



HOUSE OF COMMONS
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CANADA

THE INVESTMENT CANADA ACT: RESPONDING TO THE COVID-19 PANDEMIC AND FACILITATING CANADA'S RECOVERY

**Report of the Standing Committee on Industry, Science and
Technology**

Sherry Romanado, Chair

**MARCH 2021
43rd PARLIAMENT, 2nd SESSION**

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Chair**

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

has the honour to present its

FIFTH REPORT

Pursuant to its mandate under Standing Order 108(2), the committee has studied the *Investment Canada Act* and has agreed to report the following:

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EXECUTIVE SUMMARY

The Investment Canada Act (ICA) allows the federal government to review foreign investments. The ICA provides two distinct processes: a net benefit review and a national security review. The net benefit review grants the federal government powers to ensure that the acquisition of a significant Canadian business is likely to be of net benefit to Canada. Acquisitions are subject to net benefit review when the value of the acquired business meets or exceeds an applicable financial threshold. A national security review provides the federal government the power to prevent a foreign investment from injuring Canada's national security. Unlike the net benefit review, the federal government can subject any foreign investment to a national security review, regardless of its value. In both cases, the federal government may approve an investment with or without conditions or disapprove an investment. In the latter case, the government may block the investment or, if it was already implemented, order the divestment of the acquired Canadian business.

The House of Commons Standing Committee on Industry, Science and Technology (the Committee) heard how the context of foreign investments changed since Parliament adopted the ICA in its current form. While most foreign investments can and do benefit Canada, the acquisition of sensitive assets by state-owned or -controlled entities raises national security issues. The devaluation of many Canadian businesses experienced in the wake of the COVID-19 pandemic exposed and worsened Canada's vulnerabilities. Moreover, the federal government could improve the ICA's net benefit review process by valuing intangible assets in a manner that better reflects their importance to a knowledge-based economy. While the government discloses general information on the administration of the ICA, it could make the net benefit review process more accountable by revealing information regarding specific decisions, such as the conditions in which the government approve foreign investments.

In sum, while the legislation remains strong in many aspects, the evidence shows that the ICA would benefit from a more cautious, responsive, and transparent approach to regulating foreign investments. To that end, the Committee presents nine recommendations to the federal government.

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That the Government of Canada introduce legislation amending the *Investment Canada Act* to reduce the current valuation threshold for prospective acquisition of control by either state-owned or state-controlled enterprises to zero, so that every transaction triggers a review, including a net benefit test and a national security test. 40

Recommendation 2

That the Government of Canada introduce legislation to amend the *Investment Canada Act* so that thresholds are reviewed on an annual basis. 40

Recommendation 3

That the Government of Canada review the provisions and administration of the *Investment Canada Act* to determine how to improve the treatment of intangible assets under the net benefit review process in the context of the knowledge economy, and report on its findings to the House of Commons Standing Committee on Industry, Science and Technology within one year. 40

Recommendation 4

That the Government of Canada protect strategic sectors, including, but not limited to: health, the pharmaceutical industry, agri-food, manufacturing, natural resources, and intangibles related to innovation, intellectual property, data and expertise. 40

Recommendation 5

That the Minister of Innovation, Science and Industry justify their decision whether or not a transaction is to Canada's net advantage, that the Minister then explain the factors leading to this decision, and that the Minister make public the conditions imposed on a buyer in the case of a transaction involving a foreign investor. 41

Recommendation 6

That the Government of Canada encourage Canadian entities to keep ownership of intangible assets developed with federal funds, including intellectual property, by requiring, when appropriate, that they return moneys received from federal programs or subsidies in full or in part. 41

Recommendation 7

That the Government of Canada review its legislation framework and implement legal measures necessary to:

- Block any transaction that would undermine Canada’s national security by transferring a sensitive asset to a non-Canadian entity; and**
- Require a Canadian business or entity holding a sensitive asset to notify the federal government thirty days before implementing the transfer of that asset to a non-Canadian entity. 42**

