

中國國營企業在加拿大的投資： 加拿大鉀肥公司案的教訓

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中文摘要

2010年11月全球規模最大的礦業公司澳洲必和必拓公司（BHP Billiton）競標全球最大化肥生產商加拿大鉀肥公司（Potash Corp）案的受阻震驚了世界的投資業界。此一轟動一時的案件所牽涉到的政治面與經濟面都很廣，且此一案件進一步引人注目的是中國大陸國營企業（state-owned enterprises，簡稱 SOEs）有涉入的可能性。這一案件為我們提出了一些疑問，那就是中國國企在加投資面臨的挑戰和可能造成的影響。由於加拿大持續吸引中國大陸投資，越來越有必要妥善準備大陸國企與其他企業收購加國企業所可能引發爭議的潛在性。有幾項教訓可從加拿大鉀肥公司案中學到。最重要的是需要重新評估與改善現行投資加拿大法案（Investment Canada Act）下外國投資審查程序以避免不當的政治化與減少不確定性。

Chinese State Investments in Canada: Lessons from the Potash Saga¹

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The blocking of the BHP Billiton bid for Potash Corp. in November 2010 shocked the global investment community. The saga involved as much politics as it involved economics, this was further accentuated by the possible involvement of a Chinese state-owned enterprise. This raised questions about the challenges and potential impacts of Chinese state investments in Canada.

As Canada continues to attract large investments from China, the need to better prepare for potentially controversial acquisitions by state-owned and other enterprises is rising. Several lessons can be drawn from the Potash saga, most critically, is the need to review and improve the foreign investment review process under the

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Investment Canada Act to avoid undue politicization and reduce uncertainty. It is crucial to maintain open channels of dialogue to ensure policy decisions are transparent, predictable and clearly communicated to Chinese companies looking to invest in Canada, as well as the Canadian public. Furthermore, by addressing state ownership, Canada can also contribute to the elaboration of standards of best practices for state-owned enterprises worldwide.

TRENDING CHINESE INVESTMENTS IN CANADA

Chinese investments are expected to grow in the coming decades. Since the summer of 2009, at least seven Chinese state investments in Canada in the energy and mining sectors have totaled more than \$20 billion.² Those investments were completed unhindered (most did not meet the minimum requirements for a review under the Investment Canada Act). Confirming a sustained interest in investing in Canada, the China Investment Corporation (a sovereign wealth fund) unveiled plans to open its first overseas corporate location in Toronto on January 12, 2010.

Increased interest from Chinese state-owned enterprises (SOEs) to invest in Canada is indicative of larger trends. China intends on maintaining a strong state presence in the management of its national economy, as well as in its interactions with the global economy.

² All prices are in Canadian dollars.

In line with findings from the Asia Pacific Foundation of Canada's recent *China Goes Global 2010* report, the largest Chinese investments to date have come from state-owned firms.³ The results suggest Chinese SOEs have on average significantly larger intended investments in Canada than their non-SOEs counterparts. Indeed, despite the fact that the number of SOEs has been drastically reduced in recent years,⁴ they still control at least 30 percent of total assets in the secondary and tertiary sectors in China. This situation is also confirmed by data on Chinese state investments in the world in recent years. Indeed, the share of FDI flows by Chinese SOEs (as opposed to provincially owned or privately owned enterprises) between 2003 and 2005 was of 73.5%, 82.3% and 83.2% respectively.⁵

The Asia Pacific Foundation of Canada's survey also points to other emerging trends. Indeed, it shows that 85% of Chinese companies with investment intentions toward Canada are non-SOEs, while 50% are small and medium enterprises. This evolution will affect the reality of Chinese

³ (2010). *China Goes Global 2010: Survey of Outward Direct Investment Intentions of Chinese Companies*. Vancouver, Asia Pacific Foundation of Canada and China Council for the Promotion of International Trade. <http://www.asiapacific.ca/fr/surveys/chinese-investment-intentions-surveys/china-goes-global-2010>

⁴ Xu, Gao. (2010). *State-owned enterprises in China: How big are they?* East Asia & Pacific on the rise, The World Bank. <http://blogs.worldbank.org/esatasiapacific/node/2865>

⁵ Cheng, Leonard K. and Zihui Ma (2006). *China's Outward FDI: Past and Future+*. Pre-Conference on China's Growing Role in the World Trade. National Bureau of Economic Research. Cambridge, Massachusetts. http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf

investments in Canada in years to come. However, Chinese SOE involvement in the global economy will continue to grow, thus being prepared in dealing with these potentially large investments is essential.

