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Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative

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Foreign Direct Investment in the United States and Canada: Fractured Neoliberalism and the Regulatory Imperative

Gil Lan*

ABSTRACT

Although both Canada and the United States review foreign investment for national security concerns, Canada also requires that the investment be of “net benefit” to Canada. Recent investments by state-owned enterprises (SOEs) and sovereign wealth funds (SWFs) have prompted the suggestion that the United States should also adopt a net benefit or economic test. This Article argues that the United States should not adopt the Canadian approach. The Canadian approach attempts to screen out foreign public entities and requires that they act in a “commercial” manner. This approach is based on two assumptions. First, it assumes that one can segregate the public foreign interest from private and domestic interests. Second, it assumes that one can adequately define what it means to act in a commercial manner. This Article contends that both assumptions are incorrect due to their dependence upon classical categories such as public/private and domestic/foreign that are of limited value in a postmodern, globalized economy. This Article argues that an approach based on addressing specific harms, regardless of identity of the actor, represents a more sustainable approach towards the risks associated with foreign government-controlled entities. This Article suggests that competition law, through its policy-based regulation of harms by economic entities, can form the basis of a new regulatory structure to address concerns, which in

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retrospect, are about aggregations of power rather than strictly national identity.

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I. INTRODUCTION

Controversy arose last year over the \$15.1 billion acquisition of Nexen Inc. (a Canadian oil and gas corporation) by a Chinese state-owned enterprise (China National Offshore Oil Company (CNOOC)). The proposed transaction was reviewed by both the U.S.¹ and

1. See Carolyn King, *Cnooc Purchase of Nexen Is Approved by U.S.*, WALL ST. J. (Feb. 12, 2013, 9:54 AM), <http://online.wsj.com/news/articles/SB10001424127887324196204578299862176958542> [<http://perma.cc/ME3C-JQCN>] (archived Sept. 14, 2014) (“The approval by the Committee on Foreign Investment in the U.S., which Nexen announced Tuesday, came after the companies agreed to resubmit their application. CFIUS is a multiagency group in Washington that vets significant foreign investment in the US.”); see also Roberta Rampton & Scott Haggett, *CNOOC-Nexen Deal Wins U.S.*

Canadian governments.² The transaction was notable for at least two important reasons. First, the transaction represented the largest foreign direct investment (FDI) by China to date.³ Second, the transaction raised national security concerns in both Canada and the United States. In Canada, the immense size of the transaction involving Canada's resources was a source of controversy for those apprehensive about such a significant investment from China, a country that still adheres, at least formally, to socialist ideology.⁴ The transaction also fell within the purview of the American government's scrutiny because some of Nexen's assets were located within the United States,⁵ which raised concerns about China and its motives.⁶ Although ultimately approved by both governments, the Nexen acquisition once again brought into focus the worry that foreign government-controlled entities, such as state-owned enterprises (SOEs) and sovereign wealth funds (SWFs), could detrimentally affect domestic interests.

Approval, Its Last Hurdle, REUTERS CANADA (Feb. 12, 2013, 5:30 PM), <http://ca.reuters.com/article/businessNews/idCABRE91B0SU20130212?pageNumber=1&virtualBrandChannel=0> [<http://perma.cc/J95L-ZA54>] (archived Sept. 14, 2014) ("U.S. regulators have approved the \$15.1 billion takeover of Canadian oil and gas company Nexen Inc by China's state-owned CNOOC Ltd, removing the final obstacle to the Asian country's largest-ever foreign takeover.").

2. See Laura Payton, *Government OK's Foreign Bids for Nexen, Progress Energy*, CBC NEWS (Dec. 7, 2012, 11:32 AM), <http://www.cbc.ca/news/business/government-ok-s-foreign-bids-for-nexen-progress-energy-1.1148156> [<http://perma.cc/DU58-L2SQ>] (archived Sept. 14, 2014) ("The federal government has approved two major energy takeover deals, green-lighting a \$15.1 billion bid for Nexen Inc. by a Chinese state oil company . . . Investors have been waiting since July for a decision on the China National Offshore Oil Company (CNOOC) bid for Calgary-based Nexen."); see also Lauren Krugel, *Nexen CNOOC Takeover Complete: \$15.1-Billion Deal Closes*, HUFFPOST ALBERTA (Feb. 25, 2013, 5:47 PM), http://www.huffingtonpost.ca/2013/02/25/nexen-cnooc-takeover-complete_n_2761580.html [<http://perma.cc/M6B8-TJHA>] (archived Sept. 14, 2014) ("Chinese state-owned firm CNOOC Ltd. is now officially in control of Calgary oil and gas producer Nexen Inc.").

3. See Krugel, *supra* note 2 ("CNOOC's \$15.1 billion takeover of Nexen, first announced last July, was completed on Monday, marking China's largest-ever successful overseas acquisition.").

4. See *id.* ("The CNOOC-Nexen deal touched off a great deal of controversy about what degree foreign state-owned control of Canadian resources is acceptable. That the deal came from a Chinese company, in particular, raised concerns in some quarters about doing business with a non-democratic state.").

5. King, *supra* note 1 ("The acquisition was subject to U.S. and British approval because Nexen controls significant assets in the Gulf of Mexico and the North Sea.").

6. Cf. Tanya Talaga, *U.S. Must Approve of Sale to Chinese*, THESTAR.COM (Dec. 18, 2012), http://www.thestar.com/news/canada/2012/12/18/us_must_approve_sale_of_nexen_to_chinese.html [<http://perma.cc/NJW4-8NBD>] (archived Sept. 14, 2014) ("A Chinese presence in the Gulf hasn't been warmly welcomed by some U.S. senators, American energy executives and those with anti-Chinese sentiments that flared during the recent presidential election.").

Both the United States⁷ and Canada⁸ reserve the right to block a foreign investment transaction on national security grounds. However, some U.S. politicians have proposed that the United States should also consider “economic security” in addition to national security.⁹ U.S. concerns about China have manifested themselves in the U.S.-China Economic and Security Review Commission’s 2012 Annual Report where the key recommendations included mandatory review of all acquisitions by Chinese-owned or controlled entities as well as a broader “net economic benefit” test for all foreign investments reviewed by the U.S. government.¹⁰

Unlike the United States, Canada already has a “net benefit” test that it can apply in addition to a national security review. Under the Investment Canada Act,¹¹ the Canadian government may block a proposed foreign acquisition if it does not believe it is of net benefit to Canada.¹² Recent amendments to the Investment Canada Act potentially render any foreign investment transaction (whose value exceeds legislated monetary thresholds), including one involving an SOE, subject to a net benefit review.¹³ The term “net benefit” is not defined under the legislation, but the Canadian government has issued guidelines outlining the general principles used in the exercise of its discretion.¹⁴ Perhaps fearful that SOEs would pursue political

7. See generally JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 3–4 (2013), available at <http://fas.org/sgp/crs/natsec/RL33388.pdf> [<http://perma.cc/W9JT-J7VT>] (archived Sept. 30, 2014) (discussing the legal authority under which the U.S. government may review or block a foreign investment transaction).

8. See generally J. Anthony VanDuzer, *Mixed Signals: What Recent Developments Tell Us About Canadian Foreign Investment Policy*, 10 ASPER REV. INT’L BUS. & TRADE L. 247, 248 (2010) (explaining that Canada is required to review foreign investment transactions).

9. See Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 881–82 (2006) (noting that several Congress members proposed wide ranging changes including Senator Richard Shelby, chair of the Senate Banking, Housing and Urban Affairs Committee, to add economic security concerns as part of the review of proposed foreign investment).

10. U.S.-CHINA ECON. & SEC. REV. COMM’N, 2012 REPORT TO CONGRESS OF THE U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION—EXECUTIVE SUMMARY AND RECOMMENDATIONS 23 (2012), available at http://origin.www.uscc.gov/sites/default/files/annual_reports/2012-Report-to-Congress-Executive%20Summary.pdf [<http://perma.cc/5QUQ-USKQ>] (archived Sept. 14, 2014) (“The Commission recommends . . . prohibit[ing] investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.”).

11. Investment Canada Act, R.S.C. 1985, c.28 (Can.).

12. See *id.* § 23(3).

13. See *infra* Part II.C (discussing the Canadian foreign investment review regime).

14. See Investment Canada Act, R.S.C. 1985, c.28, § 38 (Can.) (“The Minister may issue and publish, in such manner as the Minister deems appropriate, guidelines

motives instead of profit, the guidelines note that SOEs are “susceptible to state influence.”¹⁵ Accordingly, the Canadian SOE Guidelines state that SOEs are expected to “demonstrate their strong commitment to transparent and commercial operations” and will be examined upon their “adherence to free market principles.”¹⁶ In this sense, the Canadian SOE Guidelines are similar to the international voluntary code known as the Santiago Principles that set forth guidance regarding how SWFs should behave and be governed.¹⁷ In addition to stressing that SWFs should be transparent,¹⁸ the Santiago Principles promote commercial orientation by requiring that the SWF publicly disclose financial information in order to “demonstrate its economic and financial orientation”¹⁹ as well as “aim to maximize risk-adjusted financial returns.”²⁰

Should the United States follow the Canadian example by enacting a net benefit test along with particular screening of government-influenced entities such as SOEs and SWFs?

This Article argues that the United States should not adopt a Canadian-style net benefit test. It also argues that Canada should replace its current net benefit test with a regulatory regime, inspired by competition law, which focuses on the potential for harm by large aggregations of power, regardless of whether these aggregations are labeled as domestic or foreign. Although well intentioned, a net benefit approach is problematic because it implicitly relies upon distinctions of public/private and foreign/domestic for its

and interpretation notes with respect to the application and administration of any provision of this Act or the regulations.”).

15. *Investment Canada Act, Guidelines—Investment by State-Owned Enterprises—Net Benefit Assessment*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2> (last visited Oct. 1, 2014) [<http://perma.cc/RUN8-C3VD>] (archived Sept. 13, 2014) [hereinafter Canadian SOE Guidelines].

16. *Id.*

17. INTERNATIONAL WORKING GROUP OF SOVEREIGN WEALTH FUNDS, GENERALLY ACCEPTED PRINCIPLES AND PRACTICES (GAPP) – SANTIAGO PRINCIPLES [hereinafter SANTIAGO PRINCIPLES], available at <http://www.iwg-swf.org/pubs/gapplist.htm> [<http://perma.cc/9KD2-ETC4>] (archived Sept. 14, 2014). The twenty-six current members of the International Working Group of Sovereign Wealth Funds include Canada: Alberta Heritage Savings Trust Fund; China: China Investment Corporation; and the United States: Alaska Permanent Fund. See INTERNATIONAL WORKING GROUP OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS—GENERALLY ACCEPTED PRINCIPLES AND PRACTICES “SANTIAGO PRINCIPLES” 28 (2008), available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [<http://perma.cc/GQJ7-GTHP>] (archived Sept. 14, 2014).

18. See SANTIAGO PRINCIPLES, *supra* note 17. The GAPP 2 Principle states that “[t]he policy purpose of the SWF should be clearly defined and publicly disclosed.” *Id.*

19. *Id.* (“Relevant financial information regarding the SWF should be publicly disclosed to demonstrate its economic and financial orientation, so as to contribute to stability in international financial markets and enhance trust in recipient countries.”).

20. *Id.* (“The SWF’s investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds.”).

implementation. This Article advances the claim that an increasingly globalized world has blurred the conceptual boundaries that demarcate these distinctions resulting in an incomplete capture of the societal harms that the Canadian and U.S. governments seek to address. In this sense, the discussion here draws upon the insights of Professor Larry Catá Backer who has characterized these distinctions in the context of public authorities as shareholders (as well as SWFs) as “grounded in a stubborn belief in the separability of public and private law.”²¹

SOEs and SWFs are conceptually problematic because they blend elements of hitherto separate categories. Although they purport to privately invest in the economy, they are also foreign public entities who may act politically.²² Current approaches try to mitigate this problem by requiring that the foreign public entity act in a “private” (i.e., commercially based) manner. In his critique of how the Santiago Principles have attempted to regulate SWFs (albeit through a voluntary code) Backer argues that the Santiago Principles were based upon two critical assumptions.²³ The first critical assumption is that private funds are purely commercial in the sense that they act apolitically.²⁴ The second one is that private behavior can be modeled and prescribed to SWFs.²⁵

This Article builds upon Backer’s insights by drawing upon them to develop a framework for analyzing Canadian FDI reviews and the U.S. experience. This Article argues that the Canadian SOE Guidelines are based upon two flawed assumptions. The first assumption is that one can distinguish state-owned interests from private interests. Over a century ago, U.S. legal scholars (particularly those scholars known as “Legal Realists”) punctured the neoliberal myth of a firm demarcation between market-based (i.e., private)

21. Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Element in Private Choice of Law*, 82 TUL. L. REV. 1, 62 (2008).

22. See Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT’L L. 425, 433 (2010) [hereinafter Backer, *Sovereign*] (“When states seek to be treated like private entities with respect to certain of their activities, and when private funds seek to assert a regulatory authority with respect to certain of their activities, the old jurisdictional divides between the state and the private sector, between public and private law regimes, must be substantially weakened.”).

23. See *id.* at 430–31.

24. See *id.* at 430 (“The first is that private funds have no regulatory effect—they do not project political power as states do, or for the same ends.”).

25. See *id.* at 430–31 (“The second is that it is possible to model those private behaviors and use this as a benchmark for distinguishing between benign sovereign wealth fund activities—activities that ought not to be specially regulated—from political sovereign wealth fund activities that might be specially regulated.”).

behavior from government (i.e., public) action.²⁶ This Article argues that ambiguous identities through private equity funds as well as “nonequity” modes of influence generated through global value chains make it difficult to capture the full range of foreign state interests.

The second assumption is that one can meaningfully segregate entities on the basis of whether they behave commercially and prescribe such behavior. Glimpses of the difficulty of attempting to define commercial behavior arise when one reviews the debate about shareholder primacy²⁷ and profit maximization that has dominated Anglo-American corporate law scholarship.²⁸ Moreover, the recent ascendancy of socially-conscious investing by influential banks and organizations suggests that private entities are transcending purely commercial concerns. Both the U.S. and Canadian governments have recently enacted legislation creating special corporations that may pursue social enterprise.²⁹ These corporations pursue profit but may subordinate profit motives to the generation of social contributions (e.g., the environment, creation of employment), suggesting that the imposition of purely commercial motives upon foreigners is based on a perspective that is currently being undermined even in the United States and Canada. The danger from the dually flawed Canadian approach is that its ambiguity, incoherency, and substantial discretion, left in the hands of the government, renders it vulnerable to capture by domestic interests (e.g., lobby groups) who may advance a protectionist agenda not for the good of the country but for their own pecuniary gain.³⁰

26. See generally AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (collecting important excerpts of seminal works in American legal realism theory). Chapter 4—“The Critique of the Public/Private Distinction”—is particularly relevant to the arguments advanced in this Article. See *id.* at 98–121; see also Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 467 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)) (asserting that legal realism has “fundamentally altered our conceptions of legal reasoning and of the relationship between law and society”).

27. See, e.g., Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 8–9 (2008) (commenting on the prevalence of shareholder primacy thinking).

28. See, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 164 (2008) (arguing that the case relied upon for establishing that there is a legal duty to maximize profits for shareholders has been misread).

29. See, e.g., William H. Clark & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 818 (2012) (providing an overview of benefit corporations as an example of how the purpose of the business corporation is evolving); Carol Liao, *The Next Stage of CSR in Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise*, 9 MCGILL INT'L J. SUST. DEV. L. & POL'Y 56, 79–80 (2013) (referring to the enactment of the “community contribution company” in British Columbia and similar legislation in Nova Scotia.)

30. RALPH H. FOLSOM ET AL., *PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS* 838 (3d ed. 2010) (“Essentially all nations limit foreign investment,

Beyond SOEs and SWFs lies an interesting question: *why is the Canadian government even assessing the merits of a proposed transaction to begin with?* Like the United States, Canada already has national security interest provisions that empower the government to review and block proposed foreign investments.³¹ Thus, the Canadian net benefit provisions must contemplate grounds other than national security. Going beyond national security issues seems to contradict the Canadian SOE Guidelines concern for the sanctity of “free market” principles.³² Interestingly, immediately after mentioning “free market” principles, the Canadian SOE Guidelines state that “[t]he Minister will assess the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada.”³³ This form of macroeconomic engineering is politically distant from the neoliberal free market ideology espoused only one sentence earlier.

The incoherency of the Canadian approach is a result of reliance upon old distinctions of public/private and domestic/foreign in an increasingly globalized world. Rather than relying on categorizations of domestic/foreign and public/private, this Article suggests that the law should focus on societal harms regardless of the identity of the actors involved.³⁴ It advances the claim that the real fear should be the harm that can be inflicted by aggregations of economic power, whether they are ideologically distant foreign governments pursuing political goals or powerful domestic corporations pursuing profit by selling subprime mortgages. Western scholars, from as early as the late eighteenth century, understood that a neoliberal conception of a free market necessarily entailed the infliction of harm by parties upon each other for which there was no legal compensation—a

including the most developed nations. The reasons may appear to be different, but may mask the most common reason—the protection of domestic industries.”).

31. See Investment Canada Act, R.S.C. 1985, c.28, § 25.4(1) (Can.) (“(1) [T]he Governor in Council may, by order, within the prescribed period, take any measures in respect of the investment that the Governor in Council considers advisable to protect national security . . .”).

32. Cf. Canadian SOE Guidelines, *supra* note 15 (providing that when assessing the net benefit of acquisitions of control, “the Minister will examine . . . the corporate governance and reporting structure of the non-Canadian. This examination will include whether the non-Canadian adheres to Canadian standards of corporate governance . . . and to Canadian laws and practices, including adherence to free market principles.”).