Recommendation 8

That the Government of Canada immediately introduce legislation amending the *Investment Canada Act* to allow for the review of and the ability to prevent the subsequent takeover by a state-owned enterprise of a previously ICA approved acquisition of a Canadian firm or assets by a foreign privately owned corporation. 42

Recommendation 9

That the Government of Canada immediately introduce legislation amending the *Investment Canada Act* to compel the Minister to consult with the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, and the Canadian Security Establishment in the national security process. 43



THE *INVESTMENT CANADA ACT*: RESPONDING TO THE COVID-19 PANDEMIC AND FACILITATING CANADA'S RECOVERY

INTRODUCTION

On 1 June 2020, the Standing Committee on Industry, Science and Technology (the Committee) adopted the following motion:

That, given the House motion made last week granted the committees power to study outside their usual scope, the Standing Committee on Industry, Science, and Technology conduct a study on Investment Canada Act; that this study determine the extent to which companies within strategic Canadian industries have been devalued as a result of the COVID-19 crisis; the extent to which foreign buyouts may occur; determine whether the current Investment Canada Act valuation thresholds is adequate to trigger a net benefit review given the potential extreme devaluation of companies within strategic Canadian industries; determine whether Canada should place a temporary moratorium on acquisitions from state owned enterprises of authoritarian countries; that this study consist of no less than four meetings; that this study be completed by June 21, 2020; that the Committee table its findings; and that the Government table a comprehensive response.

The Committee held three meetings, heard from 20 witnesses, and received two briefs.

AN EVOLVING CONTEXT

Parliament promulgated the original *Investment Canada Act* (ICA or the *Act*) in 1985 in replacement of the 1974 *Foreign Investment Review Act* (FIRA). FIRA responded to concerns over an upward trend in foreign (mainly American) ownership of firms in key sectors of the Canadian economy. For foreign investments to proceed under FIRA, investors had to persuade the Governor in Council that their proposed investment would likely be of significant benefit to Canada. As perspectives regarding foreign investments changed in the following years, Parliament maintained but relaxed FIRA's requirements through the new ICA.¹

1 See generally Olivier Borgeers, Emily Rix, and Lorne Salzman, [Foreign Investment Screening under Canada's Investment Canada Act](#), Canadian Bar Association, 2010.



Parliament significantly reformed the ICA in 2009. On the one hand, Parliament raised thresholds that could trigger a “net benefit” review of an investment under the *Act* and eliminated most sector-specific requirements, with the notable exception of cultural businesses. On the other hand, Parliament enacted provisions granting the federal government extensive powers to screen and potentially block any foreign investment that could threaten national security.² Despite subsequent amendments, including further increases of net benefit review thresholds, the ICA remains largely the same today. Its provisions reflect the belief that, though foreign investments generally benefit Canada’s economy, some can undermine its national security:

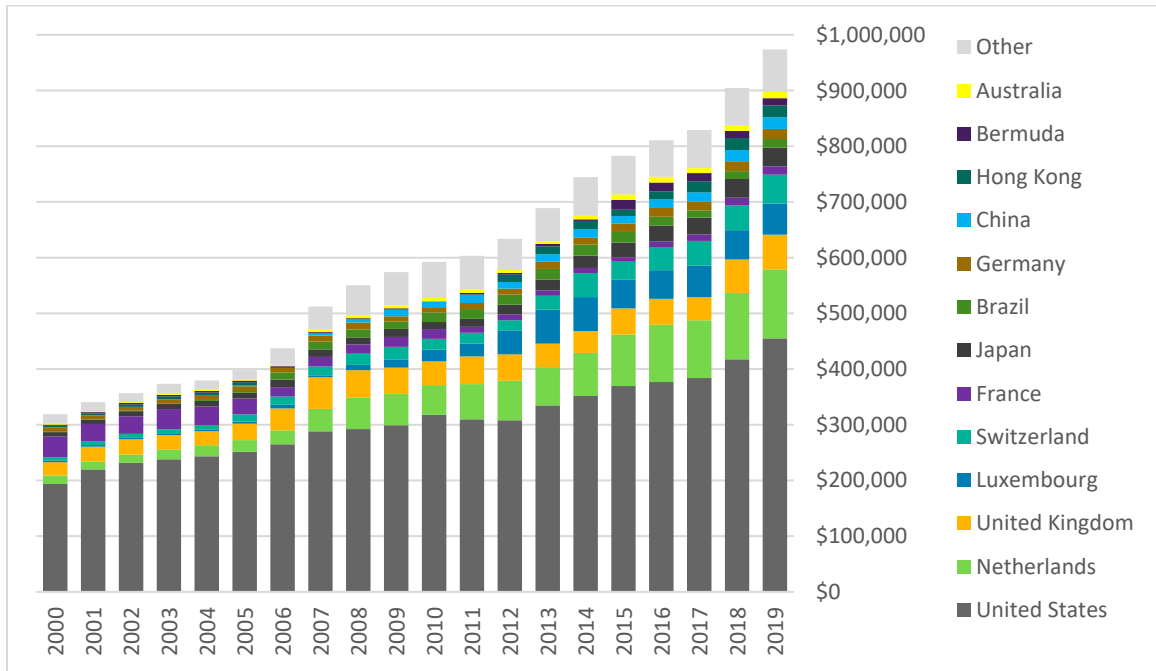
Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.³

According to data from Statistics Canada, while most foreign direct investments (FDI) in Canada came from the United States (US) in the last 20 years (Figure 1), the share of US FDI has decreased over the same period (Figure 2). After the US, the 12 predominant sources of FDI are, in descending order, the Netherlands, the United Kingdom, Luxembourg, Switzerland, Japan, China, Hong Kong, Germany, Brazil, France, Bermuda, and Australia.

2 *Ibid.*

3 [*Investment Canada Act*](#), R.S.C. 1985, c. 28 (1st Supp.), s. 2 [ICA].

Figure 1—Total Book Value of Foreign Direct Investment to Canada, by origin, 2000–2019 (in \$ million)