Major Chinese Investments in Canada since 2009

\$8.27 billion investment in (acquisition of) Addax Petroleum (a Calgary based oil and gas exploration and production company) in 2009 by Sinopec

\$1.74 billion investment in Teck Resources (a Vancouver mining company) in July 2009 by China Investment Corporation (a Sovereign Wealth Fund)

\$1.9 billion investment in two oil sand properties held by Athabasca Oil Sands Corp (a Calgary based oil exploration and production company) in August 2009 by Petro China

\$4.65 billion investment in Syncrude (a Fort McMurray based producer of synthetic crude oil from Albertan oil sands) in April 2010 by Sinopec

\$1.252 billion investment in a strategic partnership with Penn West Energy (a Calgary based oil and gas exploration and production company) in June 2010 by China Investment Corporation

\$679 million takeover bid of Corriente Resources (a

Vancouver based resource development and exploration company), in August 2010 by CRCC-Tongguan Investment Co

THE POTASH CORP. SAGA

The story of the Potash Corp. saga is relevant to a broader discussion about Chinese and other state investments for two key reasons. First, the proposed takeover of Potash Corp. by BHP Billiton of Australia would have been the biggest takeover in Canadian history.⁶ Thus, in a way, it constituted an important test of the Canadian foreign investment review process. If a known Australian publicly listed company could create such controversy, what can we expect of large investments by Chinese state-owned enterprises? Second, despite the fact that the main protagonist was BHP Billiton, the potential role of China's state-owned Sinochem also stirred much debate throughout the case. Thus, we can draw lessons from the Potash Corp. saga to reflect on the bigger picture of Chinese state investments as well as other large investments in Canada.

BHP Billiton, the largest mining company in the world by stock market capitalization, mounted a \$38.6 billion

⁶ (2010). Stop Potash Corp. takeover if it's not beneficial, Layton urges Harper. *The Globe and Mail*. Ottawa.
<http://www.theglobeandmail.com/globe-investor/potash/stop-potash-corp-takeover-if-its-not-beneficial-layton-urges-harper/article1679638/>

hostile takeover bid for Potash Corp. in August 2010.⁷ Potash Corp. is a mining company headquartered in Saskatchewan and the largest producer of Potash⁸ worldwide (it holds around 25-30% of global reserves of Potash⁹). The bid by BHP Billiton was blocked by the Minister of Industry, Tony Clement, on November 3rd, 2010, under the “net benefit to Canada” provision of the Canada Investment Act, in a move that shocked the global investment community. It was only the second time an investment was blocked in the history of the Act.¹⁰

In the months preceding the blocking of the BHP bid, it was circulated in international and Canadian newspapers that China state-owned Sinochem was preparing a counter-offer, while possibly looking to partner with another entity to do so.¹¹ On September 13, *Caijing* magazine reported that Sinochem was investigating the possibility of allying itself with Temasek (a sovereign wealth fund from Singapore) to mount a bid for Potash

⁷ Canadian shareholders hold 49% of Potash Corp., while foreign investors own 51% of the company.

⁸ Potash is Potassium in water soluble form, an essential crop nutrient.

⁹ Gascon, Denis, Richard A. Wagner, et al. (2010). Rejection of Potash Corp. Bid Brings Uncertainty to Investment Canada Act Process. *Mergers and Acquisitions: International Trade*, Ogilvy Renault. www.ogilvyrenault.com/files/OR_IB_Rejection_of_Potash_eng.pdf

¹⁰ The first time was the blocking of the \$1.3 billion takeover of MacDonald Dettwiler (BC based manufacturer of the Canadarm) by Alliant Techsystems, an American company, in 2008.

¹¹ Hook, Leslie. (2010). Beijing eyes counterbid for PotashCorp. *The Financial Times*. Beijing. <http://www.ft.com/cms/s/0/8591b9a2-b785-11df-8ef6-00144feabdc0.html#axzz1BHPRjIFT>

Corp.¹² The Alberta Investment Management Corp., a Canadian pension fund, was also approached by Sinochem to consider a joint counterbid that could also have involved the Industrial and Commercial Bank of China.¹³ The BHP bid concerned China, not only because of the dominant position it would give BHP in the potash market, but also because of the already dominant position of the mining giant in the iron ore, copper, coal and uranium markets, among other essential Chinese imports.