33. *Id.*

34. Inspired by Nobel Laureate Joseph Stiglitz, this Article attempts to modestly advance our understanding through its analysis. See Joseph E. Stiglitz, *Sovereign Wealth Funds—Distinguishing Aspects and Opportunities*, in SOVEREIGN WEALTH FUNDS AND LONG-TERM INVESTING 26, 31 (Patrick Bolton, Frederic Samama & Joseph E. Stiglitz eds., 2012) (“Academia can play a particularly important role in answering these questions. It is a space in our society in which deeper thinking about the major challenges going on in our world occurs.”).

doctrine named *damnum absque injuria*.³⁵ Some harms are considered socially acceptable because they promote competition and free enterprise, but there are limits. An example of such limits can be found in Canadian competition law, which prohibits conspiracies such as price-fixing.³⁶ Given that competition law deals extensively with both the promotion of markets and aggregations of power, this Article suggests that competition law should serve as the basis of addressing the concerns raised by SOEs and SWFs.

Part II of this Article discusses background context: state-controlled entities (SWF and SOEs) and U.S. and Canadian foreign investment regimes. Part III examines and compares the U.S. and Canadian national security review regimes while noting their political contexts. Part IV explores the fragile rationale of the Canadian net benefit provisions and its link to the Canadian SOE Guidelines. It claims that the Canadian SOE Guidelines are based on the two flawed assumptions discussed earlier and advances that claim through its examination of investment funds, global value chains, and the inclusion of noncommercial motives in private corporations as well as the rise of social entrepreneurship. Part V examines the claim that state-owned enterprises benefit unfairly from government subsidies to distill the problems identified earlier into a concrete example. It suggests that infliction of harm, regardless of identity actor, should form the basis of a future regulatory structure addressing the issue of aggregations of power that include foreign investment.

Thus, this Article builds upon Backer's work by examining SOEs and SWFs specifically within the context of U.S. and Canadian foreign investment frameworks, revealing problems with old categorical distinctions in the face of globalization and increasingly socially conscious entrepreneurship, and it contributes toward advancing a regulatory framework that can potentially address these problems.

II. CONTEXT OF FOREIGN INVESTMENT REVIEW IN THE UNITED STATES AND CANADA

This section reviews the differences between SWFs and SOEs as well as some of the characteristics that have prompted concern from a

35. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WIS. L. REV. 975, 1025–26 (1982) (discussing the general concept of *damnum absque injuria*).

36. See, e.g., Competition Act, R.S.C. 1985, c. C-34, § 45(1)(c) (Can.) (“(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges . . . (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.”).

foreign investment review perspective. It then outlines the foreign investment review frameworks of both the United States and Canada, noting the important differences between them.

A. State-Controlled Entities

SWFs and SOEs are simply the government form of what are commonly regarded as investment funds and business enterprises. The fact that they are owned by a public entity, the government, as opposed to private individuals, is the distinguishing factor. SWFs typically represent surplus revenue that a government has to invest. Specifically, one scholar has defined them as “government investment vehicles but not reserve funds managed by central banks; they can cover future public retirement, but do not have direct pension liability.”³⁷ Like most investment funds, they are pooled and managed. To the extent that the nation has surplus funds that exceed its foreign reserves, money may be invested in a separate fund—the SWF.³⁸ Since it represents a luxurious overage, these SWFs have the potential to be invested less conservatively with a view to earning higher returns. This is because foreign reserves provide a nation with an emergency source of cash and are thus invested with a view toward short-term liquidity, albeit at the price of lower interest rates.³⁹

Although SWFs gravitate toward long-term investing,⁴⁰ their investment motives can be broad and varied, ranging from pension administration to broader goals such as stabilizing the economy.⁴¹ The concept of SWFs is over half a century old,⁴² and SWFs are

37. Xu Yi-chong, *The Political Economy of Sovereign Wealth Funds*, in *THE POLITICAL ECONOMY OF SOVEREIGN WEALTH FUNDS* 1, 3 (Xu Yi-chong & Gawdat Bahgat eds., 2010) (noting that there is a lack of agreement on the exact details beyond the definition that the author has offered); cf. Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 *STAN. L. REV.* 1345, 1354 (2008) (“Like some other entities active in global finance such as hedge funds, sovereign wealth funds defy attempts at straightforward definition. In essence, they are equity investment vehicles established by and under the control of sovereign states.”).

38. Cf. ERIC C. ANDERSON, *TAKE THE MONEY AND RUN: SOVEREIGN WEALTH FUNDS AND THE DECLINE OF AMERICAN PROSPERITY* 14 (2009).

39. See *id.* (“[I]n order to ensure ready availability in time of crisis or market fluctuation, foreign reserves have normally been invested in short-term ‘safe’ markets.”).

40. See Stiglitz, *supra* note 34, at 26 (“As state-owned entities, they have a longer-term horizon than many investors.”).

41. See Gilson & Milhaupt, *supra* note 37, at 1355 (including among the objectives of such funds “stabilization of the macroeconomic effects of sudden increases in export earnings, the management of pension assets or a separate tranche of foreign-exchange reserves, or the intergenerational transfer of wealth”).

42. See *id.* at 1354 (noting also that SWFs have operated in “relative obscurity” until recently).

believed to have originated with the Kiribati Revenue Equalization Reserve Fund (Micronesian Gilbert Islands) and later adopted in Middle Eastern countries.⁴³ Currently, the range of countries that have SWFs has greatly expanded to include superpowers such as the United States of America and China as well as Australia, Canada, Russia, and Japan.⁴⁴ The China Investment Corporation is funded through excess revenue generated through international trade, although many other SWFs are funded through their natural resources (e.g., Middle Eastern countries).⁴⁵

There are two aspects about SWFs that render them vulnerable to being viewed with suspicion. First, historically, SWFs have not been transparent about their long-term goals or financial affairs compared to publicly traded corporations—although the Norwegian government pension fund may be a notable exception.⁴⁶ As noted earlier, the development of the Santiago Principles as a voluntary code for SWFs was a reaction to this lack of transparency.⁴⁷ Second, SWFs are owned and controlled by governments and, ultimately, may pursue noncommercial objectives. More bluntly put, the fear is that SWFs may also be pursuing “hidden political agendas.”⁴⁸

Of course, clandestine and nefarious motives are not enough to generate significant harm unless there is substantial economic power supporting them. This is where fears about SWFs become intensified—since 1990 SWFs have been growing,⁴⁹ and the U.N.

43. See ANDERSON, *supra* note 38, at 16 (“In each case, the underlying premise was the same—invest the earnings from an exhaustible natural resource in a manner that would benefit future generations and/or potentially secure an existing regime . . .”).

44. See LIXIA LOH, SOVEREIGN WEALTH FUNDS: STATES BUYING THE WORLD 102–15 (2010) (providing a chart listing various countries which have sovereign wealth funds and briefly summarizing their investment regimes); see also International Working Group of Sovereign Wealth Funds, *supra* note 17, at 28 (providing a list of many nations with SWFs).

45. See Gilson & Milhaupt, *supra* note 37, at 1354–55 (“Most sovereign wealth funds are financed by the sale of commodities, especially oil.”).

46. See *id.* at 1355 (“The level of transparency also differs significantly. The Norway Government Pension Fund provides full disclosure of its portfolio and investment policies. Most SWFs, on the other hand, provide virtually no public disclosure.”).

47. See Udaibir S. Das, Adnan Mazarei & Alison Stuart, *Sovereign Wealth Funds and the Santiago Principles*, in *ECONOMICS OF SOVEREIGN WEALTH FUNDS* 59, 65–70 (Udaibir S. Das, Adnan Mazarei & Han van der Hoorn eds., 2010) (discussing the development of the Santiago Principles and the issues which they address, including transparency and governance).

48. Kathryn Gordon & David Gaukrodger, *Foreign Government-Controlled Investors and Host Country Investment Policies: OECD Perspectives*, in *SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS* 496, 498 (Karl P. Sauvant, Lisa E. Sachs & Wouter P.F. Schmit Jongbloed eds., 2012).

49. See ANDERSON, *supra* note 38, at 16 (“The total size of sovereign wealth funds has dramatically increased since 1990.”).

Conference on Trade and Development (UNCTAD) reports that SWFs, in 2012, collectively managed \$5.3 trillion of assets.⁵⁰ UNCTAD also notes that SWF participation in FDI is two times that of the previous year but is still relatively small at \$20 billion.⁵¹ Although UNCTAD states that the \$127 billion worth of cumulative SWF FDI is relatively small, it is likely an underestimation because UNCTAD's data does not account for indirect investments by SWFs; it only includes investments where SWFs are the sole investors.⁵²

Concerns about SWFs also arose when they started investing in troubled financial institutions during the Financial Crisis of 2007–08.⁵³ Merrill Lynch and Citigroup received \$21 billion from South Korea, Singapore, and Kuwait SWFs in early 2008—part of the approximately \$69 billion received by investment banks from SWFs in the financial crisis at that time.⁵⁴ Although some regarded SWFs as a potentially valuable source of assistance,⁵⁵ others in the government warned about the political nature of SWFs.⁵⁶ In retrospect, SWFs came to regret their investments in the post-financial crisis aftermath, and “[t]he perception of SWFs as saviors of the Western financial system was as exaggerated as that of the SWF as threats that preceded the financial crisis . . . SWFs in 2007 and 2008 proved to be neither an unqualified threat nor an unqualified salvation for anyone involved.”⁵⁷ Notwithstanding this assessment of the neutral impact of SWFs, they still have difficulty convincing outsiders that they will act apolitically.⁵⁸ Thus, the Santiago

50. See U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT 10, U.N. Sales No. E.13.II.D.5 (2013) [hereinafter UNCTAD] (noting that developing economies counted for eighty percent of the SWF capitalization).

51. See *id.* (“SWF FDI flows doubled in 2012, from \$10 billion to over \$20 billion, bucking the global trend . . .”).

52. See *id.* (“However, UNCTAD figures for FDI by SWFs capture only investments in which SWFs are the sole and immediate investors.”).

53. See EDWIN M. TRUMAN, SOVEREIGN WEALTH FUNDS: THREAT OR SALVATION? 3–5 (2010) (“In the fall of 2007, as the global financial crisis gained momentum, views about SWFs moderated somewhat.”). Truman also states: “Five years ago, sovereign wealth funds (SWFs) were so unknown that there was no common term to describe government-owned funds that invested in whole or in part outside their home country.” *Id.* at 1.

54. See *The Invasion of the Sovereign-Wealth Funds*, ECONOMIST (Jan. 17, 2008, 12:29 PM), <http://www.economist.com/node/10533866> [<http://perma.cc/C79D-JJWL>] (archived Sept. 14, 2014) (“They have deftly played the role of saviour just when Western banks have been exposed as the Achilles heel of the global financial system.”).

55. See *id.* (“At first sight this is proof that capitalism works. Money is flowing from countries with excess savings to those that need it. . . . But there are still two sets of concerns.”).

56. See Stiglitz, *supra* note 34, at 29 (referring to Larry Summers, who would later act as head of President Obama’s National Economic Council).

57. TRUMAN, *supra* note 53, at 4.

58. See Gordon & Graukrodger, *supra* note 48, at 498–502.

Principles may partially alleviate this problem. Although others have proposed novel solutions, such as having an external fund manager administer the SWFs assets, a recent study suggests that this might not necessarily be effective.⁵⁹

Although SWFs could potentially exert influence on the operations of their investments, they are generally regarded as being more passive than SOEs. SOEs are active because they actually engage in operations and management. For example, after CNOOC purchased Nexen, the chair of Nexen's board of directors was assumed by Li Fanrong, who was also the CEO of CNOOC.⁶⁰ UNCTAD reports that the significance of SOEs has actually increased over the last three decades despite the global proliferation of privatization.⁶¹ SOEs, although fewer in number, have consolidated. This has resulted in an elevated level of economic dominance such that the world's top one hundred transnational corporations include eighteen SOEs.⁶² China stands out with regard to SOEs: the top 150 largest firms in China all have the Chinese government as the largest shareholder.⁶³

Being state-controlled entities, SOEs are also subject to the suspicion that they may be operated for political goals rather than profit maximization. In fact, given the higher level of control that SOEs have over business operations compared to SWFs, the potential for directing the business toward political ends is higher. SOEs represent an important tool for governments when they wish to intervene in the economy⁶⁴ and thus sit uncomfortably with free market ideologies. SOEs are also regarded negatively in Western market-based economies because they may benefit from direct or indirect government subsidies—an issue that has caused tension

59. See André de Palma, Luc Leruth & Adnan Mazarei, *Regulating a Sovereign Wealth Fund Through an External Fund Manager*, in *ECONOMICS OF SOVEREIGN WEALTH FUNDS* 95, 110 (Udaibir S. Das, Adnan Mazarei & Han van der Hoorn eds., 2010) (“The results show that, under reasonable assumptions, the use of fund managers may not necessarily address these concerns. This result holds when an SWF pursues only its profit-maximization motives, but even more so when it pursues multiple objectives, including learning by investing.”).

60. See Krugel, *supra* note 2.

61. See UNCTAD, *supra* note 50, at 12.

62. See *id.* (“Although the number of SOEs has been shrinking, their market power has been increasing, in part due to their consolidation into national champions across a range of strategic industries. There are now 18 SOEs among the world's top 100 TNCs.”).

63. See *id.* (“The Chinese State is the largest shareholder in that country's 150 biggest firms . . .”).

64. See Wouter P.F. Schmit Jongbloed, Lisa E. Sachs & Karl P. Sauvant, *Sovereign Investment: An Introduction*, in *SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS* 1, 9 (Karl P. Sauvant, Lisa E. Sachs & Wouter P.F. Schmit Jongbloed eds., 2012) (“SOEs have been at the forefront of sovereign intervention in the economy for centuries.”).

between the United States and China with respect to international trade.⁶⁵ Despite the negative perception that SOEs may act politically, 10 percent of all the world's FDI outflow is attributable to state-owned transnational corporations.⁶⁶

B. American Foreign Investment Review

The U.S. legislative authority for conducting a review of foreign investments is primarily found in section 721 of the Defense Production Act of 1950.⁶⁷ Although the legislation has gone through numerous amendments since its initial enactment,⁶⁸ the discussion below only focuses on the points relevant to this Article's arguments.

The basis for conducting a review of foreign investment is upon grounds of national security. This is triggered whenever there is any merger or acquisition that could result in foreign control of any person engaged in interstate commerce in the United States (referred to as a "covered transaction").⁶⁹ The committee that oversees the review is known as the Committee on Foreign Investment in the United States (CFIUS).⁷⁰ If there is a "covered transaction," then either the parties to the transaction may notify the CFIUS, or the President or CFIUS may unilaterally conduct a review.⁷¹ If the proposed transaction ultimately results in the control of any person engaged in interstate commerce in the United States by a foreign government or entity controlled by a foreign government, then a review by the CFIUS is automatically triggered.⁷² Thus, most proposed acquisitions by SOEs will attract a CFIUS review.

The key here is whether the transaction is foreign government controlled. The term "control" is not directly defined in the legislation. However, the Treasury Department has issued regulations specifically delineating which types of transactions will not be subject to review.⁷³ Generally, transactions that are merely regarded as

65. Cf. SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, UNDERSTANDING CHINA'S POLITICAL SYSTEM 11 (2013), available at <http://www.fas.org/sgp/crs/row/R41007.pdf> [<http://perma.cc/SKC3-53EL>] (archived Sept. 14, 2014) (referring to the matter as a "point of friction").

66. See UNCTAD, *supra* note 50, at 12.

67. See generally 50 U.S.C. app. § 2170.

68. See generally JARED T. BROWN & DANIEL H. ELSE, CONG. RESEARCH SERV., R43118, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND REAUTHORIZATION 3 (2013), available at <https://www.fas.org/sgp/crs/natsec/R43118.pdf> [<http://perma.cc/Z5PD-5E95>] (archived Sept. 22, 2014) (discussing generally the history of the Defense Production Act, Pub. L. No. 81-774, 64 Stat. 798 (1950)).

69. 50 U.S.C. app. § 2170(a)(3).

70. See *id.* § 2170(a)(1).

71. *Id.* § 2170(b)(1)(A).

72. *Id.* § 2170(b)(1)(B).

73. See 31 C.F.R. § 800.302 (2013) (describing five transactions that are not considered "covered transactions").

passive investments will not be treated as covered transactions and will be exempted from CFIUS review. In order to qualify as a passive investment, the transaction cannot result in the ownership of more than 10 percent of the voting securities of the firm.⁷⁴ This rule became important immediately after the financial crisis, when many SWFs invested in distressed Western financial institutions such as Merrill Lynch and Citigroup, because SWF investments, which were under the 10 percent threshold, did not have to undergo a CFIUS review.⁷⁵

Once initiated, a CFIUS review is completed within thirty days.⁷⁶ If the review determines that there is (1) a national security concern, (2) a foreign government controlled transaction, or (3) the transaction would result in the control of a critical infrastructure by a foreign person, then the CFIUS may proceed to conduct a forty-five-day investigation.⁷⁷ Upon the conclusion of the investigation, the ultimate decision resides with the President, who may suspend or prohibit the proposed transaction.⁷⁸ Although the term “national security” is not specifically defined, there is a nonexhaustive list of eleven factors that the President may consider.⁷⁹ The President’s decision on this matter is final and not subject to judicial review.⁸⁰

The present legislation now codifies what used to be an informal practice by the CFIUS to enter into mitigation agreements with the transaction parties during or prior to the review period. These mitigation agreements allowed the transaction parties to address potential national security concerns by rearranging the transaction so as to either eliminate or minimize, to an acceptable level, the risks to national security.⁸¹ The present legislation now specifically allows the CFIUS (or lead agency on its behalf) to enter into these mitigation

74. See *id.* § 800.302(b). The regulations also exempt other forms of transactions, such as acquisitions by securities underwriters or insurers in the ordinary course of business, stock splits, or stock dividends, acquisition of securities that do not result in a change of control and parent—subsidiary acquisitions. See *id.*

75. See JAMES K. JACKSON, CONG. RESEARCH SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 6 (2013), available at <http://www.fas.org/sgp/crs/natsec/RL33312.pdf> [<http://perma.cc/SY2W-GQ2R>] (archived Oct. 1, 2014) (“In some cases, the foreign investments have accounted for less than 10% of the voting securities of the firm and were classified as investments only for the purpose of investment apparently to avoid a CFIUS review or investigation.”).