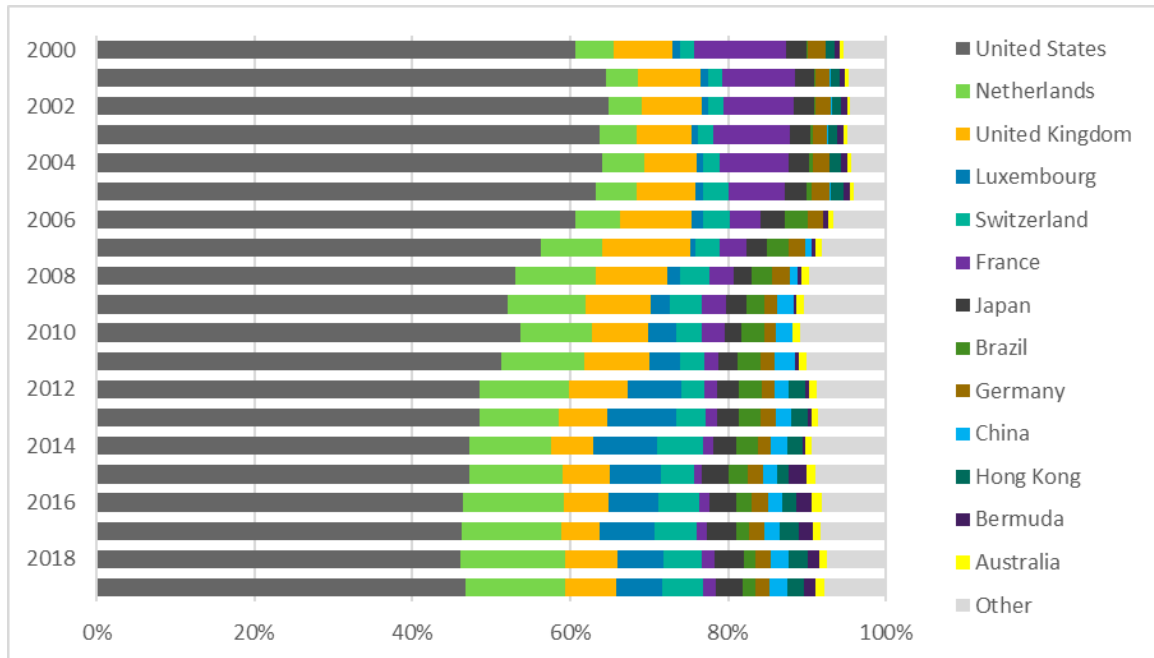


Note 1: Data not disclosed for China in 2006 and Hong Kong from 2006 to 2011, inclusively.

Source: Figure prepared by the analysts of the Library of Parliament using data from Statistics Canada, [Table 36-10-0008-01 – International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by country, annual \(x 1,000,000\)](#), accessed on 1 September 2020.



Figure 2—Total Book Value of Foreign Direct Investment to Canada, by origin, 2000–2019 (%)



Note: Data is not available for China in 2006 and Hong Kong from 2006 to 2011, inclusively.

Source: Figure prepared by the analysts of the Library of Parliament using data from Statistics Canada, [Table 36-10-0008-01 – International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by country, annual \(x 1,000,000\)](#), accessed on 1 September 2020.

Tim Hahlweg, Assistant Director for the Canadian Security Intelligence Service (CSIS), confirmed that while “foreign investment is a key driver of Canada’s economic prosperity, it also has the potential, in certain cases, to adversely affect our national security.”⁴ While the nature and origin of these threats vary, they have existed for years and foreign investments from the People’s Republic of China (China) and Russia tend to attract much of CSIS’ attention. Mr. Hahlweg also pointed to the acquisition of Canadian businesses holding vast quantities of Canadians’ personal data – such as financial and health records – or sensitive intellectual property (IP) and technology, or controlling critical infrastructure in the telecommunications, transportation or energy sectors as more likely to raise national security issues. This is especially the case when the investor has strong ties to a foreign government – for example by virtue of being (or being

4 House of Commons, Standing Committee on Industry, Science and Technology [INDU], [Evidence](#), 43rd Parliament, 1st session, 18 June 2020, 1505 (Tim Hahlweg, Canadian Security Intelligence Service).

controlled by) a state-owned enterprise (SOE) – and pursues the acquisition to serve the government's strategic goals.⁵

Much of the testimony the Committee received on the national security risks of foreign investments focused on China. According to Dr. Charles Burton, a Senior Fellow of the Macdonald-Laurier Institute, it is not uncommon for Chinese investments made in Canada and elsewhere to primarily serve strategic purposes. Dr. Burton testified that Chinese firms work in concert with their government's military and intelligence apparatuses to gain information on foreign corporations and acquire their technology. All Chinese firms, he testified, meet the definition of a SOE under the *Act* (see below), noting that government officials routinely sit on their board of directors. He also testified that Chinese firms will often attempt to avoid scrutiny when acquiring sensitive assets, for example by working through third-party intermediaries. According to Dr. Burton, the Chinese government's approach to foreign investments is part of a wider pattern of using economic tools to exert pressure on foreign corporations and their governments in order to serve its political and strategic interests.⁶

Christopher Balding, Associate Professor at the Fulbright University Vietnam, also emphasized the strong ties between Chinese firms and their government. Prof. Balding stated that every year the Chinese government provides Chinese firms a list of foreign assets for them to acquire. He sees the limited commercial success of these acquisitions – such as the investor's low equity and return on investments – as evidence that they serve strategic purpose. Like Dr. Burton, Prof. Balding warned that Chinese firms may employ intermediaries to avoid attracting scrutiny from governments.⁷

