MIXED SIGNALS: WHAT RECENT DEVELOPMENTS TELL US ABOUT CANADIAN FOREIGN INVESTMENT POLICY

J. Anthony VanDuzer*

I. INTRODUCTION

Even though Canada enjoys a high level of inward investment by comparison to many developed countries,[1] its national regime is frequently criticized as restrictive.[2] Some recent developments in Canada seem to suggest a new interest on the part of the current federal government in developing more effective domestic and international rules for foreign investment and in breaking down some of the historical Canadian barriers to inward investment. The government frequently makes public statements emphasizing the "openness" of Canada to foreign investors.[3] The steps actually taken to date, however, are not unambiguously supportive of a liberalized investment regime for foreign investors in Canada. In fact, the effect is decidedly mixed.

* Tony VanDuzer is a Professor in the Common Law Section of the Faculty of Law at the University of Ottawa (vanduzer@uottawa.ca).

[1] For 2006, Canada's stock of foreign direct investment represented over 35% as a proportion of GDP compared to a G-7 average of 25.6% for the same year (Michael Holden, "Overview of Canadian Foreign Investment" (2008) *In Brief* (Library of Parliament: Ottawa, 2008)). Canada's stock of foreign direct investment was $549.4 billion at the end if 2009, representing almost 43% as a percentage of GDP (Richard Cameron, *Canada's State of Trade—2010* (Minister of Public Works and Government Services Canada: Ottawa, 2010) 85, online: Foreign Affairs and International Trade <http://www.international.gc.ca/economist-economiste/assets/pdfs/SoT_2010_AR_ENG.pdf>).

[2] Debra Steger recently described Canada as being seen as "one of the least open developed countries for foreign capital because of our existing array of restrictions on foreign investment" (Debra P. Steger, "State Capitalism: Do We Need Controls?" (2008) 50 *Can.-Asia Commentary* 1 at 2, citing, among other sources, UNCTAD, *World Investment Report 2007* (United Nations: New York and Geneva, 2007). Recently the Competition Policy Review Panel acknowledged this widespread perception but concluded that it was not accurate (Competition Policy Review Panel, *Compete to Win, Final Report – June 2008* (Public Works and Government Services Canada: Ottawa, 2008)[*Compete to Win*] at 29-30.

[3] E.g. in the most recent speech from the Throne: Stephen Harper, "Speech from the Throne" (3 March 2010), online: Government of Canada <http://www.speech.gc.ca/eng/media.asp?id=1388>.

Changes over the past few years to the cornerstone of Canada's domestic regime for foreign investment, the *Investment Canada Act*,[4] for example, do not consistently signal a commitment to liberal access to the Canadian market for foreign investors. Guidelines adopted in 2007 setting out the government's approach to determining whether investments by state-owned enterprises (SOEs) satisfy the "net benefit" to Canada requirement in the *Act* suggest that such investments will be subject to scrutiny based on new and distinctive criteria when they are subject to review.[5] Some worry that these Guidelines will chill investment in Canada by SOEs, an increasingly important category of international investor.[6] Last year, a new screening process was added to the *Act* for investments that could be injurious to Canadian national security. The lack of any definition of the criteria that will be used to determine what could be a national security threat has caused justifiable concerns that foreign investors will be deterred by uncertainty regarding when their investments will be subject to national security review and what the outcome of such reviews will be.[7] Some recent decisions by the Minister of Industry related to the review of investments under the *Investment Canada Act* also raise concerns for foreign investors. In 2008, the Minister decided for the first time not to approve an investment. Last year, the Minister of Industry took the unprecedented step of initiating court action to enforce an investor's undertakings with respect to employment that it had made in order to obtain Investment Canada approval of its investment. Both actions are likely to confirm perceptions of Canada as an unwelcoming place for investment.

At the same time, Canada has taken some steps aimed at improving investor perceptions. It has raised the dollar amount of the thresholds for Investment Canada review, made modest improvements in the transparency of the Investment Canada review process and eliminated the special review process for investments in uranium and

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4 *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.),

5 The Guidelines can be accessed on the Investment Canada Web site, online: Industry Canada <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00066.html> [*SOE Guidelines*].

6 Steger, *ibid.*, at 11.

7 E.g. Davies, Ward, Phillips & Vineberg, "Amendments to the Investment Canada Act: What Do They Mean For You?" 13 March 2009, online: Davies, Ward, Phillips & Vineberg <http://www.dwpv.com/en/17620_23425.aspx>; and Douglas C. New, "Investment Canada Act Amendments May Increase Foreign Investor Uncertainty" (2009) Antitrust/Competition & Marketing Bulletin, online: Fasken Martineau <http://www.fasken.com/files/Publication/3299b170-e7a2-4ae8-82af-01842c87e8ad/Presentation/PublicationAttachment/72cf4361-df63-4cba-8fc5-0e0822ed2531/DM_TOR-%233099039-v1-Doug_New_May_2009_Bulletin_Investment_Canada_Act__Amendments_.pdf>.

financial and transportation services. A number of investments in Canadian resources by foreign SOEs have been approved despite the new Guidelines. Perhaps most surprisingly, Amazon's investment in a Canadian book distribution facility was approved, marking an apparent exception to long-standing protectionist policies in this cultural industry. In its international negotiations, Canada has been more aggressive in the past few years in negotiating international investment commitments with other countries, suggesting a strong commitment to ensuring stable and predictable rules for Canadian investors abroad as well as for foreign investors in Canada.