76. See 50 U.S.C. app. § 2170(b)(1)(E).

77. See *id.* § 2170(b)(2)(C).

78. See *id.* § 2170(d)(1).

79. See *id.* § 2170(f).

80. See *id.* § 2170(e) (“The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review.”).

81. See JACKSON, *supra* note 75, at 19 (“Presently, CFIUS must designate a lead agency to negotiate, modify, monitor, and enforce agreements in order to mitigate any threat to national security.”).

agreements with the transaction parties.⁸² The CFIUS's designated lead agency is also responsible for the monitoring and enforcement of the mitigation agreement.⁸³

Although the final decision about whether to block a transaction resides solely with the President, the CFIUS is required to provide reports to particular members of Congress.⁸⁴ In addition, the CFIUS is to provide an annual report to Congress regarding its activities, particularly those relating to covered transactions and critical technologies.⁸⁵

C. Canadian Foreign Investment Review

Proposed foreign investment transactions are reviewed by the Canadian government pursuant to the Investment Canada Act.⁸⁶ Unlike the U.S. approach, Canada has two streams of review, which are not mutually exclusive. First, like the United States, Canada may block investments on national security grounds.⁸⁷ There are no minimum monetary thresholds for a national security review, and the only criterion is that there must be a non-Canadian seeking to either establish a new Canadian business or acquire control of a Canadian business.⁸⁸ If the Minister reasonably believes that a proposed investment *could* be injurious to national security, then the Minister may order a review.⁸⁹

Upon a review, the Minister may order the relevant transaction parties to provide information in order to assess whether the proposed investment is a risk to national security.⁹⁰ Upon completion of the review, the Canadian government may either block the

82. See 50 U.S.C. app. § 2170(l)(1)(A) ("The Committee or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.").

83. See *id.* § 2170(l)(3)(A).

84. See *id.* § 2170(b)(3)(C)(iii).

85. See *id.* § 2170(m) (describing the contents of the annual report that is to be provided to Congress).

86. See Investment Canada Act, R.S.C. 1985, c. 28, § 2 (Can.) ("[T]he purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.").

87. See *id.* § 25.2(1) (providing for ministerial action and review where "the Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security . . .").

88. See *id.* § 25.1.

89. See *supra* note 87.

90. See *id.* § 25.2(3).

investment or allow it.⁹¹ Like the American approach with mitigation agreements, the Canadian government can conditionally approve the investment provided that the parties provide written undertakings to the Canadian government.⁹² The government's decision is final and not subject to review or appeal except for administrative review.⁹³ In Canada, there are no public guidelines as to how discretion will be exercised.⁹⁴

In addition to national security, the Canadian government may also review a transaction in order to assess whether it is of net benefit to Canada.⁹⁵ If the proposed investment transaction exceeds a minimum monetary threshold, then it is potentially subject to a net benefit review by the Canadian government. For investors from non-World Trade Organization (WTO) member countries, the thresholds are fairly low: \$5 million for direct investments⁹⁶ and \$50 million for indirect transactions.⁹⁷ However, the levels for investors from WTO member countries⁹⁸ are substantially higher and have been increasing from year to year as determined by regulations⁹⁹ enacted by the government. As of 2014, the threshold is \$354 million dollars.¹⁰⁰

Recent amendments to the Investment Canada Act can capture almost any investment involving an SOE. For example, there is a safe harbor zone, which indicates that "the acquisition of less than one

91. See *id.* § 25.4(1) (providing for powers of the Governor in Council).

92. See *id.* § 25.4(1)(b)(i).

93. See *id.* § 25.6 ("Decisions and orders of the Governor in Council, and decisions of the Minister, under this Part are final and binding and, except for judicial review under the *Federal Courts Act*, are not subject to appeal or to review by any court.").

94. See J. Anthony VanDuzer, *supra* note 8, at 252 (2010) ("[U]nder the *Investment Canada Act*, the criteria to be applied by the Minister are broad and open-ended . . .").

95. See *Investment Canada Act*, R.S.C. 1985, c. 28, § 16(1) (Can.) ("A non-Canadian shall not implement an investment reviewable under this Part unless the investment has been reviewed under this Part and the Minister is satisfied or is deemed to be satisfied that the investment is likely to be of net benefit to Canada.").

96. See *id.* § 14(3).

97. See *id.* § 14(4) ("An investment described in paragraph (1)(d) is reviewable under this Part where the value, calculated in the manner prescribed, of the assets of the entity carrying on the Canadian business, and of all other entities in Canada, the control of which is acquired, directly or indirectly, is fifty million dollars or more.").

98. See *id.* § 14.1 (defining limits for WTO investors).

99. See *id.* § 14.2 ("The Governor in Council may make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of section 14.1.").

100. *Investment Canada Act, Thresholds for Review*, INDUSTRY CANADA, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html (last visited Oct. 1, 2014) [<http://perma.cc/AZP5-XQRR>] (archived Sept. 22, 2014) (noting that the thresholds are reviewed every year). "The amount is equivalent to the growth in Nominal Gross Domestic product at market prices as published by Statistics Canada for specified periods, multiplied by the amount determined for the previous year." *Id.*

third of the voting shares of a corporation . . . is deemed not to be the acquisition of control of that corporation.”¹⁰¹ This means that such an acquisition would not attract a net benefit review. But under the new rules, the government may nevertheless regard any transaction as being an acquisition of control if it is satisfied that the entity is, in fact, controlled by a SOE.¹⁰² Similarly, although an acquisition by a Canadian would not trigger a review, the government may treat it as a non-Canadian if it believes it is in fact controlled by a SOE.¹⁰³ Furthermore, the definition of a SOE is expansive and includes indirect control or any person “acting under the influence” of a foreign government.¹⁰⁴

The default position of the Investment Canada Act is that a reviewable transaction is prohibited unless the government is satisfied that the investment is likely to be one of net benefit to Canada.¹⁰⁵ The legislation does not define or provide any guidance as to the meaning of “net benefit.” However, the Canadian SOE Guidelines¹⁰⁶ issued by Industry Canada provide guidance regarding how the net benefit assessment might apply to SOEs. There are two important aspects to note. First, the Canadian SOE Guidelines comment that SOEs are “susceptible to state influence”¹⁰⁷ and are expected to address this in their discussions with the Canadian government. Investors are expected to “demonstrate their strong commitment to transparent and commercial operations.”¹⁰⁸ The government’s examination of the SOE will also include an assessment of whether it adheres to “free market principles” and whether it will “likely operate on a commercial basis.” The foregoing language expresses the common concern that SOEs might operate on a noncommercial basis (with the fear perhaps that they pursue politically motivated objectives).

As is the case for all net benefit reviews, foreign investors bear the burden of proof of satisfying the Canadian government that the proposed investment is likely to be of net benefit to Canada.¹⁰⁹ Under the Investment Canada Act, one tool available to investors is the

101. Investment Canada Act, R.S.C. 1985, c. 28, § 28(3)(d) (Can.).

102. *See id.* § 28(6.1).

103. *See id.* § 26(2.31).

104. *See id.* § 3.

105. *See id.* § 16(1) (“A non-Canadian shall not implement an investment reviewable under this Part unless the investment has been reviewed under this Part and the Minister is satisfied or is deemed to be satisfied that the investment is likely to be of benefit to Canada.”).

106. Canadian SOE Guidelines, *supra* note 15.

107. *Id.*

108. *Id.*

109. *See id.* (“Under the Act, the burden of proof is on foreign investors to demonstrate to the satisfaction of the Minister that proposed investments are likely to be of net benefit to Canada.”).

possibility of entering into undertakings and agreements with the government¹¹⁰ in order to allay any concerns about the SOE. The Canadian SOE Guidelines state that examples of possible undertakings used in the past include “the appointment of Canadians as independent directors on the Board of Directors, the employment of Canadians in senior management positions, incorporation of the business in Canada, and the listing of the shares of the acquiring company or the Canadian business being acquired on a Canadian stock exchange.”¹¹¹

The Canadian government will also monitor whether the undertakings have been complied with. If a foreign investor fails to comply with the undertaking, the Canadian government may send a notice to the foreign investor demanding that the undertaking be complied with¹¹² or, alternatively, accept a new undertaking provided that the government is satisfied it is likely to be of net benefit to Canada.¹¹³ Ultimately, if a foreign investor fails to comply with undertakings entered into with the Canadian government, a Canadian court may order a number of different remedies, including requiring the foreigner divest itself of control of the Canadian business,¹¹⁴ ordering injunctions,¹¹⁵ directing the foreign investor to comply with written undertakings,¹¹⁶ imposing a penalty not exceeding \$10,000 each day,¹¹⁷ and suspending the voting rights of the foreign investor in its acquired assets.¹¹⁸

Overall, Canadian foreign investment review laws are less welcoming toward FDI than those of the United States. Both countries have national security reviews (regardless of level of investment), and the term “national security” is not defined in the laws of either country. However, the U.S. law at least provides a non-exhaustive list of twelve factors to be considered by the President which, coupled with the reports to Congress, provide some form of democratic transparency in the process. In contrast, Canadian law provides no guidance on the meaning of the term “national security.” Further, the Canadian review process goes beyond national security concerns by imposing a net benefit review process for large transactions. The term “net benefit” is not defined, which, in turn, provides the Canadian government with a great deal of discretion. Similarly, the definition of an SOE is broad and goes beyond control

110. Investment Canada Act, R.S.C. 1985, c. 28, § 23(3) (Can.).

111. Canadian SOE Guidelines, *supra* note 15.

112. Investment Canada Act, R.S.C. 1985, c. 28, § 39(1) (Can.).

113. *Id.* § 39.1.

114. *See id.* § 40(2)(a).

115. *See id.* § 40(2)(b).

116. *See id.* § 40(2)(c).

117. *See id.* § 40(2)(d).

118. *See id.* § 40(2)(f).

to include indirect influence, which may potentially capture a wide range of activities. The conduct expected of SOEs under the SOE Guidelines is similarly vague and speaks only of commercial and market principles without actually defining those key terms.

Perhaps sensing the problems that such ambiguity might create, the drafters of the Investment Canada Act included a modest amount of democratic accountability by requiring that the government provide a publicly available, annual report on the administration of the legislation (although there is no indication of what the report should contain).¹¹⁹ However, government compliance with even this very modest measure of accountability has been lagging. As of January 2014, only one such report had been made available on Industry Canada's website: the 2009–10 Annual Report. Finally, in early March 2014, the Director of Investments and Industry Canada posted three years of back-logged annual reports (2010–11, 2011–12 and 2012–13) in a single consolidated report on the Industry Canada website.¹²⁰

III. NATIONAL SECURITY: BALANCING INTERESTS IN THE SHADOW OF POLITICS

This section commences with a discussion of notable U.S. and Canadian foreign investment reviews, highlighting controversies that arose. It then examines how foreign investment reviews balance national security concerns with a desire to attract FDI. It cautions against the proposed U.S. addition of an "economic security test" or Canadian-like net benefit test by emphasizing the ambiguity of those tests along with the potential for politicization and potential capture by protectionist interests. It concludes with a recommendation that both the United States and Canada could improve their national

119. See *id.* § 38.1 ("The Director shall, for each fiscal year, submit a report on the administration of this Act, other than Part IV.1, to the Minister and the Minister shall make the report available to the public.").

120. *Investment Canada Act, Annual Reports*, INDUSTRY CANADA, http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html (last visited Sept. 30, 2014) [<http://perma.cc/T2W9-3NV4>] (archived Sept. 23, 2014). Although the late reports do not actually bear a date of issuance, the web pages that link to the report indicate that those pages were last modified in 2014. In addition, the copyright statement of the reports bears the date of 2014. In the consolidated report, it is clear from the Director's message that he is attempting to address the three prior years in a single report and states: "I am pleased to present the Investment Canada Act annual reports for the fiscal years 2010-11 through 2012-13." See INDUSTRY CANADA, INVESTMENT CANADA ACT: ANNUAL REPORTS 2010-11, 2011-12, 2012-13 (2014), [https://www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/ICA_AR_2010-11_2011-12_2012-13-eng.pdf/\\$FILE/ICA_AR_2010-11_2011-12_2012-13-eng.pdf](https://www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/ICA_AR_2010-11_2011-12_2012-13-eng.pdf/$FILE/ICA_AR_2010-11_2011-12_2012-13-eng.pdf) [<http://perma.cc/UA32-G9YE>] (archived Sept. 30, 2014).

security tests by supplementing them with a clear set of risk-threat-based guidelines.

A. Notable Past Transactions

Large acquisition transactions occasionally raise eyebrows due to their potential to result in a monopoly—a concern that is typically handled by competition law. However, significant acquisitions add another dimension that can run along a spectrum from understandable concerns about national security to xenophobia and local protectionism. A cursory review of selected cases in both the United States and Canada illuminates the controversy that these transactions can precipitate in the host country. The lack of transparency in the review frameworks means that controversial transactions remain vulnerable to speculations regarding whether political or protectionist motivations have dominated the internal decision-making process.

An early case that illustrates the potential for political speculation is the attempted purchase of MAMCO, manufacturer of commercial aircraft parts, by a Chinese SOE in 1989.¹²¹ The Chinese government's crackdown on political protest at Tiananmen Square had recently occurred, leaving some to surmise that this lay at the heart of President George H.W. Bush's decision to block the transaction—particularly since the proposed investment “posed no obvious threat to national security.”¹²² In 1990, the U.S. company, Norton, was the target of a hostile takeover from British Tire and Rubber.¹²³ One hundred and nineteen members of Congress, prompted by Norton employees concerned for their jobs, called for a national security investigation. Ultimately, another bid prevailed from the French conglomerate Compagnie de Saint-Gobain.¹²⁴

121. See Jackie VanDerMeulen & Michael J. Trebilcock, *Canada's Policy Response to Foreign Sovereign Investment: Operationalizing National Security Exceptions*, 47 CAN. BUS. L.J. 392, 427 (2009) (“Many speculated that the decision of CFIUS to bar the transaction, and of President Bush Sr. to follow these recommendations, was an attempt by the Bush administration to respond to the recent events of Tiananmen Square.”).

122. *Id.*

123. See Jennifer Cooke, *Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, 2009 COLUM. BUS. L. REV. 728, 757 (2009).

124. See *After Defeat, BTR Sells Norton Stock*, N.Y. TIMES, Apr. 27, 1990, <http://www.nytimes.com/1990/04/27/business/company-news-after-defeat-btr-sells-norton-stock.html> (noting that, notwithstanding its failed bid, BTR still made approximately \$12.2 million profit on the sale of its shares).

Interestingly, the prevailing bid was better for Norton employees, and the angst about national security disappeared.¹²⁵

In 2005, Unocal (an American oil corporation) was the subject of an \$18.5 billion acquisition bid from CNOOC.¹²⁶ This was a bid that competed with U.S. oil company Chevron, which had a prior bid of \$16.8 billion.¹²⁷ There quickly followed much criticism and concern about national security, particularly since CNOOC is a SOE,¹²⁸ and what followed thereafter is noteworthy. CFIUS was unable to conduct a review because the House of Representatives had passed a resolution to cut off money to CFIUS, thus frustrating any efforts for a review while other proposals floated around to either have other agencies, such as the Departments of Energy and State, analyze the investment or to protract the time required for review from ninety to 141 days.¹²⁹

Faced with this increasing mountain of procedural hurdles and negative publicity, it is not surprising that CNOOC withdrew its bid.¹³⁰ The Chinese government's response was one of disappointment, and there were references to the politicization of the entire matter by the U.S. government.¹³¹ Despite the plausible national security concerns raised in the proposed Unocal acquisition,¹³² the derailment of the regular CFIUS process "feeds the perception that Congress may obstruct viable transactions in an

125. Cooke, *supra* note 123 ("[N]o one from Norton raised national security concerns despite a lack of any evidence that a British company taking over implicated any more national security concerns than a French company.").

126. See Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 23–25 (2011).

127. See Michael Petrusic, *Oil and the National Security: CNOOC's Failed Bid to Purchase Unocal*, 84 N.C. L. REV. 1373, 1374 (2006) ("CNOOC was not the first company to make an offer for Unocal. Chevron, a privately-owned U.S. oil company, made an offer worth \$16.8 billion of cash and stock on April 4, 2005. On June 23, 2005, CNOOC followed suit with an unsolicited, \$18.5 billion all-cash bid for Unocal – almost \$2 billion more than the Chevron bid.").

128. See *id.* ("The CNOOC bid promptly attracted attention in Washington not because of its dollar amount, but because the Chinese government held a seventy percent share in CNOOC.").

129. Merrill, *supra* note 126, at 24–25 ("Congressional response was swift and decisive.").

130. See *id.* at 25 (remarking that for CNOOC, the congressional response had proved to be the "final straw").

131. See Petrusic, *supra* note 127, at 1388 ("The chief information officer of Falcon Power, a Beijing-based energy consulting firm . . . state[ed] that '[t]he way the U.S. government has treated CNOOC and politicized the deal will largely frustrate Chinese companies.'").

132. Souvik Saha, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS. 199, 221 (2012) (remarking that "[t]he CNOOC-Unocal fiasco has justifiably served as the poster child for the purported lack of transparency in the U.S. national security review process").

arbitrary and capricious manner.”¹³³ Given that CNOOC withdrew its offer, it is not clear whether it ultimately would have prevailed after a full CFIUS review, especially given that the proposed acquisition was in the energy sector.¹³⁴

Shortly thereafter, another controversy broke out with the proposed acquisition of a company that managed six U.S. ports, Peninsular and Oriental Steam Navigation (P&O), by Dubai Ports World (DP World).¹³⁵ DP World had notified CFIUS of the transaction and, after a review by CFIUS, it was concluded that an investigation was not necessary.¹³⁶ However, controversy erupted when an Associate Press news story reported that the United Arab Emirates had been home to several 9/11 terrorists while emphasizing that ports exposed the United States to risk of attacks.¹³⁷ Congress reacted quickly with a flurry of proposed legislation,¹³⁸ and there was movement to block the transaction.¹³⁹ Even though CFIUS had cleared DP World at the review stage, DP World nevertheless requested the CFIUS conduct a full investigation.¹⁴⁰ Disheartened by the continuing controversy, DP World later abandoned the transaction and sold all its U.S. port operations.¹⁴¹

In 2007, the attempted acquisition of part of 3Com, a technology company that supplied U.S. government agencies, by China-based Huawei understandably raised national security concerns and was quickly abandoned.¹⁴² The most recent case in the media involves the Obama administration blocking Chinese-owned Ralls Corp from acquiring wind-farm assets located near U.S. Navy airspace.¹⁴³

133. *Id.* at 223.