But this possible counter-offer from China provoked staunch unfavorable reactions by the Government of Saskatchewan, which pointed to the fact that Sinochem was state-owned. This view was strongly supported by a report from the Conference Board of Canada that argued that a bid from Sinochem would be contrary to Canada's interests. The report pointed out that, as an importer country, China was likely to favour a high production scenario in order to lower prices. This would ultimately be detrimental for the Government of Saskatchewan's tax revenues, but also for the rest of the Canadian potash industry, as potash prices are currently controlled through a Canadian cartel-like organization, Canpotex.

¹² (2010). "Queues to purchase the largest potash company (爭購最大鉀礦公司)" *Caijing Magazine*. <http://magazine.caijing.com.cn/2010-09-13/110519811.html>

¹³ Hook, Leslie, Helen Thomas, et al. (2010). Sinochem looks to spoil BHP's Potash bid. *The Financial Times*. Beijing, New York and London. <http://www.ft.com/cms/s/0/88de240a-c5af-11df-ab48-00144feab49a.html#axzz1APsEdNWa>

The Conference Board of Canada noted in its report: “The Province [of Saskatchewan] (...) should be concerned about a bid from a state-owned enterprise (SOE) like Sinochem, especially given that it is a SOE from a major importer country (China). SOEs such as Sinochem simply do not face the same commercial constraints as do commercial enterprises like BHPB. Therefore, we believe that Sinochem is more likely not to demonstrate market discipline to support the potash price.”¹⁴

The report also calculated that a bid by BHP would lead to potential losses of \$2 billion in tax revenues, while a high production scenario (under Sinochem for instance) could lead to losses of \$5.7 billion in the 10 years following the acquisition. Despite the fact that BHP insisted it would make up for the lost tax revenues,¹⁵ the Saskatchewan Premier Brad Wall, and Minister of Energy and Resources Bill Boyd, both supporters of the federal Conservative Party strongly campaigning against the BHP bid (as did the Liberal Party, the National Democratic Party, the Bloc Québécois, and the Premiers of Alberta, Manitoba and Quebec).

When the decision was taken by the Harper government to block the bid, many analysts in Canada

¹⁴ Grant, Michael, Michael Burt, et al. (2010). Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc. - Risks and Opportunities, The Conference Board of Canada: 70.

¹⁵ (2010). Protected Prairies. The Financial Times.
www.ft.com/cms/s/0/5e217834-e84b-11df-8995-00144feab49a.html#axzz1BHPRjIFT

¹⁶ and abroad saw it as a politically-driven choice taken by a minority government calculating the electoral impact of the decision: “Fog [or lack of clarity], of course, allows for other calculations, such as securing must-win seats in Saskatchewan or responding to sudden pangs of economic insecurity in the rest of the country.”¹⁷

THE INVESTMENT CANADA ACT

The Investment Canada Act (ICA) was created in 1985, relaxing the criteria of the former Foreign Investment Review Agency. Under the ICA, in simplified terms, foreign companies¹⁸ who wish to establish a new Canadian business, or who wish to make an acquisition for control of an existing Canadian business have to submit an application for review if the investment exceeds an annually updated threshold. The Minister of Industry assesses if the proposed investment is of “net benefit to Canada,” and if it is not injurious to Canadian national security, among other things.

“While the Act contains criteria that the Minister is to consider when making the “net benefit” determination,

¹⁶ Yaffe, Barbara. (2010). Resource decisions based more on politics than economics: Rejection of investment by Conservatives signals that Canada is not as open for business as it advertises. *The Vancouver Sun*. <http://www.vancouversun.com/opinion/Resource+decisions+based+more+politics+than+economics/3781060/story.html>

¹⁷ Mckenna, Barrie. (2010). Investment Canada Act is as clear as mud. Or Potash. *The Globe and Mail*. Ottawa. <http://www.theglobeandmail.com/report-on-business/commentary/barrie-mckenna/investment-canada-act-is-as-clear-as-mud-or-potash/article1816546/>

¹⁸ World Trade Organization member nationals.

these criteria are broad and afford the Minister substantial discretion in his decision-making.”¹⁹ Further, “national security is not defined in the ICA or regulations.”²⁰ Indeed, the Minister of Industry and the federal cabinet essentially have full discretion over how they choose to review cases and the rationale upon which final decisions are based.²¹ This process, as well as deliberations and agreements made between foreign companies and the federal government are conducted behind closed doors, creating substantial uneasiness among the Canadian public, potential investors and Canadian decision-makers who may be drawn into a political storm if contentious investments necessitate an application for review.