This short note canvasses these and other recent developments in Canada's approach to inward investment with a view to demonstrating that while the last few years demonstrate a significant expansion of Canadian government activity related to investment its actions do not amount to a coherent approach to attracting foreign investment. This paper does not attempt to provide a thoroughgoing analysis of the relative merits of each of the actions of the government related to foreign investment. Individually, some of the actions taken by the government may be justified on other policy bases. Nevertheless, often the manner in which the government has acted reflects an apparent lack of sensitivity to the effects of its actions on foreign investors' perceptions. As a consequence, the overall effect of recent developments is to diminish unnecessarily the attractiveness of Canada as a destination for foreign investment.

II. DEVELOPMENTS RELATED TO INVESTMENT CANADA REVIEW

a. Introduction to Canadian Investment Review

In order to provide some context for the discussion of recent developments related to Investment Canada review, this section briefly sets out the essential features of the review process. Notification is required under the *Investment Canada Act* for investment transactions in which a non-Canadian acquires control of or establishes a Canadian business, but review by the Minister of Industry, with the support of the Investment Review Division of Industry Canada, is limited, in most cases, to investments that are significant because they exceed certain financial thresholds or are in one of Canada's cultural industries. Approval is granted if the Minister is satisfied that the investment is of "net benefit" to Canada.

Relatively low general thresholds for review apply to acquisitions of control of a Canadian business by a foreign investor, unless the investor is of a World Trade Organization (WTO) Member or the seller is a business controlled by a person of a WTO Member (other than Canada).[8] Under these general thresholds, a direct acquisition of control is subject to review if the assets of the Canadian business are worth $5 million or more.[9] Where a foreign investor acquires control of a Canadian business by acquiring a foreign entity that already controls the business in Canada (an indirect acquisition for the purposes of the *Act*), the general thresholds are as follows:

- 50% of the asset value of the whole transaction is attributable to the Canadian business and the assets have a value of at least $5 million; or
- the Canadian business has assets of at least $50 million.

All amounts are determined by reference to the value of assets as recorded on the balance sheet of the entity holding those assets as of the end of the last completed financial year.

Where the investor is of a WTO Member or the person selling to the investor is of a WTO Member (other than Canada) much higher thresholds apply. An investor or a seller is of a WTO Member if they are controlled by the WTO Member or one of its agencies or by nationals of a WTO Member. Indirect acquisitions in these circumstances are not subject to review at all. Direct acquisitions are only subject to review if the Canadian business has assets exceeding Can$299 million (for 2010).[10] This amount is adjusted each year by an amount calculated by reference to the annual change in Canada's GDP. The result of these special rules regarding WTO Members is that the effective reach of Investment Canada review has substantially diminished over time and will continue to do so. With 153 Members (as of September 2010) the membership of the WTO includes most nations in the world and most of the countries that are not Members, like Russia, are actively negotiating

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[8] *Investment Canada Act*, *supra* note 4, ss. 14-14.1. The establishment of a new Canadian business is not subject to review.

[9] *Investment Canada Act*, *ibid.*, ss. 14(3) and 14.1(1).

[10] *Investment Canada Act*, *ibid.*, s. 14.1(1). Annual amounts are reported on the Investment Canada Act web site, online: Industry Canada <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html>.

for membership.[11] Consequently, the exclusion from review for indirect acquisitions involving WTO Members and the higher thresholds for direct acquisitions will apply in most cases.[12] There are also a significant number of exceptions from the application of these financial thresholds, including portfolio investments, transactions related to financing and the expansion of an existing foreign controlled Canadian business into related activities.[13] These kinds of transactions are not reviewable.

If a transaction is reviewable, the investor must file an application describing how the investment will be of net benefit to Canada, accompanied by supporting documentation. The Minister of Industry has a broad discretion to determine whether a transaction meets the net benefit test. The criteria that the Minister must consider include the impact of the investment on competition, productivity, compatibility with national and provincial policies, and the participation of Canadians in the Canadian business.[14]

b. Guidelines for the Review of Investment by State-Owned Enterprises (SOEs)

In December 2007, the Minister of Industry adopted guidelines that identify special criteria to be applied to determine whether foreign investments by SOEs that are subject to review under the *Investment Canada Act* are a net benefit to Canada.[15] These Guidelines were adopted largely to respond to concerns that acquisitions of Canadian businesses in the resource sector by foreign SOEs could result in decisions regarding the management of Canadian resources being made in accordance with the policies of the government in the SOE's home state rather than purely commercial considerations or Canadian policy

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[11] A list of WTO Members, observers and countries seeking to accede is provided on the WTO web site, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

[12] From 1 July 2009 to 30 June 2010, Investment Canada conducted 22 reviews that resulted in the approval of the investment (online: Industry Canada <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk-51020.html>). Statistics are not provided by Investment Canada on investments that were refused approval. According to research done for the Competition Policy Review Panel, only one application for review has been denied by the Minister of Industry since 1985 (*Compete to Win*, *supra* note 2, at 29).

[13] *Investment Canada Act*, *supra* note 1, s. 10.

[14] The net benefit standard is set in s. 16 of the *Investment Canada Act*, *ibid.*, and the criteria are set out in s. 20.