134. See Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 199, 221–22 (2009) (“[U]ltimately, congressional pressure in this context might have saved CFIUS and the Bush administration from approving a politically unpopular deal, the blocking of which would nevertheless have been too inflammatory toward China”).

135. See *id.* at 222–23.

136. See Merrill, *supra* note 126, at 26.

137. See *id.* (citing Ted Bridis, *United Arab Emirates Firm May Oversee 6 U.S. Ports*, WASH. POST, Feb. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/11/AR200602110112.html> [<http://perma.cc/EWZ9-HY2H>] (archived Sept. 23, 2014)).

138. See Sullivan, *supra* note 134, at 223.

139. See Merrill, *supra* note 126, at 27.

140. See Sullivan, *supra* note 134, at 223 (“DP World took the unusual step of requesting in late February that CFIUS conduct a full investigation, notwithstanding the prior determination that an extended review was unnecessary.”).

141. See Merrill, *supra* note 126, at 28 (“After almost a month of controversy, DP World finally succumbed to the political pressure, announcing that it would sell its U.S. operations to an American company.”); see also *id.* at 27 (noting that President Bush defended CFIUS’s approval of the DP World deal).

142. See Cooke, *supra* 123, at 739.

143. See Sara Foden, *Chinese-Owned Company Sues Obama over Wind Farm Project*, BLOOMBERG (Oct. 2, 2012), <http://www.bloomberg.com/news/2012-10-02/obama->

In Canada, proposed foreign investment has also attracted attention. In 2004, Noranda Inc. was the acquisition target of China MinMetals. Amidst concerns that Canada's resources were being diverted and that there was a climate of suspicion, China MinMetal abandoned the transaction.¹⁴⁴ However, in 2008, for the first time ever, the Canadian government actually exercised its power to block a proposed investment. Later, the acquisition of MacDonald Dettwiler by Alliant Techsystems also raised national security concerns.¹⁴⁵ MacDonald Dettwiler operated a satellite that caused the Canadian government to worry about the security of the satellite data.¹⁴⁶ Although there have been successful transactions involving foreign investment in Canadian natural resources, including by Chinese companies,¹⁴⁷ in 2010 the Canadian government blocked an attempt by BHP Billiton Ltd. to engage in a hostile takeover of the Potash Corporation of Saskatchewan.¹⁴⁸ The Canadian government has also demonstrated that it has the tenacity to pursue foreign investors who do not live up to their undertakings. In 2011, after pursuing U.S. Steel for its failure to honor undertakings given in its acquisition of Stelco, the Canadian government finally reached an out-of-court settlement with new undertakings provided.¹⁴⁹

bars-chinese-owned-company-from-building-wind-farm.html [http://perma.cc/B9EL-9VGQ] (archived Sept. 23, 2014) (discussing a lawsuit filed by Ralls Corp. against both President Obama and the CFIUS following a decision by the Committee to block a Ralls Corp. project).

144. See VanDerMeulen & Trebilcock, *supra* note 121, at 400 (discussing voiced Canadian concerns and asserting that “[t]he political unpopularity of the deal ultimately led China MinMetals to withdraw from negotiations.”).

145. See VanDuzer, *supra* note 8, at 260 (“Even though the firm would have continued to operate under a Canadian licence and the Canadian government would retain access to all data, Canadian parliamentarians, among others, worried that the security of the remote sensing data could not be assured.”).

146. See VanDerMeulen & Trebilcock, *supra* note 121, at 407; see also A. Edward Safarian, *Sovereign Direct Investment, in SOVEREIGN INVESTMENT: CONCERNS AND POLICY REACTIONS* 445 (Karl P. Sauvant, Lisa E. Sachs & Wouter P.F. Schmit Jongbloed eds., 2012) (“This was the first explicit rejection of an application under the Investment Canada Act in its twenty-three year history.”).

147. See VanDuzer, *supra* note 8, at 253 (referring specifically to oil sand acquisitions in 2010 by Sinopec, China Investment Corp., and PetroChina Co.).

148. See Lawson A.W. Hunter & Susan M. Hutton, *Foreign Investment Review in Canada: Be Careful What You Wish For*, 2011 BUS. L. TODAY 1, 1 (2011); see also *BHP's PotashCorp Bid Rejected for Now*, CBC NEWS (Nov. 3, 2010, 11:54 AM), <http://www.cbc.ca/news/business/bhp-s-potashcorp-bid-rejected-for-now-1.868381> [http://perma.cc/A3DB-2Y5K] (archived Oct. 1, 2014).

149. See *Media Room: Industry Minister Paradis Reaches an Out-of-Court Settlement in the U.S. Steel Litigation*, INDUSTRY CANADA (Dec. 12, 2011), <http://www.ic.gc.ca/eic/site/064.nsf/eng/07011.html> [http://perma.cc/KC8L-5WW9] (archived Sept. 23, 2014).

B. *The Balancing Act—Cautionary Note*

Foreign investment review presents legislators with an extremely difficult task. While many laws require the balancing of interests, the problem here is that national security represents a priority of the highest order that must be balanced against the desire to attract FDI, an increasingly important topic for Canada, which now ranks poorly in terms of its ability to attract FDI.¹⁵⁰ Overall, the two opposing objectives can be categorized as political (national security) versus economic (promotion of FDI).¹⁵¹

The analysis should not just be restricted to inward FDI. In addition to attracting foreign capital, countries like the United States are also interested in establishing operations abroad. Having an overly opaque and highly politicized foreign investment review system could possibly invite a response in kind from countries such as China. Since 1979, China has increasingly opened its foreign investment market to the world.¹⁵² However, with the passage of time, it was inevitable that China would start to develop its own regime to control the inward flow of foreign investment. For example, in 2007, foreign investment in China became regulated by the newly enacted Chinese mergers and acquisition regulations.¹⁵³ In addition, China has also developed its own relatively new national security regime.¹⁵⁴ This means that foreign investors now have “three hurdles” to overcome when investing in China: the Chinese national

150. See Matt Krzepkowski & Jack Mintz, *Canada's Foreign Direct Investment Challenge: Reducing Barriers and Ensuring a Level Playing Field in Face of Sovereign Wealth Funds and State-Owned Enterprises*, 3 UNIV. CALGARY SCH. PUB. POL'Y SPP RES. PAPERS, no. 3, Oct. 2010, at 1–2, available at <http://www.policyschool.ucalgary.ca/sites/default/files/research/mattkrzepkowski-online2.pdf> [<http://perma.cc/798V-YA93>] (archived Sept. 23, 2014) (discussing several metrics indicating Canada's poor standing globally as a receiver of FDI).

151. See Benjamin J. Cohen, *Sovereign Wealth Funds and National Security: The Great Tradeoff*, 85 INT'L AFF. 713, 713 (2009) (“At issue are two competing goals. One is economic: the desire to promote material prosperity by safeguarding opportunities for productive international investment. The other is political: the right and responsibility of every government to defend the nation's security.”).

152. See, e.g., Suqi Qin, *Transition and Incentives in China's Foreign Investment Regime*, KOREA UNIV. L. REV. 135, 135 (2011) (discussing the history of China's gradual opening up of its FDI).

153. See Jordan Brandt, *Comparing Foreign Investment in China, Post-WTO Accession, with Foreign Investment in the United States, Post-9/11*, 16 PAC. RIM L. & POL'Y J. 285, 334 (2007) (“The introduction of China's anti-monopoly provisions and MOFCOM's discretionary powers along with the inclusion of the share-swapping regulations will heavily affect the flow of foreign investment into China in the near future.”); see also ANDERSON, *supra* note 38, at 149–50 (discussing China's merger review process).

154. See Tracy Wut & Chunfai Lui, *Jumping Three Hurdles*, 30 INT'L FIN. L. REV. 70, 70 (2011) (discussing the inclusion in 2011 of a third hurdle, national security, in approving foreign investor M&A deals in China).

security regime, foreign investment approval, and an antitrust review.¹⁵⁵ With respect to issues of transparency, in 2010, China enacted its own state secrets law along with regulations that would protect state secrets with respect to Chinese SOEs.¹⁵⁶

In short, if Western nations are perceived as being overly protectionist with their FDI review process, there now exist plenty of legislative means for the Chinese to retaliate in kind. While one might argue that an authoritarian Chinese government might have retaliated without such legislation, the presence of such legislation now means that any retaliation could be cloaked in the same disguise as Western politics. This would make it difficult to criticize the Chinese position without appearing hypocritical. Or, as Ian Bremmer has noted, with respect to international trade, “[o]fficials in Washington can’t complain about ‘Buy Chinese’ provisions in Beijing’s spending plans until they remove the ‘Buy American’ clause from their own.”¹⁵⁷ Ultimately, one of the goals of designing a foreign investment review system is to promote its fairness so as to avoid retaliatory actions by other nations.¹⁵⁸

Returning to the topic of inward FDI and the task of balancing political considerations of national security with economic considerations of maintaining an attractive FDI environment, one finds that economic considerations can bifurcate into another distinct stream of considerations. The topic of economics can fall into a grey area that seeks not only to attract valuable investment into the country but also to protect the host country’s economy from being negatively affected by the actions of the investor.¹⁵⁹ In turn, this may have precipitated the calls to have the CFIUS review include

155. See *id.* at 70–71 (“[I]n the future, ‘three hurdles for foreign investors’ M&As in China’ will have to be overcome: foreign investment approval, merger-control clearance under the PRC Antimonopoly Law (AML), and now the approval for national security under Circular 6.”).

156. See generally Sigrid Ursula Jernudd, *China, State Secrets, and the Case of Xue Feng: the Implication for International Trade*, 12 CHI. J. INT’L L. 309, 316–22 (2011) (addressing China’s new state secrets legislation and its impact on international trade).

157. IAN BREMMER, *THE END OF THE FREE MARKET* 191 (2010).

158. See, e.g., George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 126 (2008) (“If the United States is seen as using national security review to engage in protectionism, this could provoke a protectionist backlash in other parts of the world and hurt U.S. companies.”).

159. See Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected*, 6 J. INT’L L. & INT’L REL. 1, 10 (2011) (highlighting the need to protect the host country’s economy from “undesired interference by foreign governments”).

“economic security” concerns.¹⁶⁰ While the government under President Bush Jr. seems to have suggested that national security reviews already take this into account,¹⁶¹ there is also the perspective that economic concerns are being invoked for protectionist motives instead.¹⁶² From that point, it is not too far to move one step further and advocate a broader, more overt consideration of net benefit to the economy (as in the case of Canada) as was done by the U.S.-China Economic and Security Review Commission in its 2012 Annual Report.¹⁶³

The invocation of economic tests, whether under the rubric of “economic security” or more overtly stated as a “net benefit” assessment, might serve to augment already negative perceptions by foreign nations regarding foreign investment review.¹⁶⁴ This is supplemented by the skeptical, but often deserved, observation that foreign investment reviews can be highly politicized as the foregoing discussion of past U.S. and Canadian acquisitions suggests. In the United States, the entire review process can be tilted toward political interests: not only do reports to Congress increase the possibility of politicization,¹⁶⁵ but the CFIUS itself is also composed of members who are subject to political influences.¹⁶⁶ Different members might also have different priorities depending upon what they believe their mandate to be. For example, there is the argument that national security concerns might be subordinated to the pursuit of economic goals because the CFIUS is chaired by the Department of the Treasury.¹⁶⁷

When the Canadian government blocked the acquisition of the Potash Corporation of Saskatchewan by BHP Billiton Ltd., the incumbent government was led by the Conservative Party. However, this was a minority government that was vulnerable to losing power if it could not muster support from at least some members of opposing

160. See Byrne, *supra* note 9, at 849 (“Similarly, inserting ‘economic security’ as a criterion for CFIUS review would take the focus off of national security and place it on economic protectionism.”).

161. See *id.* at 889.

162. See *id.* at 849 (“Similarly, inserting ‘economic security’ as a criterion for CFIUS review would take the focus off of national security and place it on economic protectionism.”).

163. See generally U.S.-CHINA ECON. & SEC. REV. COMM’N, *supra* note 10, at I-2.

164. FOLSOM ET AL., *supra* note 30, at 859 (“It is fair to comment that Exon-Florio is not well regarded abroad.”).

165. Cf. Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 352 (2007) (“FINSA’s most significant effect is to politicize the area of foreign investment due to its dramatically increased congressional-reporting requirements.”).

166. See VanDuzer, *supra* note 8, at 425–26.

167. See Georgiev, *supra* note 158, at 129 (discussing criticisms of CFIUS).

parties.¹⁶⁸ The opposition of Saskatchewan politicians to the proposed transaction certainly would have provided the incumbent government with the political incentive to block this proposed transaction. Similarly, it has been suggested that the Norton Company case¹⁶⁹ is an example of how politics has infiltrated the foreign investment review process in the United States.¹⁷⁰

The politicization of foreign investment review is not surprising given the immense amount of money and numerous interests involved. With no real definition of what constitutes “national security,”¹⁷¹ the terrain is ripe for the exploitation of “popular paranoia”¹⁷² by interest groups who seek to capture the regulatory process for their own gain.¹⁷³ Although difficult, there are at least two methods of potentially bolstering the national security regime against political capture. First, one might ensure that the government entity charged with conducting national security reviews has dedicated expertise in that area and is reasonably insulated from political interference.¹⁷⁴ Second, attempting to circumscribe the boundaries of the term “national security” by means of published guidelines¹⁷⁵ could introduce a higher degree of accountability by providing the general public with a metric by which to estimate the congruency of the government’s decision with established principles. In this regard, one very promising model has been developed by Theodore Moran

168. See Simone Collins, *Recent Decisions Under the Investment Canada Act: Is Canada Changing Its Stance on Foreign Direct Investment?*, 32 NW. J. INT’L L. & BUS. 141, 161–62 (2011) (describing how the Conservative Party needed to have the continued support of the Saskatchewan province, which disapproved of the acquisition of Potash, in order to maintain control of the national government).

169. See Cooke, *supra* note 123 (providing an overview of the Norton Company case).

170. See FOLSOM ET AL., *supra* note 30, at 858 (referencing the Norton Company case as an example of an option that takes into account “the political sensitivity of foreign investment in the United States”).

171. In some respects, this parallels international trade disputes which have similar national security exceptions. VanderMeulen and Trebilcock note that under the General Agreement on Tariffs and Trade, the interpretation of the term national security has been contested and unclear. See VanderMeulen & Trebilcock, *supra* note 121, at 420–21.

172. Cf. BREMMER, *supra* note 157 (“Just as U.S. policymakers can resist the populist temptations of trade protectionism, they can also refuse to allow popular paranoia to block valuable foreign investment in U.S. assets.”).

173. Cf. Merrill, *supra* note 126, at 4 (arguing that public choice theory might be a possible perspective through which we might understand the CFIUS review process).

174. See Safarian, *supra* note 146, at 448.

175. Cf. Kristy Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act That Needs Revision*, 15 U.C. DAVIS J. INT’L L. & POL’Y 43, 69 (2008) (“Preserving national security and encouraging foreign investment creates a difficult balance to maintain. However, realization of market improvements to the current CFIUS process could occur by creating a more exact definition of national security and requiring increased transparency to the American public.”).

who has categorized national security risks into three broad threat categories.

The first category (which I will refer to as “Threat I”) consists of proposed acquisitions that would make the home country dependent upon a foreign-controlled supplier that might delay, deny, or place conditions upon the provision of goods or services crucial to the functioning of the home economy. The second category (“Threat II”) is a proposed acquisition that would transfer, to a foreign-controlled entity, technology or other expertise that might be deployed by the entity or its government in a manner harmful to the home country’s national interests. The third category (“Threat III”) is a proposed acquisition that would enable the insertion of some potential capability for infiltration, surveillance, or sabotage into the provision of goods or services crucial to the functioning of the home economy.¹⁷⁶

This categorical methodology is consistent with the risk-focused approach that this Article advocates later in Part IV.

The suggestion that the United States and Canada adopt Moran’s categorical guidance is not intended to hamper the very real concern that foreign investments can involve national security risks. Instead, the goal is to provide a reasoned approach to very important risks while at the same time insulating the process from lobbyists who may try to capture the process to pursue other goals.¹⁷⁷ This would particularly be so for Western democracies, such as the United States, where lobbying groups wield considerable power.¹⁷⁸ One recent study of lobbying found that the expected rate of return on lobbying was a remarkable 220:1.¹⁷⁹ This emphasizes the importance of guarding against the exploitation of the ambiguity inherent in the term “national security.” It also gives reason to be concerned about suggestions in the United States that advocate introducing additional terms such as “economic security” or following the vague Canadian

176. THEODORE H. MORAN, CANADIAN COUNCIL OF CHIEF EXECUTIVES – CONSEIL CANADIEN DES CHEFS D’ENTREPRISE, CHINESE FOREIGN DIRECT INVESTMENT IN CANADA: THREAT OR OPPORTUNITY? 5–6 (2012), available at <http://www.ceocouncil.ca/wp-content/uploads/2012/03/Chinese-Foreign-Direct-Investment-in-Canada-Theodore-H-Moran-March-2012.pdf> [<http://perma.cc/4245-PXVJ>] (archived Sept. 23, 2014).

177. See CHRISTOPHER BALDING, INTERSECTION OF MONEY AND POLITICS 89 (2012) (“If restrictions in international investment are to be justified by invoking reasons of national security, then national security must mean something tangible beyond any industry with politically connected lobbyists.”). Not all lobbying is necessarily to block an investment. Anderson argues that lobbying in the United States has contributed to the acceptance of SWFs. See ANDERSON, *supra* note 38, at 136–38.

178. See KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS 253 (2011) (recounting how in the aftermath of the subprime crisis in 2009, “commercial banks paid over 50 million to lobbyists to beat back legislative reforms”).

179. See Raquel Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return on Lobbying Expenditures: An Empirical Cast Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 443 (2009) (“In our case study, corporations that lobbied received the lion’s share of the available benefits and those corporations were concentrated within a fairly small group of industries.”).

approach of “net benefit.” While this Article has suggested that national security reviews are indispensable, but could be augmented with better guidelines and monitoring agencies, the next part will critique the efficacy of using net benefit reviews to single out SOEs.