The Investment Canada Act

1974: Creation of the Foreign Investment Review Act. “FIRA was enacted on the premise that the ability of Canadians to maintain effective control over their economic environment was a matter of national concern.” (Competition Review Panel)

1985: Creation of the Canada Investment Act. The mandate of the act, as well as its criteria and thresholds

¹⁹ (2008). *Compete to Win: Final Report June 2008*. Competition Policy Review Panel, Publishing Works and Government Services Canada. www.ic.gc.ca/eic/site/cpri-gepmc.nsf/eng/h_00040.html.

²⁰ Glossop, Peter and Rosaleen Piluso (2010). *Frequently Asked Questions Concerning the Investment Canada Act*. News & Resources, Osler. www.osler.com/NewsResources/Details.aspx?id=2268#16

²¹ Davis Ward Phillips & Weinberg (2009) “Amendments to the Investment Canada Act: What Do They Mean For You?” http://www.dwpv.com/en/17620_23425.aspx

were relaxed. Its stated purpose is “to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada.” (Industry Canada)

2007: The Minister of Industry announces the implementation of specific guidelines for acquisitions by state-owned enterprises.

2008: The Competition Review Panel, created in 2007, publishes its report and recommendations.

2009: Introduction of the National Security Review of Investment Regulations.

2009: The *Budget Implementation Act* is passed. Once pending regulations are passed, the review threshold for foreign acquisitions needing to apply for a review under the Canada Investment Act is set to go up from \$299 million (2010) to \$600 million in enterprise value, and then to \$1 billion within 4 years. In addition, the lower review thresholds for investments in the transportation services, uranium production and financial services are cancelled (while the threshold for cultural industries is maintained). (Canada Gazette)

The absence of transparency also opens the door for changes over time in the tendency of decision-makers to block investments or not. This situation is sub-optimal for Canadians and foreign investors alike. The level of uncertainty and unpredictability both in Ottawa and abroad remains high.

This situation exists despite the fact that, in July 2007, the Conservative government set up a Competition Review Panel to assess Canadian foreign investment policies.²² The rationale for setting up the panel was precisely to review and update the ICA, which had not been reviewed in more than 20 years. The panel's report and associated recommendations were published in June 2008. Few of the recommendations have yet to be implemented.

RECOMMENDATIONS: THE CANADIAN FOREIGN INVESTMENT REVIEW PROCESS

The Potash Corp. saga highlights the need to improve the Canadian foreign investment review process. Improvements are particularly warranted in the following areas: recognizing the distinctiveness of state-owned enterprises; improving the quality of communication of decisions and special undertakings approved by Industry Canada; enhancing the government's credibility in post-investment monitoring; and participating in international collaborative initiatives.

THE DISTINCTIVE CHARACTER OF STATE-OWNED ENTERPRISES

The current shift towards a Pacific centred global economy, with the rise of China's hybrid economy at its centre, as well as the Global Financial Crisis in 2008, has

²² (2008). *Compete to Win: Final Report June 2008*. Competition Policy Review Panel, Publishing Works and Government Services Canada. www.ic.gc.ca/eic/site/cpri-gepmc.nsf/eng/h_00040.html.

weakened the belief that the future resides in a smaller role for government in the global economy. Already in 2006, “four of the top five companies in the world [were] non-listed.”²³

The distinction between state-owned and private ownership has many dimensions. First, there is a general uneasiness with direct foreign state ownership of domestic companies. In the Canadian public, for instance, only 18% of Canadians are in favour of a Chinese state-owned enterprise buying a controlling stake in a Canadian company.²⁴ This resonates also in policy circles²⁵ and media. Part of this uneasiness stems from the contrary nature of direct involvement of states in the conduct of international investments and broader discussions of disengagement of the state from the economy. Some find it paradoxical to witness foreign state-owned enterprises acquiring domestic companies that have been privatized only a few years earlier. This would have been the case with a Sinochem takeover of Potash Corp., which was privatized by the government of Saskatchewan in 1989.