[15] The issuance of guidelines is permitted under the *Investment Canada Act*, *ibid.*, s. 38.

priorities.[16] The growing financial strength of sovereign wealth funds and other kinds of SOEs has been a source of concern in many quarters.[17] One specific event that generated significant debate in the popular press in Canada was an offer by a Chinese SOE, China Minmetals, to buy Noranda Inc., then Canada's largest mining company.[18] In addition to general concerns about China Minmetals as an SOE, there were specific concerns related to allegations regarding the company's involvement in human rights abuses.[19] Even though the Minmetals offer was eventually withdrawn, the debate it generated encouraged the adoption of the SOE Guidelines.[20]

As noted, under the *Investment Canada Act*, the criteria to be applied by the Minister are are broad and open-ended, including, for example, "[t]he compatibility of the investment with national industrial, economic and cultural policies."[21] Nevertheless, the federal government felt compelled to articulate additional, more specific criteria tailored to the concerns expressed regarding SOEs. The Guidelines indicate that the Minister will examine whether an SOE adheres to Canadian standards of corporate governance and to Canadian laws and practices. Corporate governance standards are identified as including "commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders."[22] The Minister will also consider to what extent the Canadian business to be acquired by an SOE will continue to be able to operate on a commercial basis in relation to the following factors:

- where to export;
- where to process;
- the participation of Canadians in its operations in Canada and elsewhere;
- support of on-going innovation, research and development; and

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16 Steger, *supra* note 2.
17 In 2007, the G-7 countries asked the International Monetary Fund, the Organization for Economic Cooperation and Development, and the World Bank to develop a code of conduct for SOEs. See *infra* notes 26 and 27.
18 Steger, *ibid.*, at 10; Aaron Dhir, "Of Takeovers, Foreign Investment and Human Rights: Unpacking the Noranda-Minmetals Conundrum" (2006) 22 B.F.L.R. 77.
19 Dhir, *ibid.*
20 Steger, *supra* note 2 at 10.
21 *Investment Canada Act*, *supra* note 4, s. 20.
22 *SOE Guidelines*, *supra* note 5.

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

The introduction of guidelines setting out criteria for Ministerial decision making go some way to enhancing the transparency of the investment review process which has frequently been criticized for being opaque.[23] At the same time, the Guidelines appear to introduce a new set of criteria to the application of the net benefit test and, as a result, a greater risk that Investment Canada approval of investments by SOEs will be refused. Subsequent practice suggests that the guidelines will not be applied systematically to shut out SOEs. A number of major investments by Chinese SOE's in the resource sector have been approved and are going ahead, including major acquisitions in the oil sands by PetroChina Co., China Investment Corp., and Sinopec in 2010.[24] Nevertheless, concerns remain that the introduction of the Guidelines sends a negative signal to SOE investors many of whom already view Canada as a hostile environment.[25] One reason for investors to perceive the Guidelines in a negative way is that new guidelines did not seem to be necessary. The broad criteria to be used by the Minister to determine if an investment is a net benefit to Canada provide ample basis to apply the kinds of considerations identified in the Guidelines in reviewing SOE investments. Also, standards for SOE investment are being developed globally. For example, in 2007, prior to the adoption of the Guidelines, the G-7 countries asked the International Monetary Fund, the Organization for Economic Cooperation and Development, and the World Bank to develop a code of conduct for SOEs.[26] A draft governance and

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[23] E.g. *Compete to Win*, *supra* note 2, at 33; Donald G. McFetridge, *The Role of Sectoral Ownership Restrictions*, Consultation Paper for Competition Policy Review Panel ((15 March 2008) (on file with the Competition Policy Review Panel), at 4; and Steger, *supra* note 2, at 11, 12, and 14. More detailed guidelines were recommended by the Competition Policy Review Panel (*Compete to Win*, *ibid.*).

[24] Shawn McCarthy, "China's big move into Alberta" *The Globe and Mail* (12 April 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/globe-investor/chinas-big-move-into-alberta/article1532062/>; and The Canadian Press, "Sinopec free to buy into Syncrude" *The Globe and Mail* (25 June 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/sinopec-free-to-buy-into-syncrude/article1618216/>. Other investments by SOEs are discussed in Steger, *supra* note 2, at 10.

[25] Steger, *ibid.*, at 6. Steger describes the Guidelines as "a giant step in the wrong direction" from the point of view of encouraging investment (Steger, *ibid.*, at 14).

[26] Statement of G8 Finance Ministers and Central Bank Governors, Washington, 19 October 2007, online: G8 <http://www.g8.utoronto.ca/finance/fm07109.htm> cited in Steger, *ibid.* at 13.

accountability framework referred to as the "Santiago Principles," was released by an IMF working group in October 2008.[27] In the context, Canada's unilateral adoption of new standards may be perceived as an effort to put in place distinctive restrictions on SOE investment.

III. AMENDMENTS TO THE INVESTMENT CANADA ACT

a. Introduction

In 2009, Parliament passed the most extensive set of amendments to the *Investment Canada Act* since the enactment of the legislation in 1985.[28] Most significantly, these amendments changed the thresholds for investment review and introduced a new national security review process. While some of the amendments appear to reflect greater openness to foreign investments, others seem likely to discourage foreign investment.

b. Thresholds for Review Raised but Basis for Calculation Changed

Under the 2009 amendments, the threshold for review of foreign investments will be increased substantially from approximately $300 million in 2010 to $600 million and then progressively to $1 billion within four years. At the same time, however, the amendments change the basis for calculating the threshold to "enterprise value."[29] Both changes had been recommended by the Competition Policy Review Panel in its 2008 report which provided a comprehensive analysis of Canadian investment policy.[30] As of 31 August 2010, these amendments were not in force because the regulations defining "enterprise value" are not yet final. The draft regulations indicate that the enterprise value will be

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[27] International Working Group on Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practices* (2008), online: IMF <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

[28] *Budget Implementation Act*, S.C. 2009, c. 2 [*2009 Amendments*]. Other significant amendments followed from the conclusion of the *North American Free Trade Agreement*, 17 December 1992, C.T.S. 1994/2, (1994) 32 I.L.M. 605 [*NAFTA*], and the *Marrakech Agreement establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 187. The *2009 Amendments* were preceded by the 2008 report of the Competition Policy Review Panel (*Compete to Win*, *supra* note 2). The Panel conducted the most significant policy review in this area in more than 20 years. The amendments implemented only some of the Panel's recommendations.