IV. NET BENEFIT AND SOES—COLLAPSING DISTINCTIONS

This section commences with a review of the Canadian net benefit assessment process and the Canadian SOE Guidelines. It argues that those guidelines depend on a classic neoliberal conception of private and public demarcations of the economy. The claim advanced is that Canadian SOE Guidelines depend on two assumptions, both of which are incoherent. It then examines each assumption and provides evidence of the incoherency.

A. Net Benefit, SOEs, and Neoliberalism

The net benefit assessment provisions of the Investment Canada Act have the good intention of allowing only foreign investments that ultimately further the well-being of its citizens. State-owned enterprises are scrutinized in particular because they are “susceptible to state influence”¹⁸⁰ and need to demonstrate commitment to “commercial operations”¹⁸¹ and “adherence to free market principles.”¹⁸² Implicitly, the net benefit assessment must mean something beyond national security because those concerns are directly addressed in a separate part of the legislation. Under the net benefit provisions, any foreign investment exceeding the monetary thresholds is potentially subject to a net benefit review. But Canada, like the United States, already has provisions in its competition law¹⁸³ that review large proposed mergers or acquisitions. Therefore, there must be something particular about foreign acquisitions that provokes the extra attention under the Investment Canada Act.

The suspicion that foreigners would be acting in ways that harm Canadians should be dealt with under the national security provisions. So, what is the purpose of the net benefit provisions? Language in the Canadian SOE Guidelines suggests that while the analysis is about economic effects, there is no mention of national security. For example, the Canadian SOE Guidelines state that “the

180. Canadian SOE Guidelines, *supra* note 15.

181. *Id.*

182. *Id.*

183. See Competition Act, R.S.C., 1985, c. C-34 (Can.) (regulating large proposed mergers or acquisitions); see also Canadian Competition Bureau, *Merger Review Process Guidelines* (Jan. 11, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html> [<http://perma.cc/37NB-MM57>] (archived Sept. 24, 2014).

Minister will assess the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada.”¹⁸⁴ In addition, they also state that the Minister will assess whether or not the business acquired by the SOE will “likely operate on a commercial basis.”¹⁸⁵

The language above suggests that the concern is that state-owned enterprises engage in noncommercial activities. If that is the case, then the important question is why would one subject foreign private enterprises to net benefit assessments. Prime Minister Harper’s comments on the matter are vague. In his official statement, he discussed the net benefit assessment but focused particularly on foreign state owned enterprises only.¹⁸⁶

In particular, he indicated that in the future “the Minister will find the acquisition of control of the Canadian oil-sands business by foreign state-owned enterprises to be of net benefit only in an exceptional circumstance.”¹⁸⁷ This implies that the acquisition by a foreign, private company may be acceptable. Yet, the net benefit assessments apply to both private and public foreign entities. Even if one accepts the concern that foreign SOEs are noncommercial and potentially harmful to the Canadian economy, this does not explain why foreign private entities should be subjected to net benefit assessments. One scholar, Ian Lee, has opined that the Prime Minister is indicating that there is a “two tier system”¹⁸⁸ that scrutinizes foreign SOEs but will be more accepting of private, foreign entities. Lee suggests that, with respect to FDI review scrutiny, the Prime Minister is really stating “between the lines that we are not

184. Canadian SOE Guidelines, *supra* note 15.

185. *Id.* It also states that the assessment will include, with respect to the SOE:

[W]here to export; where to process; the participation of Canadians in its operations in Canada and elsewhere; the impact of the investment on productivity and industrial efficiency in Canada; the support of ongoing innovation, research and development in Canada; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position. *Id.*

186. See Prime Minister Stephen Harper, *Statement of the Prime Minister of Canada on Foreign Investment*, PRIME MINISTER OF CANADA (Dec. 7, 2012), <http://www.pm.gc.ca/eng/news/2012/12/07/statement-prime-minister-canada-foreign-investment> [<http://perma.cc/UN2A-GFDL>] (archived Sept. 23, 2014) (“And, Canadians expect that we shall approve foreign investments that are of net benefit to Canada.”).

187. *Id.*

188. Diana Mehta, *Foreign Investment Doesn’t Need Absolute Clarity: Harper*, TORONTO STAR (Nov. 8, 2013), http://www.thestar.com/business/2013/11/08/foreign_investment_doesnt_need_absolute_clarity_harper.html [<http://perma.cc/AV7U-SDDT>] (archived Sept. 23, 2014) (quoting Ian Lee of Carleton University’s Sprott School of Business).

going to do that to private for-profit companies coming from an OECD [Organization for Economic Cooperation and Development] country.”¹⁸⁹ This suggests that the current net benefit assessment is directed primarily toward foreign SOEs but is drafted broadly to include a range of discretion for the Prime Minister’s office.

An analysis of the Canadian SOE Guidelines reveals that it depends upon a classical, neoliberal perspective. Neoliberalism is a philosophical perspective that views the world as a dichotomy of private (individuals) versus public (government).¹⁹⁰ It posits that individuals transacting in a free market characterized by private property rights ultimately advance collective best interests.¹⁹¹ It also contemplates that the role of government is minimized to the essential role of creating, but not interfering in, markets.¹⁹² Cambridge economist Ha-Joon Chang characterizes free market fundamentalism as a myth and presents the myth as stating: “Markets need to be free. When the government interferes to dictate what market participants can or cannot do, resources cannot flow to their most efficient use.”¹⁹³ He then asserts that there is no such thing as a truly free market—its parameters are always circumscribed by politics.¹⁹⁴

The neoliberal vision of private individuals transacting in a free market (supported to a minimal extent by a public government) assumes a clear demarcation between public and private spheres in the economy. Yet, the fragile construction of this assumption was demonstrated by American Legal Realists in the early twentieth century.¹⁹⁵ Their work challenged the dominant laissez-faire idealism of the time, which held that a private market should be free from the intrusion of government measures such as welfare-based legislation.¹⁹⁶ Morris Cohen astutely observed that what one might view as a private property right was actually a delegated power from

189. *Id.*

190. *Cf.* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

191. *Cf. id.* (“Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”).

192. *See id.*

193. HA-JOON CHANG, 23 THINGS THEY DON’T TELL YOU ABOUT CAPITALISM 1 (2010).

194. *See id.* (“The free market doesn’t exist. Every market has some rules and boundaries that restrict freedom of choice.”).

195. *See* AMERICAN LEGAL REALISM, *supra* note 26, at 99 (“These doctrinal developments were driven or reinforced by a host of loosely related attitudes and assumptions—many of them outgrowths of the ideology of classical liberalism.”).

196. *Cf. id.* (providing a brief overview of the arguments against laissez-faire idealism).

the sovereign (i.e., the government).¹⁹⁷ He was absolutely correct. Property rights derive their power from the fact that individuals can call upon the government to enforce them. In so doing, he had elegantly restated “almost a generation of American and legal thought.”¹⁹⁸

Cohen’s keen insight continues to have application today, ranging from analysis of the subprime mortgage crisis¹⁹⁹ to this Article’s discussion regarding FDI. A FDI involves a foreigner acquiring property rights in the host country. But Cohen’s insight is that property rights are a delegation of sovereign power. Therefore, when a foreigner acquires property rights in the host country, in reality the host sovereign is delegating a modicum of power to that foreigner. The underlying tension inherent in this situation increases if the foreigner also happens to be another sovereign state or one that is controlled by the other sovereign state, such as in the case of foreign SOEs.

Classical understandings of public/private spheres are ambivalent to these power relations because, although the foreign SOE is a government entity in its home jurisdiction, in the host country’s jurisdiction it is not “government.” The foreign SOE simply owns property; it has no power to legislate in the host country. It is merely a “private” entity in the host country. However, when a foreign SOE wields strong economic power and engages in a large acquisition, public/private categorizations do not obscure the very real sense that there is an exchange of power occurring. Backer suggests that, in the past, governments feared that the growth of private power might rival their own.²⁰⁰ Moreover, he anticipates that the new fear is foreign governments projecting their public power through the “usurpation of private power.”²⁰¹

How does the host country constrain the power of the foreign government in this case? One possibility would be to enact laws that

197. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927–28).

198. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960* 165 (1992).

199. See, e.g., Joseph William Singer, *Property Law and the Mortgage Crisis: Libertarian Fantasies and Subprime Realities*, 1 PROP. L. REV. 7, 8 (2011) (“Liberty is not possible without regulation; paradoxically, the liberty we experience in the private sphere is only possible because of the regulation we impose in the public sphere. Indeed, it is fair to say that when we talk about liberty, we’re talking about the benefits of living within a just regulatory structure.”).

200. See Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulations of Sovereign Wealth Funds, State-Owned Enterprises and the Chinese Experience*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 3, 19 (2010).

201. See *id.* (“But, unlike the perceived danger confronting their ancestors, the challenges today do not arise from the usurpation of public power by private enterprises: instead it arises from the usurpation of private power by foreign public actors that reach across borders.”) (footnote omitted).

curtail the power of all private entities. The other approach might be to identify the foreign entity and prohibit investment altogether. However, if the host country wants to continue to welcome foreign investment, then the issue becomes more problematic. How is the exercise of foreign, public power in a domestic, private market curtailed? In the case of foreign SOEs, one might require that the foreign SOE act like other "private actors." This assumes that one can define this type of behavior meaningfully and prescribe it to the foreign SOE, as Backer has observed in his analysis of SWFs.²⁰²

The above approach resonates with an underlying tension. Paradoxically, in order to preserve a neoliberal vision of a free market where individuals conduct business free of meddlesome government intervention, the government is now prescribing how private (foreign) actors ought to behave. Notwithstanding this ideological dilemma, the above approach is the one that is encapsulated within the Canadian SOE Guidelines and is based on two assumptions. The first assumption is that it is possible to identify foreign SOEs, and the second is that it is possible to essentialize "free market" and "commercial behavior." Below, this Article analyzes both of these assumptions and finds them to be problematic.

B. *Struggle #1: Identifying the Foreign State Interest Comprehensively*

Both SOEs and SWFs have raised concerns for host countries. Although SWFs are not addressed in the Canadian SOE Guidelines, from the point of view of the Canadian government, they might still be subject to a net benefit assessment for two reasons. First, under the Investment Canada Act, an SOE is broadly defined to include even an entity that is indirectly influenced by a foreign government.²⁰³ Although SWFs and SOEs are different concepts,²⁰⁴ the definition is arguably broad enough to capture SWFs as well. Second, the net benefit assessment process is not simply restricted to SOEs and thus may potentially apply to SWFs.

Is it possible to identify an SWF? Large SWFs, such as the China Investment Corporation, are very prominent and identification is not an issue. However, it is not simply the existence of SWFs that concerns host countries. It is the perception that these SWFs may exert their power through equity structures, such as voting shares (i.e., their investments), in order to pursue politically motivated

202. See Backer, *Sovereign*, *supra* note 22, at 445–46.

203. Investment Canada Act, R.S.C. 1985, c. 28, § 3 (Can.).

204. See Jongbloed, Sachs & Sauvart, *supra* note 64, at 3–10 (categorizing state-influenced FDI entities as being SWFs and SOEs and briefly explaining their attributes).

objectives. The problem is that there are at least two legal structures that can obscure the exercise of power. First, corporations are legislative creations that have a separate legal identity from their shareholders.²⁰⁵ Since corporations generally have the powers of a natural person to conduct business,²⁰⁶ they may transact in the market as if they were real persons while masking the identity of their shareholders. Second, individuals do not need to transact personally. They may invest indirectly as in the case of hedge funds²⁰⁷ or private equity funds.²⁰⁸

The fusion of these two concepts is manifested in investment structures such as private equity funds (which include hedge funds). The identities of the investors of these funds are shielded when they purchase equity because (a) they do not become the corporation that they purchase, but rather are merely shareholders; and (b) they do not hold the shares themselves but through the hedge or private equity fund.²⁰⁹ Also, under U.S. securities law, these funds are considered private and unregistered pools of capital²¹⁰ and, under the private exemption exception, are not required to disclose their holdings.²¹¹

205. See FRANKLIN A. GEVURTZ, *CORPORATION LAW* 5–8 (2010) (discussing limited liability of corporate shareholders).

206. See, e.g., DEL. CODE ANN. § 121(a) (2013) (allowing the corporation the “powers and privileges” that are “necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.”).

207. See generally DANIEL CAPOCCI, *THE COMPLETE GUIDE TO HEDGE FUNDS AND HEDGE FUND STRATEGIES* 18–23 (2013) (describing hedge funds in the United States and Canada).

208. See Steven E. Hurdle Jr., *A Blow to Public Investing: Reforming the System of Private Equity Fund Disclosures*, 53 UCLA L. REV. 239, 241–50 (2005) (discussing the structure and regulation of private equity funds); see also ALAN R. PALMITER, *SECURITIES REGULATION* 516–17 (5th ed. 2011) (describing private equity funds).

209. See Hurdle, *supra* note 208, at 242–44 (explaining the desire for privacy in private equity investments); see also CAPOCCI, *supra* note 207, at 18–20 (describing hedge or private funds in the U.S. and Canada).

210. See PALMITER, *supra* note 208, at 517 (“Private equity funds are private, unregistered investment pools that typically acquire a 100 percent ownership interest in mature companies that often were once publicly held and are ‘taken private’ by the private equity fund.”).

211. See Hurdle, *supra* note 208, at 245 (explaining how exemptions under the Securities Act of 1933 allow private equity funds to avoid disclosing information to the public or securities regulations authorities). With respect to the two main exemptions discussed, see Investment Company Act of 1940, 15 U.S.C. § 80a-3(c)(1) (2012) (exempting the private fund if there are one hundred investors or less); 15 U.S.C. § 80a-3(c)(7)(A) (exempting the private fund if it is owned exclusively by “qualified purchasers”); 15 U.S.C. § 80a-2(a)(51)(A)(i), (iv) (defining a “qualified purchaser” to include a natural person with more than \$5 million in investments or a person/company who “owns and invests on a discretionary basis” \$25 million or more in investments); see also PALMITER, *supra* note 208, at 517 (“By limiting investment in their funds, private funds are exempted from the definition of ‘investment company,’ thus removing them from the heavy regulatory scheme applicable to mutual funds.”).

Yet, one of the key criticisms directed at SWFs is their purported lack of transparency and, in part, this is one of the key aspects that the Santiago Principles addresses. The lack of transparency with SWFs is evidenced by the difficulty in collecting data on them.²¹² Since private equity and hedge funds have traditionally operated in a similarly opaque manner (i.e., no disclosure),²¹³ this has led to the observation that this represents the application of a protectionist double standard.²¹⁴ For those who are concerned about the potential national security risks that SWFs might pose, this poses an extremely problematic situation. SWFs could invest in private equity, which in turn could make acquisitions that do not trigger any form of foreign investment review.²¹⁵ This is because private equity funds did not have to disclose their holdings in the past. The participation of SWFs in private equity funds is no secret and is even acknowledged in UNCTAD's 2013 Annual Report where it is stated that this makes "public and private distinctions less clear cut."²¹⁶ For those concerned about this risk, recent developments that seek to empower shareholders may have the consequence of correspondingly increasing the power of SWFs equity holdings.²¹⁷

However, under recent amendments to laws governing investment advisors, private equity funds may have to disclose the identity of clients if the regulatory authorities are assessing "potential systemic risk."²¹⁸ It is unclear whether monitoring funds for the activities of SWFs would be considered within the ambit of "systemic risk." This illustrates how "public" (SWFs) can become

212. See Bahgat Gawdat, *The USA's Policy on Sovereign Wealth Funds' Investments*, in *THE POLITICAL ECONOMY OF SOVEREIGN WEALTH FUNDS* 229–30 (Xu Yi-chong & Gawdat Bahgat eds., 2010) (noting, with respect to SWFs, that they "cannot be specifically identified because of data collection limitations and restraints on revealing the identity of reporting persons and investors").

213. See Hurdle, *supra* note 208, at 242–44 (discussing the high importance of privacy of information to private equity funds).

214. See BALDING, *supra* note 177, at 91 ("Support for transparency promotes a discriminatory and protectionist stance to require regulations above and beyond what is required of similar investors.").

215. See ANDERSON, *supra* note 38, at 160 (describing how the Service Employees International Union brought attention to this issue in 2008); see also SERVICE EMPLOYEES INTERNATIONAL UNION, *SOVEREIGN WEALTH FUNDS AND PRIVATE EQUITY: INCREASED ACCESS, DECREASED TRANSPARENCY* (2008), available at <http://www.uni-europa.org/apps/portal.nsf/3100172b0315a124c125717d005dd9bb/c372d96ddb5f04a6c1257551003c2477?FILE/SEIUSovereign%20Wealth%20Funds%20and%20Private%20Equity.pdf> [<http://perma.cc/A836-39HJ>] (archived Oct. 9, 2014).

216. UNCTAD, *supra* note 50, at 13.

217. See George S. Everly III, *Sovereign Wealth Funds and Shareholder Democratization: A New Variable in the CFIUS Balancing Act*, 25 MD. J. INT'L L. 374, 375 (2010) ("Examined alongside CFRUS regulations, this movement towards increased shareholder rights and influence may exacerbate national security concerns in situations where SWFs have gained a significant equity stake in a corporation.").

218. See Investment Advisers Act of 1940, 15 U.S.C. § 80b-10(c) (2012).

“private” (private equity funds/hedge funds) through the use of standard legal structures. More importantly, a universal rule that requires all private equity funds to disclose the identity of their holders seems to be the only way of addressing this problem.