States do not necessarily infuse their enterprises with incentives at odds with liberal norms of economic behaviour, although SOE mandates remain a political

²³ Minto, Rob. (2006). Private vs public. *The Financial Times*. <http://www.ft.com/cms/s/0/965bc3fc-8b9e-11db-a61f-0000779e2340.html#axzz1APsEdNWa>

²⁴ Asia Pacific Foundation of Canada 2010 Public Opinion Survey Results <http://www.asiapacific.ca/sites/default/files/filefield/2010PollReport.pdf>

²⁵ See interview of Larry Summers, at http://qn.som.yale.edu/article.php?issue_id=10&article_id=141

choice influenced by economic realities as well as by other dimensions of the country's interaction with the rest of the world. In fact, today many SOEs are given liberal mandates. However, the institutional separation between SOEs' economic and political decision-making remains unequal in China today. Hence the possibility of close links to government preferences (the Conference Board of Canada identified Sinochem's motivations in the Potash case as to "offset market power of large diversified or specialized producers and to secure long term supplies.")²⁶

State involvement in overseas investments can create an unequal playing field, such as, easier access to finance, market information, resources, key government networks, preferential supply contracts, control over distribution channel, etc. However, another possibility is that SOEs may prioritize national interests, especially under duress. For instance, during the September 2010 incident that involved a clash between a Chinese fishing boat and Japanese Coast Guards in the disputed Diaoyu/Senkaku Islands, "China used its growing economic power to threaten a possible embargo on exports of rare metals that are crucial to Japanese industry."²⁷

²⁶ Grant, Michael, Michael Burt, et al. (2010). Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc. - Risks and Opportunities, The Conference Board of Canada: 70.
www.gov.sk.ca/adx/aspx/adxGetMedia.aspx?mediaId=1245&PN=Shared

²⁷ Tiberghien, Yves. (2010). "The Diaoyu Crisis of 2010: Domestic Games and Diplomatic Conflict." Harvard Asia Quarterly 12(3&4): 70-78.

Moreover, there exist many different types of SOEs and state investment funds that complicate the review process. China illustrates this point clearly with its myriad of state owned arrangements. Within this complex environment, it is difficult to perform individual and timely review processes without prior knowledge of individual state owned enterprises, their governance structures, their investment strategies, and their relations with the Chinese political economic environment. All state investment funds are not created equal: some are more transparent, and more prepared than others to work within a set of widely accepted best practices. The specific nature of state-owned entities does warrant specific criteria for evaluation. However, it is necessary to strike a delicate balance with SOE policy.

The difference between state-owned and privately-owned investment companies is relevant to the formulation of Canadian inward investments policies. The current government made a step forward in 2007 by introducing specific SOE guidelines in the ICA.²⁸ The guidelines remain broad, but point in the right direction in terms of examining the nature and extent of control by the foreign government, the corporate governance, the operating and reporting practices, and whether the acquired Canadian business retains the ability to operate on a commercial basis.

²⁸ The Competition Review Panel was explicitly directed to avoid touching on state-owned investment issues, and Industry Canada came up with guidelines separately.

Awareness on behalf of Canadian regulators of SOE's specificity creates both a platform for dialogue and a basis of understanding between potential state investors and their Canadian counterparts. SOE specific guidelines also temper the uncertainty of those that meet them, and provide clear incentives for better governance for those who do not. The current ICA guidelines for state-owned enterprises are a first step, but opportunities remain for them to be further specified and developed.

COMMUNICATION OF FOREIGN INVESTMENTS REVIEW PROCESS WITH THE CANADIAN PUBLIC

There is a broad consensus on the need to improve communication of how decisions are taken under the ICA with the Canadian public. This recommendation was central to the motion to improve foreign takeover reviews introduced by the National Democratic Party on November 4, 2010, and passed unanimously by parliament a few days later.²⁹

This was also one of the main recommendations of the Competition Review Panel in 2008, still in need of implementation:

The current inability of ministers to articulate the reasons for allowing or disallowing a foreign

²⁹ (2010) NDP foreign takeover motion passes with widespread support. NDP Press Releases. www.ndp.ca/press/ndp-foreign-takeover-motion-passes-with-widespread-support.

investment proposal does not meet contemporary standards for transparency. In addition, the Panel recommends that ministers should publish annually a report on the operation of the ICA. The annual report should provide information on the development of any new policies or guidelines as well as an over view of all transactions subject to the ICA and undertakings provided by foreign investors in relation to the disallowance test under the legislation. The report should be required to provide 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. To further improve the administration of the ICA we believe that the government should also make increased use of guidelines and other advisory materials to provide information concerning the review process, explain the basis for making decisions under the Act, and clarify interpretations by Industry Canada or the Department of Canadian Heritage regarding its application.³⁰