[29] *2009 Amendments*, *ibid.*, s. 448, amending s. 14.1 of the *Investment Canada Act*, *supra* note 4.

[30] *Compete to Win*, *supra* note 2, at 31.

based on the market value of the business being acquired.[31] Until these amendments come into force, the basis for calculation of the thresholds will be the value of acquired assets as found in the financial statements of the entity owning those assets as of the end of the preceding financial year.[32] The chief advantage of this basis of calculation is the ease with which it can be applied by businesses to determine if an investment will be reviewable. In the view of the Competition Policy Review Panel, enterprise value was preferable, however.

> The concept of enterprise value better reflects the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized in a balance sheet by current accounting methods.[33]

Despite the substantial increase in the dollar amount of the threshold for review, the shift to enterprise value for calculation of the thresholds may actually expand the scope of review because, in most cases, enterprise value is likely to substantially exceed book value. As a result, even though the thresholds will be set at higher dollar amounts, the new basis for calculating them will mean that some investments will be subject to review that would not have been reviewable prior to the amendments. The situation that prompted the federal government to change the basis upon which the thresholds will be calculated provides an example of how the scope of review will often be increased under the new threshold. Investment Canada refused to review an acquisition by the Swedish firm, Ericsson, of assets of the Canadian firm, Nortel, where the accounting book value of the assets, $182.5 million, did not exceed the t relevant thresholds, even though the price that Ericsson was offering for the assets, $1.13 billion, exceeded the thresholds substantially.[34] Under the new higher thresholds calculated using

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[31] *Regulations Amending the Investment Canada Regulations*, published for comment in *Canada Gazette Part I*, Vol. 143, No. 28, on 11 July 2009. The draft regulations propose to use "market capitalization" for the calculation of enterprise value for publicly traded firms. For transactions for which market capitalization information is not available, such as those involving the acquisition of a privately held Canadian business or where all or substantially all of the assets are being acquired, the value of "gross assets" will be used to calculate "enterprise value." (s. 3.2).

[32] *Investment Canada Regulations*, S.O.R./85-611, s. 3.1.

[33] *Compete to Win*, *supra* note 2, at 31.

[34] Josh Wingrove, "Ottawa signs off on Nortel-Ericsson deal," *The Globe and Mail* (16 September 2009), online: *The Globe and Mail*

enterprise value, the Ericsson acquisition would have been subject to review. Consequently, more transactions may be subject to review after the amendments come into force. As well, whatever the conceptual merits of enterprise value, adopting this basis for calculation of the thresholds will make it harder for investors to assess when review will be required.

c. Elimination of Lower Thresholds for Review in Certain Sectors

Until 12 March 2009, the acquisition of control or the establishment of a Canadian business engaged in certain sensitive or strategically significant activities was subject to review if the size of the investment exceeded the relatively low general thresholds. The rules eliminating review of indirect acquisitions of Canadian businesses and setting substantially higher thresholds for the review of direct acquisitions where investors were from WTO Members did not apply. These activities were the production of uranium or owning an interest in a uranium property in Canada, the provision of any financial or transportation service, and activities in cultural industries.[35] The 2009 amendments eliminated this special treatment for all but the cultural industries with the apparent aim of encouraging investment in these sectors.

Despite moving these sectors to higher thresholds for Investment Canada review, however, they remain subject to significant ownership restrictions, including foreign ownership restrictions in some cases, under other government measures.[36] The government has announced its intention to relax some of these restrictions. In March 2010, the elimination of restrictions on foreign investment in uranium mining was promised,[37] though, so far, this has not been done. In the same month,

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<http://www.theglobeandmail.com/globe-investor/ottawa-signs-off-on-nortel-ericsson-deal/article1290360/?cmpid=rss1>.

[35] *Investment Canada Act*, *supra* note 4, ss. 14.1(5) and 15. Cultural industries are defined in Schedule IV of the *Investment Canada Regulations*, *supra* note 32 as the publication, distribution or sale of books, magazines, periodicals, newspapers, or music in print or machine readable form and the publication, distribution, sale or exhibition of film or video products, or audio or video music recordings.

[36] These restrictions are described and critiqued in McFetridge, *supra* note 23.

[37] Ownership of a uranium mining property by non-Canadians, as defined in the *Investment Canada Act*, *supra* note 4, is limited to 49%, unless no Canadian partner can be found: "Policy on Non-resident Ownership in the Uranium Industry" online: Natural Resources Canada <http://www.nrcan.gc.ca/eneene/sources/uranuc/uranium/respol-eng.php>.

in the Speech from the Throne, it was announced that the elimination of foreign ownership restrictions in telecommunications would be studied.[38] This announcement was presaged by a decision by the Cabinet in December 2009[39] that overturned a Canadian Radio-television Telecommunications Commission decision[40] to deny a wireless telephone licence to an applicant that it determined exceeded the maximum permitted level of foreign ownership.[41] Some critics argued that the decision by Cabinet was inconsistent with existing rules regarding foreign ownership of Canadian telecommunication companies[42] and the decision itself is now being challenged in the Federal Court.[43] The government has made only limited progress in removing the foreign ownership restrictions in the telecommunications sector so far.[44] Despite its pronouncements and the amendments to the *Investment Canada Act* Canada has not developed, much less implemented, a coherent policy for opening up the uranium and telecommunications sectors to foreign investment.