Is it difficult to identify a foreign SOE? It is easy to identify large, powerful SOEs such as CNOOC. However, like the above discussion regarding SWFs, the important point is not simply the formal ownership of the foreign business entity. Instead, the concern is that a foreign nation can project its power and preferences (e.g., pursuing noncommercial objectives) through its SOEs. But focusing on equity structures does not capture the full picture. A foreign SOE that proposes to do business in a host country is a more specific version of a multinational enterprise (MNE). The OECD Guidelines on Multinational Enterprises²¹⁹ do not provide a precise definition of “multinational enterprise” and states that “[t]hey usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.”²²⁰ Thus, the definition transcends formal ownership structures (i.e., equity) and is focused more on the relational activity between various nodes.²²¹

This is important because it appreciates that coordination of economic activity can occur outside of the traditional structure of a corporation. In turn, MNEs can be powerful economic actors that spread their interests across countries in a manner that best suits them.²²² This should not be surprising as the annual revenues of some of the world’s largest corporations exceed the gross domestic product (GDP) of some developed nations (e.g., Walmart exceeding Sweden).²²³ The power wielded by MNEs goes beyond the intricate sets of corporate subsidiaries that they might possess. Recently, it has become more apparent that the complex sets of relationships among various actors involved in the globalized provision of goods and services has given rise to spheres of commercial influence that go

219. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 17 (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> [<http://perma.cc/BG6P-FNC9?type=pdf>] (archived Oct. 1, 2014).

220. *Id.*

221. See PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 6–7 (2d ed. 2007) (highlighting as decisive the ability to coordinate activities “between enterprises in more than one country”).

222. MICHAEL J. TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 441 (3d ed. 2005) (describing the issues of foreign investment and the role of multinational corporations as “closely linked”).

223. D. Hoornweg et al., *The World’s Top 100 Economies*, WORLD BANK, <http://siteresources.worldbank.org/INTUWM/Resources/WorldsTop100Economies.pdf> (last visited Oct. 1, 2014) [<http://perma.cc/Z75E-XZAR>] (archived Sept. 24, 2014).

far beyond equity investments. These diverse economic ecosystems are referred to as global value chains.

Beyond the traditional equity-based direct investment, there is a growing prevalence of global value chains, within which production, trade, and investment all take place. These global value chains reflect a new phase in economic globalization in which multinational corporations are engaging in an increasingly complex array of non-equity activities to build interdependent networks of operations.²²⁴

Accordingly, the Obama administration has recognized that global value chains represent the flow of critical goods to the United States and has developed a strategy to ensure that this flow is secure.²²⁵

The importance of global value chains is reflected in the fact that UNCTAD's 2013 Annual Report is subtitled "Global Value Chains."²²⁶ UNCTAD estimates that trade in goods and services from global value chains is approximately \$20 trillion (sixty percent of global trade) but also notes that this is inflated due to double counting of intermediaries.²²⁷ However, even after accounting for the double counting, the numbers are still impressively high. For example, UNCTAD calculates that the \$19 trillion of 2010 global exports should be reduced by \$5 trillion due to double-counting.²²⁸ Moreover, UNCTAD estimates that approximately eighty percent of global trade is attributable to transnational corporation coordinated global value chains.²²⁹ Even though global value chains are coordinated in structures that transcend the equity structure of the traditional corporation, they nevertheless represent an important projection of power.

TNCs coordinate GVCs through complex webs of supplier relationships and various governance modes, from direct ownership of foreign affiliates to contractual relationships (in non-equity modes of international production, or NEMs), to arm's-length dealings. These governance modes and the resulting power structures in GVCs have a significant bearing on the distribution of economic gains from trade in GVCs and on their long-term development implications.²³⁰

224. JAMES K. JACKSON, CONG. RESEARCH SERV., RL32461, OUTSOURCING AND INSOURCING JOBS IN THE U.S. ECONOMY: EVIDENCE BASED ON FOREIGN INVESTMENT DATA 41 (2013), available at <https://www.fas.org/sgp/crs/misc/RL32461.pdf> [<http://perma.cc/UL29-XAAN>] (archived Sept. 24, 2014).

225. See *id.* at 43.

226. UNCTAD, *supra* note 50.

227. See *id.* at xxi ("GVCs lead to a significant amount of double counting in trade, as intermediaries are counted several times in world exports but should be counted only once as 'value added in trade.'").

228. See *id.*

229. See *id.* at x ("TNC-coordinated GVCs account for some 80 per cent of global trade.").

230. *Id.* at xxii.

For purposes of this Article, these contemporary observations are significant because they draw attention to a blind spot in foreign investment reviews. Even though a commercial entity is not formally controlled by a foreign government or SOE, it may nevertheless be under the influence of one. This would be particularly so if the commercial entity is located in the foreign country and has significant assets or business interests there. For example, during its post-1979 reforms, China has gradually privatized many SOEs. These recently privatized SOEs may nevertheless still have strong relationships with, and be under the influence of, the Chinese government.²³¹

The Investment Canada Act and Canadian SOE Guidelines may potentially capture this situation because the definition of “SOE” is broadly defined to include indirect influence. While this theoretically captures the importance of global value chains, it also results in a definition that is so broad that it becomes difficult to envisage how it would be implemented. The expansive definition of SOE means that a Canadian-based corporation with significant business dealings in China and agreements with the Chinese government could be construed as a foreign SOE. In addition, as more U.S.- and Canada-based companies invest in China (i.e., outward FDI), they will face China’s own foreign investment regime. Like Canada, the Chinese government has been known to approve foreign investment but impose conditions upon the investor (similar to Canadian undertakings or U.S. mitigation agreements).²³² One could certainly consider this as being under the influence of the Chinese government and, thus, falling within the definition of a foreign SOE.

This does not suggest that we ought to dismiss the importance of nonequity modes of influence. Countries like China may exert a powerful influence on companies doing business within its borders. This is not a stretch of the imagination when one considers China’s importance to many North American corporations. For example, it is anticipated that in 2014, based upon sales and number of stores, China will displace Canada as Starbucks’s second largest market and will play a prominent role in its Asia market strategy.²³³ Rather, the

231. See Safarian, *supra* note 146, at 444 (stating that, with respect privatized Chinese SOEs and the Canadian Guidelines, “the guidelines fail to take into account the numerous state-influenced firms, such as those firms recently privatized yet with close ties to government, unless the term ‘indirectly’ is construed very broadly”) (footnote omitted).

232. See, e.g., Paula Gilardoni, Melanie Tan & Bridget Liedig, *With Strings Attached – Lessons from MOFCOM’S Most Recent Merger Decisions* (May 16, 2013), <http://www.lexology.com/library/detail.aspx?g=1a6f5118-676e-4eeb-96e4-a046ef1c5546> [<http://perma.cc/R4B3-875D>] (archived Sept. 14, 2014) (discussing the broad reach of China’s merger control regime).

233. See Vanessa Wong, *Starbucks Gets Ready to Go from Tall to Venti in China*, BLOOMBERG BUSINESSWEEK (Nov. 1, 2013), <http://www.businessweek.com/articles/>

suggestion here is that the collapse of private/public distinctions leads to a legal test that is so broad that it lacks meaning. In a seminal article from 1982, Harvard professor Duncan Kennedy addressed this problem in the context of the blurring of public and private distinctions. He stated:

Success for a legal distinction has two facets. First, it must be possible to make the distinction: people must feel that it is intuitively sensible to divide something between its poles, and that the division will come out pretty much the same way regardless of who is doing it. Second, the distinction must make a difference: a distinction without a difference is a failure even if it is possible for everyone to agree every time on how to make it. Making a difference means that it seems plain that situations should be treated differently depending on which category of the distinction they fall into.²³⁴

In the case of the Canadian SOE Guidelines, it is not clear whether either of the two above criteria is fulfilled. First, the degree of foreign government influence that is required to cause a business to be categorized as an SOE is so vague that it is uncertain whether most people would come to the same result. Second, if the concern is that a business might act in noncommercial ways, does the identity of the business really matter?²³⁵

The Canadian government recently stated that it does not intend to provide any more clarification and that the government must reserve some degree of discretion.²³⁶ But when the meaning of “net benefit” is so unclear and a detailed description of how the government comes to these decisions is not provided, one wonders what the point of having a purported rule is. From the perspective of a skeptical public, it would seem that they are ad hoc decisions based on whimsical politics of the day. Without any further clarification, we are left with a nominal distinction that does not provide much predictive value. As Duncan remarked, “The distinction is dead, but it rules us from the grave.”²³⁷

2013-11-01/starbucks-gets-ready-to-go-from-tall-to-venti-in-china [http://perma.cc/TM9C-5NW8] (archived Sept. 14, 2014).

234. Duncan Kennedy, *The Stages of the Decline of the Public Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982).

235. For similar reasoning with regard to SWFs and hedge funds, see Stiglitz, *supra* note 34, at 30 (“Why should there be differing standards of transparency in SWFs from, say, hedge funds? Why should we feel more comfortable about an SWF that invests through a nontransparent hedge fund than one that invests directly?”).

236. See Mehta, *supra* note 188 (noting the Canadian Prime Minister’s comment that it would be “foolish for the Canadian government to provide absolute clarity” regarding the country’s investment guidelines).

237. Kennedy, *supra* note 234, at 1353.

C. Struggle #2: Defining Commercial Behavior Meaningfully

The requirement that SOEs act in a “commercial” manner and “adhere to free market principles,” as indicated in the Canadian SOE Guidelines, appears to be prompted by the concern that SOEs may act in political or socially motivated ways. Yet, it is not clear how one would define “commercial” or “free market” behavior. If political and socially motivated behaviors are removed, then it appears this is a reference to a desire that the SOE operate with an exclusive view toward profit-maximization. Distinguishing SOEs from other business entities on this basis suggests that “private” market actors do not act in political or socially motivated ways. An examination of contemporary realities reveals that this is not true.

Since SWFs are owned by governments, they may be potentially reviewed on either national security grounds or even attract net benefit review given the expansive definition of SOEs under the Canadian SOE Guidelines. The approach to SWFs is try to guide them toward “private” behavior despite their public ownership nature.²³⁸ For example, the Santiago Principles state that an SWF’s operational management with respect to third parties should be on “economic and financial grounds;”²³⁹ financial information should be disclosed to demonstrate the SWF’s economic and financial orientation;²⁴⁰ and, moreover, the SWF is to behave in a way that “aim[s] to maximize risk-adjusted financial returns . . .”²⁴¹

Thus, despite their affiliation with a government entity, SWFs are expected to mimic the behavior of private actors in free markets—a behavior that is “substantially non-political”²⁴² and with a view to “maximization of financial advantage.”²⁴³ This is supposed to reflect a description of an “idealized private investor.” But this line of thinking is outdated and does not accurately reflect contemporary realities. While it might be argued that many private actors might act in this idealized manner, there are enough notable exceptions to make distinguishing SWFs on political/social behavior grounds suspect.

The Equator Principles represent a voluntary set of principles that promote socially and environmentally responsible investment, particularly regarding project finance in emerging markets. It has seventy-nine current members who span more than thirty-five

238. See Larry Catá Backer, *The Norwegian Sovereign Wealth Fund: Between Private and Public*, 40 GEO. J. INT’L L. 1271, 1272 (2009) [hereinafter Backer, *Norwegian*] (describing the current “formally public/functionally private” model of regulation).

239. SANTIAGO PRINCIPLES, *supra* note 17 (referring to GAPP Principle 14).

240. See *id.* (referring to GAPP Principle 17).

241. *Id.* (referring to GAPP Principle 19).

242. Backer, *Norwegian*, *supra* note 238.

243. *Id.*

countries,²⁴⁴ and include well-known U.S. financial institutions such as Bank of American Corporation, Citigroup Inc., JPMorgan Chase and Co., and Wells Fargo Bank.²⁴⁵ Well-known Canadian financial institutions include Bank of Montreal, Bank of Nova Scotia, Royal Bank of Canada, Canadian Imperial Bank of Commerce, and TD Financial Group.²⁴⁶ Every member commits to upholding the principles that include not only environmental and social assessment/standards but also grievance mechanisms, independent review, monitoring and reporting, and transparency requirements.²⁴⁷ What is particularly interesting is that the membership includes not only the leading financial institutions above, but it also includes government-affiliated entities that promote international trade such as the Export-Import Bank of the Americas and Export Development Canada.²⁴⁸ This suggests that noncommercial, environmental/socially conscious norms can be shared between both private and public entities, with private entities also serving as an important vehicle for the proliferation of these norms.²⁴⁹

In addition, beyond the large financial institutions that have adopted the Equator Principles, there is a significant growing group of influential private investors who advocate socially responsible investing that blends concern for social and environmental issues while also generating a financial return for the investors. One leading nonprofit organization that unifies these types of private investors is the Global Impact Investing Network (GIIN). GIIN's members are expected to have "a demonstrated commitment to, and experience making, investments for social and environmental impact."²⁵⁰ Some of GIIN's members include J.P. Morgan, Credit Suisse, Deutsche Bank, Goldman Sachs Urban Investment Group as well as the World

244. See *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/about-ep/about-ep> [http://perma.cc/F2VN-4MVK] (archived Sept. 12, 2014).

245. See *Members & Reporting*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/members-reporting/members-and-reporting> [http://perma.cc/SM6G-74EB] (archived Sept. 14, 2014).

246. See *id.*

247. See *The Equator Principles June 2013*, EQUATOR PRINCIPLES, at 1, 8–10, http://www.equator-principles.com/resources/equator_principles_III.pdf (last visited Jan. 11, 2014) [http://perma.cc/DLT3-EBYL] (archived Sept. 24, 2014).

248. See *Members & Reporting*, *supra* note 245.

249. Ariel Meyerstein, *Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Equator Principles*, 45 N.Y.U. J. INT'L L. & POL. 487, 577 (2013) ("By providing platforms for the dissemination of the ideas and organizational practices that undergird the sustainability agenda, they help create the social linkages and governance structures among competitor institutions necessary for norm diffusion.").

250. *Membership Criteria*, GLOBAL IMPACT INVESTING NETWORK, http://www.thegiin.org/cgi-bin/iowa/council/member_process/index.html [http://perma.cc/ND5L-Y5ZJ] (archived Sept. 14, 2014).

Bank affiliated International Finance Corporation.²⁵¹ J.P. Morgan conducted a survey of GIIN members in early 2013 that revealed the financial significance of the organization. The expected commitment to impact investing for the year 2013 from respondents was \$9 billion.²⁵²

Similar to the discussion above of investment bodies, corporations are not solely defined in terms of profit maximization by all members of the business community. The growing movement toward corporate social responsibility²⁵³ evidences the contemporary outlook that it is legitimate and accepted that corporations need not pursue solely monetary gain but can also balance noncommercial objectives in their missions. In the landmark Canadian Supreme Court case of *BCE Inc. v. 1976 Debenture Holders*, the Court held that directors owed a duty to advance the best interests of the corporation but that the best interest of the corporation was not necessarily synonymous with shareholders only.²⁵⁴ The acknowledgement that directors may have a duty to consider broader stakeholder interests implies that profit maximization is no longer an exclusive objective of the corporation. In the United States, the general theme of the *BCE* case had already been codified into law by many states. These states enacted “constituency statutes” that specifically permit directors of corporations to consider broader stakeholder interests beyond those of shareholders.²⁵⁵ In the United Kingdom, the 2006 Company Law not only makes it permissible for directors to consider nonshareholder interests but actually requires

251. See *GIIN Members*, GLOBAL IMPACT INVESTING NETWORK, <http://www.thegiin.org/cgi-bin/iowa/network/members/index.html> [<http://perma.cc/Q2QT-PV3H>] (archived Sept. 14, 2014).

252. See J.P. Morgan, *Survey Shows Market Growth in Impact Investments and Satisfaction Among Investors* (Jan. 7, 2013), https://www.jpmorgan.com/cm/cs?pagename=JPM_redesign/JPM_Content_C/Generic_Detail_Page_Template&cid=1320509594546&c=JPM_Content_C [<http://perma.cc/5DDW-7XNW>] (archived Sept. 14, 2014) (reporting a USD 1 billion increase from 2012).

253. Andrew Crane et al., *The Corporate Social Responsibility Agenda*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 3, 3 (Andrew Crane et al. eds., 2008) (referring to CSR’s “phenomenal rise to prominence in the 1990s and 2000s”).

254. See *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, 565 (Can.). See generally Ed Waitzer & Johnny Jaswal, *Peoples, BCE, and the Good Corporate “Citizen”*, 47 *OSGOODE HALL L.J.* 439 (2009) (discussing the potential impact on directors of the *BCE* case’s articulation of broad director duties).

255. See generally Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 *GEO. WASH. L. REV.* 14 (1992) (discussing the interpretation of constituency statutes); see also Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 *LOY. L.A. L. REV.* 765, 767 (2009) (discussing the application of constituency statutes to corporate decision making).

that they consider interests such as employees and the broader community.²⁵⁶

The legitimacy of blending entrepreneurial profit motive with social mission has received statutory recognition in the United States, Canada, and the United Kingdom. There is a growing movement toward social enterprise globally.²⁵⁷ Social entrepreneurs are concerned with using traditional entrepreneurship techniques but are primarily driven to advance social causes such as protecting the environment, creating jobs, and providing health care.²⁵⁸ In the United States, there are a growing number of states that have enacted “benefit corporation” legislation that requires that the corporation pursue general benefits for the community²⁵⁹ and, optionally, specific benefits of its own choosing.²⁶⁰ Directors of these corporations are specifically required to consider the pursuit of these benefits in their managerial decision-making process.²⁶¹ The benefit corporation is also required to provide an annual report describing how it has attempted to advance its declared social mission.²⁶² Benefit corporations that wish to further demonstrate their commitment to social mission advancement can apply for third-party certification by organizations such as B-Lab.²⁶³ B-Lab is a nonprofit

256. See Companies Act, c. 46, § 172 (2006) (U.K.).

257. See Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 714, 642–644 (2013) (noting significant growth in the social enterprise sector despite the global recession); see also Jacques Defourny & Marthe Nyssens, *Conceptions of Social Enterprise and Social Entrepreneurship in Europe and the United States: Convergences and Divergences*, 1 J. SOC. ENTREPRENEURSHIP 32, 35–37 (2010) (explaining how the Nordic, U.K., and Southern countries have moved toward social enterprise); Jacques Defourny & Shin-Yang Kim, *Emerging Models of Social Enterprise in Eastern Asia: A Cross-Country Analysis*, 7 SOC. ENTERPRISE J. 86, 87 (2011) (analyzing “historical and current socio-economic contexts . . . as well as the key factors and driving forces . . . which led to the emergence of social enterprise” in China, Hong Kong, Japan, South Korea and Taiwan).

