry Act 1975*, c. 68, available online at: <http://www.legislation.gov.uk/ukpga/1975/68/contents>.

[73] See GAO Report 2008, *supra* note 47 at 101.

[74] Quoted in *How Canada Stacks Up, supra* note 36 at 19.

[75] See *Australia's Foreing Investment Policy, supra* note 51.

[76] See Tim Kiladze, "The Canadian government's 'net benefit' test", *The Globe and Mail* (15 November 2010), online: <http://www.theglobeandmail.com/report-on-business/the-canadian-governments-net-benefit-test/article1800120/>.

[77] See Corcoran, *supra*, note 28.

[78] Australia, for example, insisted that British investors maintain dual securities listing for BHP Billiton and Rio Tinto, each the product of mergers between British and Australian companies. Despite only requiring a small number of undertakings in each case, both businesses remained clearly Australian.