The Government of Canada has announced plans to reduce the restrictions on foreign ownership in the uranium industry (Brenda Bouw, "Ottawa to relax uranium rules" *The Globe and Mail* (4 March 2010) online: *The Globe and Mail* <http://www.theglobeandmail.com/globe-investor/ottawa-to-relax-uranium-rules/article1489049/?cmpid=tgc>.

38 Stephen Harper, "Speech from the Throne" (3 March 2010), online: Government of Canada <http://www.speech.gc.ca/eng/media.asp?id=1388>. The Standing Committee produced its report in June 2010, but was not able to reach a consensus on how to move forward (Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector, Report of the Standing Committee on Industry, Science and Technology, Hon. Michael Chong, Chair 40th Parl., 3d sess.).

39 Order-in-Council, PC 2009-2008, 10 December 2009.

40 Telecom Decision CRTC 2009-678, online: CRTC <http://www.crtc.gc.ca/eng/archive/2009/2009-678.htm>.

41 Steven Chase, Jacquie McNish and Omar El Akkad, "Wireless sector at forefront of Tories' deregulation plans" *The Globe and Mail* (10 March 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/report-on-business/wireless-sector-at-forefront-of-tories-deregulation-plans/article1496847/>.

42 Iain Marlow, "Ottawa refuses to release Globalive decision documents" *The Globe and Mail* (8 February 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/report-on-business/ottawa-refuses-to-release-globalive-decision-documents/article1459676/>.

43 Public Mobile has applied to the Federal Court of Canada for a judicial review of the Governor-in-Council variance of the CRTC decision on Globalive (*Re Public Mobile Inc. v. AGC (Globalive Wireless Management Corp.)*, T-26-10 (F.C.T.D.)).

44 On 12 July 2010, legislation was enacted to remove foreign ownership restrictions on Canadian satellite carriers.

d. Improved Transparency

One continuing concern regarding Investment Canada review has been its lack of transparency.[45] The positive relationship between regulatory transparency and attracting investment is well documented.[46] Many features of the Investment Canada review, however, do not meet basic standards for transparency. The criteria for decisions on investment review are opaque. Decisions on investment reviews are not published. No reasons are given and there is no right of appeal. The Competition Policy Review Panel concluded that Investment Canada review needs greater regulatory clarity and predictability and its administration should be more efficient.[47]

The 2009 amendments to the *Investment Canada Act* represent just a small step in the direction of improved transparency. The Minister is now required to publish an annual report on the administration of the *Investment Canada Act*.[48] The introduction of a requirement for an annual report had been recommended by the Competition Policy Review Panel though the Panel had gone on to indicate what content should be included.[49] The amendments, however, do not prescribe any specific content for the report. The government also stopped short of requiring the Minister of Industry to report publicly regarding any investment that was refused and to provide reasons, both changes that the Panel had recommended.[50] As well, the Panel had recommended increased use of guidelines, like those for the review of investments by SOEs, the provision of more information on the review process and streamlining the review process[51] but, so far, no steps have been taken to implement these recommendations. Overall, Canada seems unwilling to develop a

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[45] See, *supra* note 24. Steger describes the process as "secretive and arbitrary" (at 11).

[46] OECD, *Public Sector Transparency and International Investment* (OECD: Paris, 2003).

[47] *Compete to Win*, *supra* note 2, at 33.

[48] *Investment Canada Act*, *supra* note 4, s. 38.1. No annual report has yet been published so it is not known what will be disclosed in practice.

[49] The Panel recommended that the report should

> provide information on the development of any new policies or guidelines as well as an overview of all transactions subject to the ICA and undertakings provided by foreign investors in relation to the disallowance test under the legislation… and sufficient detail, without breaching commercial confidences, to allow the Canadian public to assess whether the Act is meeting its objective of ensuring that foreign investment proposals are not contrary to Canada's national interests. (*Compete to Win*, *supra* note 2 at 33).

[50] *Ibid.*

[51] *Ibid.*

robust, transparent investment review process that would constrain the existing broad discretion of the Minister and create a regime that would be more palatable to foreign investors.

e. National Security Review

The creation of a special review process for investments that could be injurious to Canadian national security undoubtedly represents the adoption of a more restrictive approach to those few foreign investments that may threaten Canadian security interests.[52] But, while some process to screening investments that threaten security may well be necessary, the particular process that has been put in place seems designed without any regard to its potential negative effects on foreign investors generally.

Investments subject to review include, the acquisition of a Canadian business, whether "in whole or in part," and the establishment of an entity carrying on any part of its business in Canada, even if it has only a minimal presence.[53] There are no minimum financial thresholds for review. The amendments do not provide any guidance regarding what kinds of investments may be considered to be injurious to Canadian national security. National security review can be undertaken for all investments made after 12 March 2009.