258. Cf. Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 (2010) (discussing how a social enterprise “measures its success both in terms of its financial performance . . . and its success in advancing a social mission or addressing social concerns”) (footnote omitted).

259. See Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 291–92 (2013).

260. See *id.* at 91.

261. See *id.* at 293 (“If the independent standards are the heart of the BC, then the duties of the directors and officers breath life into the entity, as they impose an obligation to consider the benefit purpose in decision making.”).

262. See *id.* at 292.

263. See *id.* at 290–91.

organization that has a standard for social mission advancement and will certify corporations that comply with that standard.²⁶⁴

Since 2005, the United Kingdom has offered a specialized corporate entity known as the “community interest company.”²⁶⁵ Community interest companies have to generate benefits for the broader community and comply with their stated social mission.²⁶⁶ Community interest companies provide assurance to the general public that they remain committed to their social objectives because the legislation prohibits any transfer of assets outside of the company unless it is for fair value or to another social mission driven entity (e.g., a charity).²⁶⁷ The legislation also places a cap on dividends that can be declared to shareholders thus further preserving funds within the company so as to advance social objectives.²⁶⁸ In 2013, the Canadian provinces of British Columbia²⁶⁹ and Nova Scotia²⁷⁰ each enacted legislation that created organizational forms resembling the UK community interest company.

It should be noted that the U.S., UK, and Canadian social enterprise legislation discussed above are distinct from other organizations such as charities or nonprofit organizations. Although charities and nonprofits are also social mission driven, they prohibit distribution of profits to members or owners. In contrast, benefit corporations and community interest companies are permitted to

264. See *id.* (discussing BLab and the certification process); see also B-Lab, *How to Become a B Corp*, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> [<http://perma.cc/6AZL-V7BA>] (archived Sept. 13, 2014).

265. Companies (Audit, Investigations and Community Enterprise) Act, c. 27, § 26 (2004) (U.K.) (providing for the creation of community interest companies).

266. See *id.* § 35 (prescribing a “community interest test” for the social mission of the company).

267. See *id.* § 30(1) (restricting distribution of assets); see also Office of the Regulator of Community Interest Companies, *Office of the Regulator of Community Interest Companies: Information and Guidance Notes—Chapter 6: The Asset Lock*, DEP’T FOR BUS. & INNOVATION SKILLS (Mar. 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211746/13-709-community-interest-companies-guidance-chapter-6-the-asset-lock.pdf (describing the application of asset locks to community interest companies).

268. See Companies (Audit, Investigations and Community Enterprise) Act, c. 27, § 30(3) (2004) (U.K.) (allowing limitations on payments of interest); see also Office of the Regulator of Community Interest Companies, *Changes to the Dividend and Interest Caps for Community Interest Companies: Response to the CIC consultation on the dividend and interest caps*, DEP’T FOR BUS. & INNOVATION SKILLS 6 (Dec. 10, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264664/CIC-13-1333-community-interest-companies-response-on-the-cic-consultation.pdf (summarizing the restrictions placed on the assets of community interest companies).

269. See Business Corporations Act, S.B.C. 2002, c. 57, §§ 51.91–51.99 (Can. B.C.) (providing for the creation and regulation of “community contribution companies”).

270. See generally An Act Respecting Community Interest Companies, S.N.S. 2012, c. 38, § 1 (S. Nu.) (authorizing the Minister to make “regulations respecting the designation and operation of community interest companies”).

distribute profits to their members or owners. They represent a blending of social mission with profit-generating behavior.

The above discussion examples—(1) commitment of leading financial institutions to the Equator Principles, (2) the growth of social impact investing, (3) the recognition and legitimization of nonprofit maximizing behavior in traditional corporations, and (4) the legislation of entities such as benefit corporations and community interest companies—are evidence of a single important point. SOEs and SWFs are not the only entities that seek to advance noncommercial objectives within an entrepreneurial framework. Thus, to single out SOEs and SWFs on the basis of noncommercial behavior is an insufficient distinction.

Earlier, this Article discussed the assertion that SOEs and SWFs should be treated differently because they can act politically. Politically motivated actions by state-owned entities should hardly be surprising since governments have actively and transparently pursued the interests of their home countries on the international stage.²⁷¹ That SOEs and SWFs can and will act politically is undoubtedly true. For example, China's outward FDI is intimately tied to the Chinese government's broader vision of China's direction and geopolitical position in the world. Its current push for FDI was initiated in the early 2000s as part of its "Going Global" program, which sought to encourage outward FDI.²⁷² The motivations for the program are diverse and include not only the acquisition of natural resources for China's immense population but also the increases in efficiency that Chinese MNEs enjoyed over their solely domestic counterparts.²⁷³ This suggests that a one-dimensional view of state-controlled entities is inaccurate. While it is true they pursue political objectives, it is also true that they can be commercially oriented as well—the two modes of behavior are not necessarily mutually exclusive.²⁷⁴

To suggest that SOEs and SWFs can be distinguished because they act politically implies that private actors are apolitical. But the existence of powerful lobbying interests, particularly those for

271. See BALDING, *supra* note 177, at 90 (“[G]overnments have always lobbied or coerced on behalf of their own companies and investments both domestically and internationally.”).

272. See XIAOFEI LI, CHINA'S OUTWARD FOREIGN INVESTMENT: A POLITICAL PERSPECTIVE 12–13 (2010).

273. *Id.* (“To sum up, outward FDI can help companies realize various strategic objectives, such as market expansion, increase in efficiency and acquisition of natural resources and strategic assets.”).

274. See Michael Keller & Laura Vanoli, *Chinese SWFs: At the Crossroad Between the Visible and the Invisible Hand*, in CHINESE INTERNATIONAL INVESTMENTS 97–101 (Ilán Alon, Marc Fetscherin & Philippe Gugler eds., 2012) (explaining the private and government strategies behind Chinese SWFs and the concerns that each present).

powerful industries such as the financial sector in the United States, indicates that private actors do act politically. Moreover, they have gone to battle for that right and emerged victorious in the United States. The power of corporations to politically voice their interests recently won an important victory in the case of *Citizens United v. FEC*²⁷⁵ where the U.S. Supreme Court struck down federal legislation that prohibited corporations from directly spending money to advance political views²⁷⁶—leading to the worry that this could have a negative impact on the U.S. electoral process. From the perspective of this Article, this leads to at least two important observations. First, the activities of powerful business lobby groups erode the legitimacy of the distinction that SWFs and SOEs should be treated differently due to their political activities. If political activities should play a role in foreign investment review, and perhaps some might argue that it should, then one must also account for the political activities of powerful MNEs. Large non-state-owned MNEs have tremendous monetary power—some with annual revenues exceeding the GDP of some countries²⁷⁷—and can deploy that fiscal strength through the lobbying process, particularly in the United States. Second, it is a reminder that powerful business lobby groups can potentially seek to influence the outcomes of the foreign review process itself.

In summary, the Canadian SOE Guidelines are based upon two incomplete assumptions. First, they do not adequately identify the full range of foreign power that they seek to address. Although large SWFs are identifiable, the globalized and anonymous movement of capital in equity structures, such as the corporation and private equity funds, means there is a wide range of foreign investment that remains unaccounted for under the present guidelines. Second, although large SOEs such as CNOOC are identifiable, nonequity modes of foreign influence dominate the global trade landscape to an astonishing degree through global value chains as discussed in the UNCTAD Annual Report 2013. Although Investment Canada Act and Canadian SOE Guidelines theoretically account for these nonequity modes of influence through the broad definition of what constitutes a SOE, the definition is so vague that it hardly provides any

275. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

276. See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 643 (2011) (noting the overwhelmingly negative response by academics to the *Citizens United* ruling).

277. See Hoornweg et al., *supra* note 223 (listing the world’s top 100 economies, including countries, cities, and companies, in descending order according to GDP/Revenues).

meaningful guidance. Given the opacity of the net benefit review process, this results in limitless discretion for the government without any substantive metrics by which the public might hold the government accountable for its decision.

Second, the concern that SOEs and SWFs should be distinguished from other investments because they may pursue noncommercial objectives is also incoherent. Some of the largest and most influential financial institutions have committed themselves to incorporating environmental and socially responsible objectives through the Equator Principles, thereby detracting from singular profit maximization. Large groups of private investors seek to advance socially responsible investing through influential networks such as GIIN. The movement toward corporate social responsibility indicates that pursuit of noncommercial objectives is not only legitimate but actively promoted. This view received support recently from the Canadian Supreme Court and is also evident in the number of U.S. states that have enacted constituency statutes. Moreover, the rise of social entrepreneurship demonstrates the social legitimacy of business enterprises pursuing noncommercial objectives as a *primary* goal. This has received legislative endorsement in the United States, United Kingdom, and Canada through the enactment of corporate structures such as benefit corporations and community interest companies that specifically promote social entrepreneurship. The suggestion that SOEs and SWFs should be singled out for their pursuit of political objectives is flawed because private corporations also act politically through lobby groups. Particularly in the United States, corporate-financed lobby groups can directly influence politicians and may potentially derail and capture the foreign investment review process.

Despite its criticism of the Canadian SOE Guidelines, the foregoing analysis suggests increased vigilance on the national security front. The current foreign investment review process only captures equity modes of influence such as when an identifiable entity like an SOE seeks to acquire a domestic enterprise. It does not account for the highly influential nonequity modes of investment that occur through global value chains. This blind spot leaves both the United States and Canada at risk that they may not sufficiently control access to critical goods (a type I Threat under Moran's categorical framework).²⁷⁸ The Obama Administration's strategy for securing critical resources in the global value chain is a good example of proactive thinking that is not hampered by old distinctions.

278. MORAN, *supra* note 176, at 5–6 (defining “Threat I” to consist of “proposed acquisitions that would make the home country dependent upon a foreign-controlled that might delay, deny, or place conditions upon the provisions of goods or services crucial to the functioning of the home economy.”).

V. THE ROAD AHEAD: A PRELIMINARY PROPOSITION OF HARM-BASED REGULATION

In this part, it is argued that the Canadian net benefit assessment should be replaced by a framework that (1) focuses on the risk of harm to Canadians, (2) places primary reliance on assessment by Competition Bureau experts and toward drafting laws of general application, and (3) promotes greater transparency and accountability through the dissemination of decision reasons. This part draws upon recommendations made by Canada's own review process, which were never adopted by the Canadian government, and draws comparisons to the United States. It advances its claim for an approach that focuses on harm, regardless of the identity of investor, by drawing upon insights from the doctrine of *damnum absque injuria*. Using the issue of subsidies as an example, it reinforces its claim that distinctions between private/public and foreign/domestic are becoming increasingly difficult to sustain, thereby justifying a regulatory regime that focuses on aggregations of power (via monetary thresholds) and harm.

A. Replace "Net Benefit" with a Universal Regulation of Harm Approach

In 2007, the Competition Policy Review Panel was created by the Ministers of Finance and Industry and its mandate was to "examine and report on the laws and policies that will underpin Canada's continued economic growth and development."²⁷⁹ In its review, the panel analyzed the Investment Canada Act and made several recommendations. First, the panel agreed that the inclusion of a distinct "national security" review was important and opined that the CFIUS review process could serve as a model for Canada.²⁸⁰ Second, the panel recommended that the "net benefit" test should be changed to a standard that evaluates whether the investment is "contrary to Canada's national interest."²⁸¹ Furthermore, the panel also stated that the burden of proof should be shifted to the government and that

279. COMPETITION POLICY REVIEW PANEL - GROUPE D'ÉTUDE SUR LES POLITIQUES EN MATIÈRE DE CONCURRENCE, *COMPETE TO WIN—FINAL REPORT* v. (2008), available at [https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/\\$FILE/Compete_to_Win.pdf](https://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf) [<http://perma.cc/9UZE-V92T>] (archived Oct. 1, 2014).

280. See *id.* at 30–31 ("We respectfully suggest that the scope of this review [national security] requirement should be aligned with that of the investment review process used by the Committee on Foreign Investment in the United States.").

281. *Id.* at 32.

this would be more consistent with “Canada’s basic policy premise that FDI generates positive benefits for the country.”²⁸²

The panel noted that there were criticisms about the administration of the Investment Canada Act and recommended that the government should explain its reasons for blocking any transaction in a publicly available report.²⁸³ The panel concluded that, “[t]he current inability of ministers to articulate the reasons for allowing or disallowing a foreign investment proposal does not meet contemporary standards for transparency.”²⁸⁴ It is important to also remember that this recommendation was not with respect to national security, which is a separate ground for review. In a national security review, the implication of state secrets would justify a lower level of transparency. The panel did however welcome the publication of the Canadian SOE Guidelines as a step toward transparency.²⁸⁵

With respect to the recommendations above, the Canadian government implemented the separate national security review, but it lacks many of the distinguishing features of the CFIUS review process, such as an enumeration of relevant factors to be considered and a reporting process. While the Canadian government did enact the recommendation that the government publish a public annual report on the administration of the Investment Canada Act,²⁸⁶ as noted earlier, the timely production of these annual reports for public viewing has, to date, been lagging.²⁸⁷ The other two recommendations were not followed. Canada has not substituted its net benefit assessment with a “contrary to the national interest” test, nor has it shifted the burden of proof to the government. The lack of transparency, which caused the panel concern, persists as there is no requirement for the Canadian government to provide any public reasons for a blocked transaction.

The panel’s recommendation that Canada focus on whether the transaction is “contrary to Canada’s national interest” is a step in the right direction because it promotes transparency and accountability. By placing the onus on the government to show that an investment is contrary to the national interest, it forces the government to not only articulate its reasoning but also to specifically address the harms

282. *Id.* The panel also understood that this would tend to relax the restrictions on inward FDI and acknowledged “that an investment that would not have been able to meet the former net benefit test would be able to proceed without intervention from the minister, unless it was a case where the minister’s concern with regard to the factors required to be considered under the ICA rose to the level of the national interest.” *Id.*

283. *See id.* at 33.

284. *Id.*

285. *See id.* at 31 (expressing the panel’s belief that the new guidelines “will improve transparency in the administration of the ICA”).

286. *Id.* at 33 (outlining recommendations for the annual report).

287. *See supra* note 120 and accompanying text.

contemplated.²⁸⁸ In the United States, even under consideration of national security, which typically requires elevated secrecy, the legislation at least lists the potential factors the President should consider.

The U.S. approach to national security can also provide further guidance. The President's decision to block a transaction must be based on a finding by the President that there exists a credible threat to national security.²⁸⁹ However, in addition to that, the President must also find that *no other provisions of law* "provide adequate and appropriate authority for the President to protect the national security in the matter before the President."²⁹⁰ Correspondingly, a Canadian foreign investment review articulating specific harms should publicly explain why those harms cannot be addressed by existing laws of general application. This minimizes the exercise of executive discretion when rules already exist that have been scrutinized by Parliament and enacted democratically. To the extent that existing laws do not address the potential harm, there can be public policy debate as to whether that harm is better addressed through enactment of laws of general application rather than isolating ad hoc transactions for specific undertakings.

It is also important to note that the term "harm" carries with it the potential for over-inclusion of every potential negative societal outcome. Even when one is acting simply to maximize one's own interests, without necessarily any intended malevolence to others, there is still the possibility that one causes harm to others. And, there are circumstances where the legal system will not provide any compensation for the victim of that harm. This is summarized in the classic legal doctrine of *damnum absque injuria*.²⁹¹ Moreover, in the realm of economic competition, not only does uncompensated harm exist, but also it is actually encouraged.

Consider the problem of economic competition . . . this is an example of a permissive law that allows the infliction of harm The market place is predicated on the systematic infliction of harm by some actors on others. Inefficient businesses are driven out of the marketplace by their competitors. Workers are fired to make way for machinery. Companies relocate, moving jobs along with them. Families are scattered and uncertainty abounds. When one considers the reality of a market system, it is evident that the legal system allows a great deal

288. See Hunter & Hutton, *supra* note 148, at 2 (restating the proposed amendments as a "net harm" test).

289. See 50 U.S.C. app. § 2170(d)(1)-(d)(4)(A).

290. *Id.* § 2170(d)(4).

291. See Singer, *supra* note 35 (discussing the concept of *damnum absque injuria*).

more *damnum absque injuria* than [liberal legal theorists such as] Bentham or Mill would have us believe.²⁹²

Therefore, an act that causes harm is not, in and of itself, sufficient reason to prohibit it. The real question is whether society will allow the harmful act to persist. Whether the harmful act is permitted will depend closely on the advantages that society feels will accrue from those acts. To what extent should economic competition be allowed to inflict societal harm? The answer to this difficult question is found scattered throughout legislation. For example, minimum wage laws protect workers from economic exploitation. The more comprehensive treatment of permissible economic competition is found primarily in competition laws, such as the Competition Act in Canada,²⁹³ and through various antitrust statutes in the United States.²⁹⁴

This is relevant because an assessment of any foreign investment is likely to come to a determination that the transaction can result in some form of harm. However, whether it is “contrary to the national interest” will require a more detailed assessment of whether that harm is acceptable. This suggests that competition law might provide the basis of an analytical approach to this issue given its experience in delimiting the acceptable parameters of economic competition. The next section explores this possibility and grounds its analysis in the issue of government subsidies.

B. *Regulating Risk of Harm: Subsidies and Competition Law*

Government subsidies are a controversial aspect of both international trade and foreign investment. Generally speaking, according to the WTO, subsidies refer to a government body providing a financial contribution that confers a benefit.²⁹⁵ Subsidies are considered “specific” if they target a particular company, sector, or region.²⁹⁶ Assume Country A and Country B are both WTO members. Also assume Country A subsidizes the manufacture of some of its exports to Country B. If Country A’s subsidized exports are causing material injury to Country B’s domestic industry, then under WTO

292. *Id.* at 1013.

293. Competition Act, R.S.C., 1985, c. C-34 (Can.).

294. See CHRISTOPHER L. SAGERS, ANTITRUST 3 (2011) (attributing Antitrust law to “three short provisions from two federal statutes: Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1–2, and § 7 of the Clayton Act, 15 U.S.C. § 18.”).

295. See *Subsidies and Countervailing Measures: Overview*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Oct. 1, 2014) [<http://perma.cc/J7C3-9KK4>] (archived Sept. 14, 2014) [hereinafter WTO] (providing the elements of the term “subsidy”).