The need for greater transparency also concerns the post-investment monitoring of special regulatory undertakings. The Minister of Industry has the power to

³⁰ (2008). *Compete to Win: Final Report* June 2008. Competition Policy Review Panel, Publishing Works and Government Services Canada. www.ic.gc.ca/eic/site/cpri-gepmc.nsf/eng/h_00040.html.

negotiate such special conditions before approving an investment, but the government's credibility in subsequently enforcing them has suffered in recent years.³¹

Potash Corp.'s chief executive, Bill Doyle suggested the implementation of another type of condition: if a company violated the agreement to, say, "running this company on a commercial basis in the best interests of the province of Saskatchewan and the shareholders and [remain committed to] the capital expenditure plan and Canpotex," then "a golden share would kick in and the government could force those changes"³² (more common in Europe, golden shares give governments veto power over major corporate decisions). This proposition potential would provide the government with the increased capacity to enhance post-investment monitoring.

³¹ In July 2010, for the first time in the Canada Investment Act history, the attorney general of Canada sued and won a case against a foreign company. US Steel was ordered to pay penalties for breaching the terms of its takeover of Stelco Inc. in 2007, which included maintaining employment levels, after the company closed two of its mills in Ontario in 2008 and 2009. Wakil, Omar. (2010). U.S. Steel Case Decision in Canada May Have Broader Ramifications. *Torys on Mergers and Acquisitions*, Torys LLP. <http://www.torys.com/Publications/Documents/Publication%20PDFs/MA2010-3.pdf>; (2010). Court rules U.S. Steel case must proceed. *CBC News*. <http://www.cbc.ca/canada/story/2010/07/26/us-steel-stelco-lawsuit.html>

³² (2010). Chinese seek nod from Ottawa to proceed with Potash acquisition. *The Globe and Mail*. <http://www.theglobeandmail.com/globe-investor/potash/chinese-look-for-nod-from-ottawa-to-proceed-with-potash-acquisition/article1748789/>

INTERNATIONAL COLLABORATIVE INITIATIVES SUCH AS THE INTERNATIONAL FORUM OF SOVEREIGN WEALTH FUNDS

The situation of state owned investments worldwide is evolving rapidly. One of the leading initiatives generating much interest is the work of the International Forum of Sovereign Wealth Funds (IFSWF),³³ where Canada is represented by the Alberta Heritage Fund. The IFSWF is a voluntary group of 24 sovereign wealth funds (a particular type of state investment fund), from 23 countries. The group has produced 24 voluntary best practices dubbed the Santiago Principles,³⁴ which are a set of clear and relevant guidelines for the behavior of state-owned funds overseas.

At present, it is difficult to assess the level of Canadian involvement in the IFSWF. However, Canada, as recipient of inward state investments, may benefit from fully participating in this group which voluntarily sets targets of good governance for state investment funds. Indeed, the work of the IFSWF has to be actively supported, monitored, and could even become one of the sources of inspiration for more sophisticated and up-to-

³³ IFSWF is a voluntary group of Sovereign Wealth Funds, which meets, exchanges views on issues of common interest, and facilitates an understanding of the Santiago Principles and SWF activities. <http://www.ifswf.org/pr/pr4.htm>

³⁴ (2008). *Sovereign Wealth Funds: Generally Accepted Principles and Practices*. International Working Group of Sovereign Wealth Funds. Santiago: 52 <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>

date guidelines regarding foreign investment by state-owned enterprises.

Beijing has stepped forward and hosted the annual meeting of the IFSWF in April 2011. Could Canada envisage hosting a meeting in the near future? This would not only be a great opportunity to showcase Canada as a potential investment destination, but would work to cement Canada's reputation as a country committed to a sound and stable international investment environment.

The Santiago Principles (excerpts)

GAPP 4 There should be clear and publicly disclosed policies, rules, procedures, or arrangements in relation to the SWF's general approach to funding, withdrawal, and spending operations.

GAPP 4.2 The general approach to withdrawals from the SWF and spending on behalf of the government should be publicly disclosed.

GAPP 11 An annual report and accompanying financial statements on the SWF's operations and performance should be prepared in a timely fashion and in accordance with recognized international or national accounting standards in a consistent manner.

GAPP 12 The SWF's operations and financial statements should be audited annually in accordance with recognized international or national auditing standards in a consistent manner.