National security reviews involve several stages. If the Minister of Industry believes, on reasonable grounds, that an investment by a non-Canadian investor would be injurious to national security, the Minister may send a notice to the investor. The investment cannot be completed between the time the notice is received and the receipt by the investor of a notice indicating that no review would be undertaken or that the investment is authorized.[54] Cabinet, on the recommendation of the Minister, can order a formal review with further notice to the investor.[55]

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[52] An earlier attempt to create a security review process failed. In June 2005, the Minister of Industry introduced a bill amending the *Investment Canada Act* to permit the review of foreign investments that might compromise Canada's national security where such reviews were deemed necessary by the federal Cabinet acting on a recommendation of the Minister. Review could have been deemed necessary regardless of the size of the transaction. This bill never passed. See, Bill C-59, *An Act to Amend the Investment Canada Act*, 1st Sess., 38th Parl., 2005, First Reading 20 June 2005.

[53] *Investment Canada Act*, *supra* note 4, s. 25.1. The entity must have a place of operations in Canada, at least one employee and assets in Canada used in carrying on the entity's business.

[54] *Investment Canada Act*, *ibid.*, s. 25.2

[55] *Investment Canada Act*, *ibid.*, s. 25.3.

If a review is ordered, the Minister can require information from the investor and the investor has an opportunity to address national security concerns. If the Minister considers that national security concerns unresolved, the matter can be referred to Cabinet with a report of the Minister's findings. Cabinet may prohibit the investment or authorize it subject to specified conditions being satisfied or upon undertakings by the investor. Cabinet may also order divestiture by the investor if the investment has been completed where this is necessary to address any national security concerns.[56]

One reason for the adoption of a separate national security review procedure may have been the proposed 2008 acquisition by American defence contractor Alliant Techsystems of MacDonald Dettwiler, a Canadian firm that operated a satellite providing data to the Canadian government regarding Canada's north. Concerns were expressed regarding the risk to Canadian security associated with the proposed sale.[57] 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. Ultimately, the Minister of Industry refused to approve the sale, concluding that he was not satisfied that the transaction would be a net benefit to Canada.[58] No reasons were given. This case appears to be the first case in which a foreign investment was actually refused in an Investment Canada review.

In enacting a specific process to review investments based on security considerations, Canada's regime falls into line with many other states that provide for such a review, including the United States, the United Kingdom, China, Japan, Germany and Australia[59] and implements one of the recommendations of the Competition Policy Review Panel.[60] Nevertheless, the nature of the process raises a number of concerns. As noted, there are no financial thresholds that must be met for such a review and no criteria for what will be considered a national security concern. Apparently, the government has no intention of

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56 *Investment Canada Act*, *ibid.*, s. 25.4.
57 Campbell Clark, "Space division sale no threat to Arctic sovereignty, CEO says," *The Globe and Mail* (1 April 2008), online: *The Globe and Mail* <http://www.theglobeandmail.com/news/technology/space-division-sale-no-threat-to-arctic-sovereignty-ceo-says/article675718/?cmpid=tgc>.
58 Industry Canada, "Minister of Industry Confirms Initial Decision on Proposed Sale of Macdonald, Dettwiler and Associates Ltd. to Alliant Techsystems Inc," online: Industry Canada <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04219.html>.
59 *Compete to Win*, *supra* note 2 at 31.
60 *Ibid.*

clarifying what it considers a national security concern.[61] At the end of the review, Cabinet has an unlimited discretion both to determine if the investment threatens national security and, if it decides that a threat exists, to impose conditions on the acquisition, to prohibit it, or require a divestment if the investment transaction has already been completed. Given the recent enactment of these provisions, there is no experience to suggest how frequently or in what circumstances this process will be used. Nevertheless, the undefined scope of the new national security review procedure creates a risk that it could be used to limit investment in a wide range of circumstances undermining predictability and certainty for investors[62] and, as a result, it is likely to have a deterrent effect on prospective foreign investors. It is not obvious why the government is resistant to clarifying what it considers a security threat when other jurisdictions, including the United States, have been able to provide some criteria.[63] In this context, the failure to specify any criteria would seem to reflect a surprising insensitivity to the perceptions of foreign investors and the impact that its approach would have on how Canada would be viewed as a destination for investment

IV. OTHER RECENT EVENTS

a. Introduction

A few other recent events confirm the mixed messages that the current government is sending on investment. While Canada has been aggressively negotiating international investment agreements around the globe that provide predictability and protection for Canadian investors abroad and foreign investors in Canada, it has been unwilling to ratify the International Convention on the Settlement of Investment Disputes[64] (ICSID), which 144 other countries have joined, to provide access to the convention's process for investor-state dispute settlement. On the home front, some similar ambiguity is evident in two isolated cases that mark significant departures from past policy and practice of uncertain import.

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[61] New, *supra* note 7.

[62] This concern was widely expressed at the time the amendments were enacted. See, for example, Davies Ward, Phillips & Vineberg, *supra* note 7; New, *ibid*.

[63] See the so-called Exon-Florio amendment which is s. 5021 of the *Omnibus Trade and Competitiveness Act of 1988*, P.L. 100-418 (1988), codified as 50 U.S.C. App. §2170(f), as amended by *Foreign Investment and National Security Act of 2007*, Pub. L. 110-49, 121 Stat. 246 (2007), codified as 5 U.S.C. 5315 and 552b.

[64] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 U.N.T.S 159, reprinted in 4 I.L.M. 532 (1965).

In 2009, apparently for the first time, the Minister of Industry took action against a foreign investor using the enforcement powers under the *Investment Canada Act*. In 2010, an investment by Amazon to set up a book distribution facility was approved even though the investment was contrary to the government's own longstanding policy on investment in this protected cultural sector.

b. International Activity

Canada's recent international treaty practice suggests that Canadian policy supports a liberal foreign investment regime both at home and abroad. Some aspects of Canadian activity at the international level, however, indicate that Canada's commitment in this regard is a qualified one.