296. See *id.* (stipulating that “[t]here are four types of ‘specificity’ within the meaning of the SCM Agreement”).

rules, Country B may impose a tax or tariff on Country A's goods.²⁹⁷ These taxes or tariffs are known as "countervailing duties."²⁹⁸ The rationale for countervailing duties is that subsidies distort competition and are unfair;²⁹⁹ in essence, domestic manufacturers or producers in the import country have to compete against exporters who enjoy government support. The winner in the market should be the producer who independently makes the best product, not the one who has the most generous government.

However, an MNE located abroad does have a possible choice. If an MNE wants to sell its products in Canada but does not want to pay tariffs, it has the choice of "jumping the tariff barrier"³⁰⁰ by attempting to establish a production facility in Canada.³⁰¹ This could involve an FDI transaction (e.g., taking over a Canadian company with production facilities) but would not be subject to any review if it did not raise national security concerns or reach the applicable monetary threshold so as to trigger a net benefit review. This does not necessarily mean establishing a local production facility will be cheaper than having exported the goods from abroad and paying custom tariffs. Setting up a local production facility can be an expensive capital investment including financing, paying taxes and license fees in Canada, and paying employees higher wages due to stricter minimum wage laws.

Using the CNOOC acquisition of Nexen as an example, it is evident that subsidies can become an issue in an FDI transaction. China and its SOEs have been the subject of much criticism because China has a long track record of providing heavy subsidies to its SOEs,³⁰² thereby insulating them from the discipline of free market competition. With respect to a FDI transaction, two issues arise regarding subsidies. First, SOEs like CNOOC might benefit from Chinese government subsidies to fund the acquisition in the foreign

297. See TREBILCOCK, HOWSE & ELIASON, *supra* note 222, at 276–86 (providing a general explanation of how subsidies are treated under the World Trade Organization); cf. WTO, *supra* note 295 ("A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury.").

298. FOLSOM ET AL., *supra* note 30, at 448.

299. See *id.* at 447–48 ("Subsidies come in many forms, including, among others, tax reductions or rebates; tax credits, loan guarantees, subsidized financing, equity infusions; and outright grants In theory, a countervailing duty offsets exactly the unfair subsidy").

300. MUCHLINSKI, *supra* note 221, at 39.

301. See *id.* ("The foreign firm then has a choice between jumping the tariff barrier and setting up local production, whether through a licensee or a production subsidiary, or not investing at all.").

302. See, e.g., *Perverse Advantage*, ECONOMIST (Apr. 27, 2013), <http://www.economist.com/news/finance-and-economics/21576680-new-book-lays-out-scale-chinas-industrial-subsidies-perverse-advantage> [<http://perma.cc/P24C-BBU6>] (archived Sept. 14, 2014) (discussing Chinese subsidies).

country. In CNOOC's unsuccessful attempt to acquire Unocal in 2005, the planned acquisition was substantially dependent on Chinese government subsidization.³⁰³ Given the large sums of money available to the Chinese government, this could lead to an inflated price for the acquisition. If this were to happen in Canada, the domestic companies bidding for the acquisition would be unhappy, but it is not clear why this would be harmful from a Canadian perspective. Yuan Woo, CEO of the Asia Pacific Foundation of Canada states:

If CNOOC was a Canadian state-owned company, I would be unhappy about my tax dollars subsidizing their perhaps too-rich offer to buy Nexen. Chinese citizens may well be upset about the deal, but that is for the Chinese government to worry about. If CNOOC is indeed paying too much for Nexen, hooray for Nexen shareholders.³⁰⁴

The second way subsidization arises as an issue in FDI involving foreign SOEs has to do with fair competition. Since SOEs pursue noncommercial goals and enjoy financial support from their home government, they have the luxury of being able to survive without necessarily being as efficient as private enterprises. Domestic Canadian enterprises that do not enjoy support from the Canadian government and have to compete against the foreign SOEs are at a disadvantage. What if the foreign SOE continues to produce cheaper goods, below cost, due to subsidization by the foreign government? The domestic Canadian producers might not be able to compete and will be driven out of business. However, that is not necessarily an issue unique to FDI or SOEs. Abuse of dominant position and anticompetitive pricing practices can be reviewed under Canadian competition law³⁰⁵ and can be addressed under those rules. On the other hand, if the foreign SOE continues to exist due to subsidization, without necessarily seeking to be anticompetitive, then the Competition Act may not necessarily apply because it is not "aimed at preventing subsidies and artificially low prices."³⁰⁶

303. See Charlie Zhu & Umesh Desai, *China's CNOOC May Tap Bond, Loan Markets for Nexen Bid*, GLOBE & MAIL (July 27, 2012, 6:23 AM), <http://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/chinas-cnoc-may-tap-bond-loan-markets-for-nexen-bid/article4443823/> [<http://perma.cc/N7YS-AVNE>] (archived Sept. 14, 2014) (noting that CNOOC's heavy reliance on government subsidies drew substantial criticism from U.S. politicians).

304. Yuen Pau Woo, *CNOOC-Nexen: Does State Ownership Matter?*, ASIA PACIFIC FOUND. OF CAN., <http://www.asiapacific.ca/editorials/presidents-view/37763> [<http://perma.cc/6BLF-EUE5>] (archived Sept. 14, 2014).

305. See Competition Act, R.S.C. 1985, c. C-34, § 78(1)(i) (Can.) (stipulating that "selling articles at a price lower than acquisition cost for the purpose of disciplining or eliminating a competitor" is considered an anticompetitive act).

306. Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *"State-Owned Enterprises: Trade Effects and Policy Implications,"* OECD Trade Policy

This scenario raises an important question that goes back to the *damnum absque injuria* discussion earlier. If a foreign government wants to continue to fund its offshore SOE, despite the fact that it is losing money, does the fact that it might potentially cause harm to domestic competitors mean such actions should be prohibited? Not all harms are necessarily prohibited. While the domestic producers might be harmed, the foreign SOE continues to pay taxes, employ local residents, and perhaps provide consumers with cheaper goods and services. In other words, there is not enough information at first glance to condemn the practice simply because it harms some segments of the population, particularly when it benefits others.

In fact, in the Nexen acquisition, the Canadian government insisted that CNOOC undertake to maintain levels of Canadian employment at Nexen. But the Canadian SOE Guidelines also emphasize that the Canadian government wants foreign SOEs to operate in a commercial manner. What if the profit-maximizing, commercial analysis requires layoff of workers? That would bring the Canadian SOE Guidelines into conflict with the specific undertakings. In fact, that undertaking has come back to “haunt CNOOC.”³⁰⁷ CNOOC’s return on Nexen assets is only 3.5 percent compared to its overall average of 11 percent, and it was recently reported that CNOOC is planning to lay-off workers and reduce its operational expenses despite its pledge to maintain Canadian jobs.³⁰⁸ If CNOOC receives subsidies to maintain its operations and honor its commitments to Canada, would those subsidies be regarded as bad for Canada? Conversely, if Nexen’s decision to lay-off workers was based on sound long-term, commercial sustainability planning, is that not exactly the type of planning the Canadian government called for? This latest controversy crystallizes, in concrete terms, the contradiction in the Canadian position.

Even if we assume that foreign subsidies distort the Canadian market and ought to be dissuaded, why should that analysis apply only to foreign enterprises? If it could be shown that foreign subsidies benefit domestic Canadian enterprises as well, then the approach

Papers, No. 147, at 7 (2013), <http://dx.doi.org/10.1787/5k4869ckqk7l-en> [<http://perma.cc/PJS2-ATEB>] (archived Sept. 14, 2014).

307. Nathan Vanderklippe, *Nexen Deal Comes Back to Haunt CNOOC*, GLOBE & MAIL (Dec. 3, 2013, 7:19 PM), <http://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/nexen-acquisition-hurting-cnoocs-performance/article15742860/> [<http://perma.cc/7XGN-BHRJ>] (archived Sept. 14, 2014).

308. See *id.*; see also Claudia Cattaneo & Jeff Lewis, *Nexen Letting Staff Go, Slashing Costs Despite CNOOC's Pledges to Ottawa to Win Takeover Approval: Sources*, FIN. POST (June 27, 2014, 6:00 AM), http://business.financialpost.com/2014/06/27/nexen-cutting-jobs-slashing-costs-despite-cnoocs-pledges-to-ottawa-to-win-takeover-approval-sources/?_lsa=6f1b-39a5 [<http://perma.cc/A4T6-TFYF>] (archived Sept. 14, 2014) (noting that CNOOC’s “reshaping” of Nexen “raises questions about CNOOC’s commitment to conditions imposed by the federal government in exchange for approval of the controversial deal”).

should be to scrutinize all enterprises, foreign and domestic, for this practice. It would not just be restricted to foreign enterprises in a foreign investment review.

An example can illustrate how foreign government subsidies can benefit a domestic Canadian enterprise. This example involves international trade of goods. In 2005, the Canadian Corn Producers made a complaint to the Canadian International Trade Tribunal that their competitors, U.S. corn growers, were being subsidized by the U.S. government.³⁰⁹ The tribunal ruled in favor of the U.S. corn growers because the Canadian Corn Producers could not prove that they had suffered any material injury. The Canadian Corn Producers were undoubtedly unhappy with this ruling. What is fascinating is who had joined forces with the U.S. Trade Representative to oppose the Canadian Corn Producers complaint. *The complaint was opposed by many prominent Canadian businesses in the food processing industry.*³¹⁰ The Canadian food processing industry used the lower-priced U.S. corn as inputs into their own products and thereby directly benefited from the U.S. subsidies.³¹¹ Clearly, domestic businesses can benefit from foreign subsidies targeted to foreign businesses.

Although the above is an international trade case, its logic easily applies in an FDI case. Assume that a Chinese SOE established a business producing widgets in Canada. Those widgets are used by domestic Canadian firms as inputs into their own products. If the Chinese SOE is subsidized by the Chinese government (e.g., frequently receives cash infusions and low interest loans), it might be able to produce cheaper widgets. Canadian widget manufacturers would be upset, but the Canadian firms buying widgets as inputs would be delighted. If one depends solely on a classic public/private divide as an organizing paradigm, it might not be so clear that a private/domestic enterprise could benefit from a foreign government's subsidy to its own SOE. What matters is not the characterization of public or private versus foreign or domestic. What matters is the

309. See Canadian International Trade Tribunal, *Dumping and Subsidizing Order*, Preliminary Injury Inquiry, No. PI-2005-001, Grain Corn (Nov. 2, 2005), http://www.citt.gc.ca/en/dumping/preinq/determin/archive_pi2f001_e [<http://perma.cc/9BW5-JXBU>] (archived Oct. 1, 2014).

310. See *id.* The twenty-three parties opposing the application included many Canadian associations, such as the Canadian Pork Council, Animal Nutrition Association of Canada, Canadian Cattlemen's Association, Food Processors of Canada, Brewers of Canada, Maple Leaf Foods Inc., and Canadian Snack Food Association. *Id.*

311. See Grain Corn: Canadian International Trade Tribunal Inquiry No. NQ-2005-001 (Apr. 18, 2006), <http://www.fasken.com/canadian-international-trade-tribunal-inquiry-no-nq-2005-001/> [<http://perma.cc/9RjF-JUYL>] (archived Sept. 14, 2014) (quoting Canadian lawyers for some of the parties opposing the application: "If the dumping and countervailing duties had become permanent, it is likely that a number of Canadian corn processors would have had to close down or move their operations to the US.").

reconstituted economic and power relationships that the old distinctions are no longer able to fully capture.

It is important to note that what constitutes a government subsidy can go beyond a direct infusion of cash. It can include financing assistance (e.g., guarantees) and preferential tax treatment (e.g., tax credit, deferral advantages, and lower tax rates).³¹² But it does not end there. What constitutes a subsidy is often framed as an unfair advantage that is provided by the foreign government to its own firms in its country.³¹³ The problem with this is that virtually any government action can potentially confer a benefit on a firm. For example, this can include government building a road that particularly helps a firm or investing in infrastructure or providing social benefits that a foreign government does not provide to its people.³¹⁴ The amorphous nature of an allegation of an unfair subsidization has “no natural limits to it.”³¹⁵

The concept of subsidies has been used to advance claims relating to perceived lower standards in other countries. Weak labor and environmental laws have been framed as hidden forms of subsidies to industries in those nations with the weaker laws.³¹⁶ This raises an interesting scenario relating to MNEs and global value chains. Imagine an American corporation that is a leading producer of electronics but offshores its labor to a country with weak employment law standards (e.g., low or non-existent minimum wage). It is arguable that this American corporation is now being subsidized by the weaker standards in that country, all to the detriment of American factory workers who could have had those jobs. Is this good or bad? Leaving aside the significant concern about exploitation of workers in another country, from an economics perspective it would depend, at least in part, on whether the gains to the American corporation were sufficiently distributed in the American economy so as to offset the loss of jobs.

This Article is not arguing for or against the merits of subsidies. The point is that the beneficiaries of foreign subsidies are not only foreign enterprises but can also be domestic enterprises (as well as domestic consumers). Old distinctions of foreign/domestic and public/private are collapsing in a globalized economy increasingly dependent on global value chains. To isolate only foreign SOEs in a “net benefit” or “contrary to national interest” review on the basis that they benefit from foreign government subsidies is an incomplete

312. See FOLSOM ET AL., *supra* note 30, at 448 (providing examples of various forms of subsidies).

313. See TREBILCOCK, HOWSE & ELIASON, *supra* note 222, at 284.

314. See *id.*

315. *Id.*

316. See *id.* (positing various forms of “implicit subsidies”).

analysis. To the extent that subsidies are considered harmful, both domestic and foreign entities need to be reviewed.

In the discussion above, the main issue is whether the economic actors involved and the competition (or lack thereof) results in harm and the extent to which society is willing to tolerate that harm in lieu of the benefits that it provides. This suggests that this determination should be carried out by a government agency with experience in assessing the harms from mergers, pricing differences, and coordinated exertions of power (e.g., abuse of dominance) such as the Canadian Competition Bureau. In so doing, Canada would be leveraging off already existing institutional competencies as well as case law, decisions and notifications, interpretations, and experience with negotiations and undertakings.³¹⁷

The balancing of harm versus benefit might seem to be a return to the net benefit test. It is not. Unlike the net benefit test, the proposed reviews would be for all large transactions exceeding a monetary threshold, regardless of whether the actors are foreign or domestic. Also, unlike the net benefit review, the assessment would focus on harm as an analytic strategy for compelling the government to articulate precisely its concerns and compel the publication of its reasons so that its decision might be assessed by the public. In other words, the review would use a "contrary to the national interest" standard but apply it to all transactions, domestic and foreign, exceeding the monetary threshold.

If a transaction is blocked, then the Competition Bureau should state why the matter could not have been addressed by current existing laws, thereby prompting discussion upon whether general legislation should be enacted. The Competition Bureau's forte is the examination of issues through an economics-dominated perspective, and there may be noneconomic values at stake, such as social stability and equity. To the extent that the Competition Bureau's decision is not inconsistent with other values that society feels ought to prevail, the availability of its reasons and ability to have open, democratic dialogue is vitally important to a legislative amendment process that can address these concerns.

VI. CONCLUSION

The Canadian net benefit review framework, including its specialized treatment of SOEs (and potentially SWFs as well), relies upon neoliberal distinctions between public/private spheres. However, the realities of a globalized economy have rendered these

317. Cf. Safarian, *supra* note 146.

distinctions increasingly difficult to maintain and diminished their relevance. At the same time, the potential politicization of foreign investment reviews means that the ambiguity and fragmented meanings embedded in outdated distinctions may leave the review process vulnerable to capture by protectionist interests. With respect to national security, both countries should provide more detailed guidance of the risk-threats to be addressed. The existence of influential nonequity modes of investment and the vast size of global value chains call for an increased sense of vigilance because current investment review frameworks focus on equity modes of investment.

The Canadian net benefit framework, with its reliance on distinctions of public/private versus domestic/foreign, results in an incomplete and inconsistent capture of the harms that it seeks to address. It is, at best, a temporary patchwork solution. The globalized free flow of capital and anonymized structures in corporations and investment funds make it difficult to identify SWFs or other projections of foreign power embedded in investments. The existence of nonequity modes of investment also makes it difficult to detect foreign influences beyond traditional corporations. Further, attempts to discern and prescribe “commercial behavior” are misguided. The global trend for both investments and corporations is to incorporate noncommercial behavior, such as socially and environmentally responsible concerns, into their missions. Concerns that SWFs and SOEs act in politically motivated ways miss the mark because private actors increasingly act politically and seek to influence legislators, including possibly the foreign investment review process itself.

For these reasons, the Canadian net benefit framework should be discarded in favor of a universal “risk of harm” regulatory approach. This approach could take the form of a “contrary to national interest” standard that places the onus of proof on the government to articulate what harms it is addressing if it blocks a transaction. The government should also publish the reasons for its decisions while explaining why currently existing laws do not adequately address the identified harms provoking the block. Using subsidies as an example, the prior insights of this Article were applied to demonstrate why the distinctions between foreign/domestic and public/private failed to meaningfully distinguish between perceived harms of subsidization. Accordingly, this Article submits that the “contrary to national interest” review should assess all transactions exceeding an applicable monetary threshold, regardless of the national identity of investor or whether it is considered a public or private entity.

As a practical matter, the Canadian government should leverage upon the already existing institutional competencies of the Canadian Competition Bureau’s experience in dealing with similar matters. Removing the decision from the hands of incumbent politicians and vesting it in a government agency may serve to partially insulate it

from partisan politics. Drawing upon the American Legal Realist insight regarding *damnum absque injuria*, this Article argues that society allows uncompensated harm to exist—the critical question being which types of harms should be allowed in a market-based society. Sensitive to the fact that this is a socially constructed norm rather than a pure economics analysis, it has been suggested that the Competition Bureau’s traditionally economic-focused approach may need to be balanced by transparent reporting and explanation. This can provide the basis for informed dialogue about whether legislative responses might be required to advance noneconomic values, such as social stability and equality. Given the close legal traditions of Canada and United States, the United States may wish to correspondingly reassess the wisdom of adopting an “economic security” test or Canadian-like net benefit framework.