GAPP 19.1 If investment decisions are subject to other than economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed.

In essence, the Investment Canada Act will necessitate regular updating and modernizing in line with best practices internationally and an active involvement with voluntary international collaborative initiatives such as the IFSWF is certainly conducive to this aim.

WHAT ABOUT AUSTRALIA?

While Canada is looking to increase its investment review threshold from \$312 million to \$600 million and going up to \$1 billion within four years,³⁵ Australia is moving in the opposite direction.

The Australian Foreign Investment Review Board has recently updated its regulatory framework by specifying more stringent conditions under which an SOE investment is subject to compulsory notification. Two aspects are worth mentioning. First, Australia defines foreign state controlled enterprises as enterprises with more than 15% of government ownership, with more than 40% of combined government ownership, or with substantial government control regardless of the percentage of ownership. This definitional stance is more specific and much more stringent than Canada's. Second,

³⁵ (2009). Canada Gazette. Public Works and Government Services Canada. Ottawa. 143: 2082. <http://www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/pdf/g1-14328.pdf>

a foreign state controlled company has to notify the treasurer of any investment it makes in Australia, not only acquisitions of control, like it is the case in Canada. Australia has also been considering ownership caps of 50% for state controlled enterprises in certain sectors of the economy.³⁶ Interestingly however, Australia's FDI performance index (rate of FDI on GDP) is higher than Canada's.³⁷

It is also interesting to look at the Australian experience for examples of further specification of SOE guidelines. For instance, some of Australia's trading partners have expressed concern that a market based dynamic is not preserved in Australia's export industries after a large Chinese state-owned acquisition is completed. To mitigate this potentiality, a recommendation was made to include in the Australian foreign investment policy "protections to preserve the integrity of the market for the company's product, such as commitments for arms-length marketing of product and the establishment of board sub-committees and information barriers to deal with 'conflict of interest' concerns."³⁸

³⁶ Lyons, Russell and Andrew Gaffney (2009). Foreign investment policy is Australia's doosra - it's very hard to pick. Straight talking, Middletons. www.middletons.com.au/news/news.asp?id=248

³⁷ (2009). Inward Foreign Direct Investment (FDI) Performance Index. How Canada Performs: Details and Analysis, The Conference Board of Canada www.conferenceboard.ca/HCP/Details/Economy/Inward-FDI-Performance.aspx#What_rankinFDI

³⁸ Lyons, Russell and Andrew Gaffney (2009). Foreign investment policy is Australia's doosra - it's very hard to pick. Straight talking, Middletons. www.middletons.com.au/news/news.asp?id=248

CONCLUSION

In the words of the Canadian Competition Review Panel: “Consistent with Canada’s legal traditions and our international reputation for sound governance practices, the review process should be predictable, timely and transparent” while “acknowledging that foreign investment typically delivers important economic benefits.”³⁹ The Potash Corp. saga highlighted the weaknesses of the Canada foreign investment review process. It is important for the ICA to remain up to date in the face of the rapid evolution of state-owned investments globally. It is also particularly important to get this right, in light of the growing importance for Canada of Chinese state-owned and private investment.

China is emerging as a partner that we will only see more of in the coming decades. It is crucial to maintain open channels of dialogue and make sure Canada’s policy decisions are more transparent, predictable and clearly communicated to our Chinese counterparts, and to the Canadian public. Indeed, “How [Canada]’s political and business leaders respond to the growing reach and influence of China’s globalising companies is one of the most significant issues of our time, and our response will shape [Canada and Canadian] business for decades to come. Clarifying [Canada]’s attitude and approach to investment by Chinese SOEs and sovereign wealth funds

³⁹ (2008). *Compete to Win: Final Report* June 2008. Competition Policy Review Panel, Publishing Works and Government Services Canada. www.ic.gc.ca/eic/site/cpri-gepmc.nsf/eng/h_00040.html.

is a priority.”⁴⁰

Further, taking a clear stance on minimum standards of best practice for state-owned enterprises can place Canada in a leading position worldwide on this issue. It could also lead to the strengthening of norms of best practice internationally, in the hope of ultimately contributing to the positive evolution of state owned enterprises’ behavior worldwide.

⁴⁰ Olsson, David and Jin Xiong (2010). China outbound investment will impact on the Australian regulatory landscape, Mallesons Stephen Jaques. www.mallesons.com/publications/2010/Apr/10306748w.htm.