In the last few years, Canada has invested heavily in developing its network of bilateral investment treaties and free trade agreements with similar investment commitments. Since 2008, Canada has signed six bilateral investment treaties. Canada has concluded negotiations on two other treaties and is actively negotiating with 10 countries, including China, India, Indonesia and Vietnam.[65] During the same period, Canada has entered into three Free Trade Agreements containing investment chapters setting out rules that largely mirror those in Canadian investment treaties. Nine more trade agreements are being negotiated.[66]

While one of the overall goals of the treaty negotiation program is to ensure a stable and predictable environment for investors though the investor protection provisions in the treaties,[67] it is noteworthy that the investment treaty model adopted by Canada in 2003[68] and some of the treaties that it has concluded since then reflect a set of obligations that are more balanced than NAFTA and Canada's previous treaties, in the sense that the right of the host state to regulate in the pubic interest,

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[65] Exploratory talks have been initiated by Canada with the European Union, India, Morocco, and the Andean Community regarding the negotiation of FTAs. Information on all of Canada's agreements and negotiations can be accessed from the Department of Foreign Affairs and International Trade Web site, online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en#free>.

[66] Department of Foreign Affairs and International Trade, *ibid*.

67 Céline Lévesque, "Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond" (2006) 44 Can. Y.B. Int'l Law 249.

[68] Canada's New Model Foreign Investment Protection Agreement, online: Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>.

especially in relation to the social interests affected by investment, is more clearly preserved. In part, the adoption of the new treaty model is a response to Canada's experience with investment arbitration cases under NAFTA Chapter 11.[69] Canada's has added the following new types of provisions to achieve this rebalancing:

- Revised versions of core investor protection obligations that clarify and arguably expand the scope for host states to regulate.
- General exceptions to investor protection obligations.
- Enhanced requirements for openness and transparency in investor-state arbitration.[70]

While there is some debate regarding the desirability and effect of such provisions,[71] overall, they undoubtedly reflect a concern with priorities other than the protection and consequent encouragement of foreign investors.

Canada's unconsummated relationship with ICSID similarly reflects a preoccupation with considerations other than attracting investors. Canada signed the ICSID Convention in 2006. Federal legislation was passed in 2008 authorizing Canada to become a party to the convention.[72] Canada has not yet ratified the treaty. The federal government appears to be waiting until all provinces and territories have given their endorsement to the treaty because provincial and territorial measures may be the subject of investor-state claims that could be dealt with under the ICSID rules and provincial legislation is needed to fully implement the convention. Since investor-state disputes under Canada's investment obligations may be initiated by investors under other arbitral procedures, the main direct effect of the failure of the federal government to obtain provincial commitments to ICSID is only to deny access to a particular procedure, though certainly the one which is best known and most used.[73] The main indirect effect is to send a message that Canada still has reservations about committing to a procedure that all other G-8 countries and all but three members of the OECD have endorsed.

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[69] Lévesque, *supra* note 67 at 250.
[70] *Ibid.*, at 255-277.
[71] *Ibid.*
[72] An Act to implement the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), S.C. 2008, c. 8.
[73] UNCTAD, *World Investment Report 2010: Investing in a Low Carbon Economy* (New York and Geneva: United Nations, 2009) at 83.

c. Domestic Activity

In 2009, the Minister of Industry made use of the powers under the *Investment Canada Act* to require a foreign investor to comply with an undertaking that it made in connection with obtaining approval of its investment by the Minister. Under the *Act*, if an investor fails to comply with an undertaking to the Minister, the Minister may demand compliance and, ultimately, apply to a court for an order directing compliance as well as a monetary penalty of up to $10,000 per day until the investor complies.[74] In order to obtain Investment Canada approval of its 2007 takeover of Canadian steel maker, Stelco, US Steel made commitments regarding the level of employment and production that it would maintain in Canada for three years. Since the acquisition, US Steel has laid off more than 2,000 Canadian workers and shut down Stelco's steel-making operations. In May 2009, the Minister of Industry sent US Steel a letter demanding that it comply with its undertakings.[75] In July 2009, the Minister announced that the government had filed an application in the Federal Court for an order requiring US Steel to comply with its undertakings and to pay a fine of $10,000 a day beginning with the day the first layoff occurred, 1 November 2008.[76] US Steel challenged the constitutionality of the provisions of the *Investment Canada Act,*[77] but the Federal Court recently denied the company's application.[78] The company has launched an appeal.[79] The main case between US Steel and the Canadian government has yet to be resolved.

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[74] *Investment Canada Act*, *supra* note 4, ss. 39 (demand); 40 (application for court order and fine).
[75] Industry Canada, "Industry Minister Clement Holds U.S. Steel to its Commitments" (6 May 2009), online: Industry Canada <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04631.html>.
[76] *Attorney-General of Canada v. United States Steel Corporation*, T-1162-09 (F.C.T.D.). Industry Canada, "Industry Minister Clement Takes Further Steps to Hold U.S. Steel to its Investment Canada Act Commitments" (17 July 2009), online: Industry Canada <http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html>.
[77] Kristine Owram, "U.S. Steel challenge to Investment Canada Act a delay tactic: Stakeholders" *The Canadian Press* (14 October 2009), online: *The Canadian Press* <http://ca.news.finance.yahoo.com/s/14102009/2/biz-finance-u-s-steel-challenge-investment-canada-act-delay.html>.
[78] *Attorney-General of Canada v. United States Steel Corporation*, 2010 FC 642.
[79] *United States Steel Corporation v. Attorney-General of Canada*, 2010 FCA 200. Jeff Gray, "U.S. Steel appeals court ruling in Stelco case" *The Globe and Mail* (29 June 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/us-steel-appeals-court-ruling-in-stelco-case/article1623498/?cid=art-rail-economy>.

It is not clear why, apart from short term political consideration of seeking the approval of the laid off workers and their supporters, the government engaged in this unprecedented use of the long dormant enforcement provisions of the *Investment Canada Act*, especially in the difficult environment for business that has followed the financial crisis. Its action will send a strong message to foreign investors that the government has adopted a new policy of rigorous enforcement of Investment Canada undertakings. It will also confirm the impression that the environment for foreign investment in Canada is a hostile one.

In light of the government's action in the US Steel case, its decision regarding Amazon's application to set up a book distribution facility seems surprising. In 2010, the government through the Minister of Canadian Heritage approved the establishment of a wholesale book distribution centre by Amazon in Canada.[80] Canadian Heritage's policy guideline, which has not been formally revoked or amended, prohibits such new investments in book distribution unless the investment is implemented through a Canadian controlled joint venture.[81] It is not yet clear to what extent the Amazon decision represents a one-time *de facto* exception or the beginning of a new policy direction.

V. CONCLUSION

Canada relies on foreign investment to support its economic development and growth. Increasingly, Canada must compete with a growing number of countries for its share of the global investment pie. For a variety of reasons, Canada is losing this contest.[82] Canada's

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[80] The Canadian Press, "Amazon cleared to open warehouse" *The Globe and Mail* (12 April 2010), online: *The Globe and Mail* <http://www.theglobeandmail.com/globe-investor/amazon-cleared-to-open-warehouse/article1531726/>. Industry Canada approved an acquisition of Lionsgate Entertainment – a significant Canadian film production business – in June 2010: Janet Whitman, "Ottawa OKs Icahn takeover," *Financial Post* (10 June 2010), online: *The Financial Post* <http://www.financialpost.com/Ottawa+Icahn+takeover/3134576/story.html>. Canadian Heritage policy does not prohibit acquisitions in film production, though such acquisitions are reviewed in terms of the compatibility with national cultural policies.

[81] Canadian Heritage, "Canadian Heritage: Investment Canada Act: Revised Foreign Investment Policy in Book Publishing and Distribution," online: Canadian Heritage <http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/bkp-eng.cfm>.

[82] Canada's share of the world's inward FDI stock declined from 9.8% in 1980 to 3.2% in 2006 (Conference Board of Canada, Trends in Foreign Direct Investment and Mergers and Acquisitions: International and Canadian Performance and

shrinking share of inward investment emphasizes the importance of having a coherent policy to attract investment. The survey of recent events undertaken above suggests that no such coherent policy exists.

Certainly recent statements by government, the aggressive pursuit of new international investment agreements providing protection for foreign investors in Canada and some steps it has taken in relation to Investment Canada review suggest a commitment to facilitating inward investment. In particular, by raising the dollar amount of the thresholds for Investment Canada review, improving the transparency of the review process (if only slightly), removing uranium mining and financial and transportation services from the special lower thresholds for review and approving investments in Canadian resources by foreign SOEs as well as Amazon's investment in a book distribution facility Canada seems to be sending a message to foreign investors that the investment review process should not be considered an impediment to foreign investment.

Indeed, even without these recent events, one might conclude that the operation of the Investment Canada review process should really not be considered much of a barrier to investing in Canada. After all, the risk that approval will not be obtained seems very small. Since 30 June 1985, when the Investment Canada regime came into force, almost all investment transactions had been approved, including those in the cultural industries.[83] This high percentage of approvals has to be understood, however, in the context of the administrative process. Over time, applicants and their legal advisers have learned what applications are likely to receive approval and thus only submit applications with conditions that are acceptable. Proposals that are never submitted might be significant. It is significant that perceptions of Canada as a regime hostile to foreign investment persist despite the high approval ratio. Undoubtedly, negative perceptions endure because of the continuing lack of transparency of the Investment Canada process as well as the undertakings that are imposed on investors in order to obtain approval of their investments.[84]

Implications (Conference Board: Ottawa, 2008), at 5). In 2009, investment inflows fell 53.7% declining more precipitously than global flows (*Canada's State of Trade—2010*, *supra* note 1, at 81, 85).

[83] One study found that up until 2008 all investments reviewed by Industry Canada but one (of over 1500) and all but three (of 99) reviewed by Canadian Heritage were approved (*Compete to Win*, *supra* note 2, at 29).

[84] McFetridge describes the imposition of unnecessary and inefficient undertakings as the most serious defect in Investment Canada review (McFetridge, *supra* note 23).

In this regard, a number of steps taken by Canada recently are likely to worsen investor perceptions. The adoption of a new national security review process without any identified criteria seems most likely to have a chilling effect on investment. Similarly, the adoption of distinct criteria for investment by SOEs may discourage state firms and sovereign wealth funds from entering the Canadian market. The first refusal of an investment, together with the first enforcement action against a foreign investor that has not lived up to its commitments made to secure approval of its investment represent apparent changes in the approach taken toward foreign investment which are bound to discourage investors even though they may be largely responses to short term considerations rather than reflecting a broader policy direction. This paper has not sought to provide a thoroughgoing analysis of the relative merits of each action of the government related to foreign investment over the past few years. It has tried to show only that, taken together, there is little evidence of a coherent policy to promote investment in Canada and that Canada will be less successful in attracting foreign investment than it needs to be as a result.