In contrast, Professor Gordon Houlden, Director of the China Institute at the University of Alberta, argued that not all foreign investments from Chinese SOEs present the same level of risk to Canada's national security. He added that while many Chinese firms are *de facto* SOEs and do not operate independently from the Chinese government, it can be difficult to ascertain whether a given firm should be treated as a SOE. Moreover, he explained that investments in sensitive sectors or activities carry more risk to national security. Based on data collated by the China Institute, Prof. Houlden observed that Chinese investments started to accelerate in 2003-04 with total investments of \$2-3 billion and peaked at \$23 billion in 2013 before dropping to \$2-4 billion in 2018-19. Statistics Canada and the China Institute have tracked Chinese investments in Canada

5 Ibid., 1505, 1535, 1545.

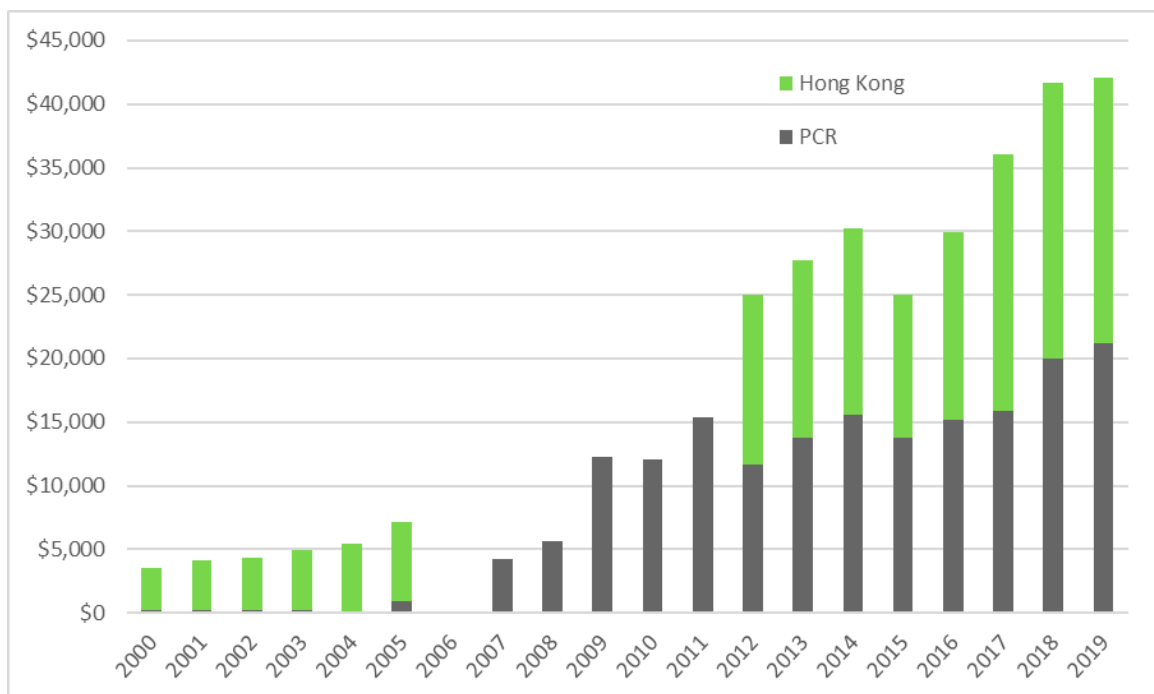
6 INDU, [Evidence](#), 8 June 2020, 1110, 1120, 1145, 1205-1210, 1235 (Charles Burton, as an individual).

7 INDU, [Evidence](#), 15 June 2020, 1125, 1130, 1140, 1205, 1245 (Christopher Balding, as an individual). See also *ibid.*, 1120.



differently in the past 20 years (see Figures 3 & 4). Despite the risk associated with some Chinese investments, Prof. Houlden maintained that Canada can and should continue to benefit from Chinese investments, provided that we protect our national security and maintain our innovation capacity.⁸

Figure 3—Total Book Value of Foreign Direct Investment from the People’s Republic of China (PCR) and Hong Kong to Canada, 2000–2019 (in \$ million)

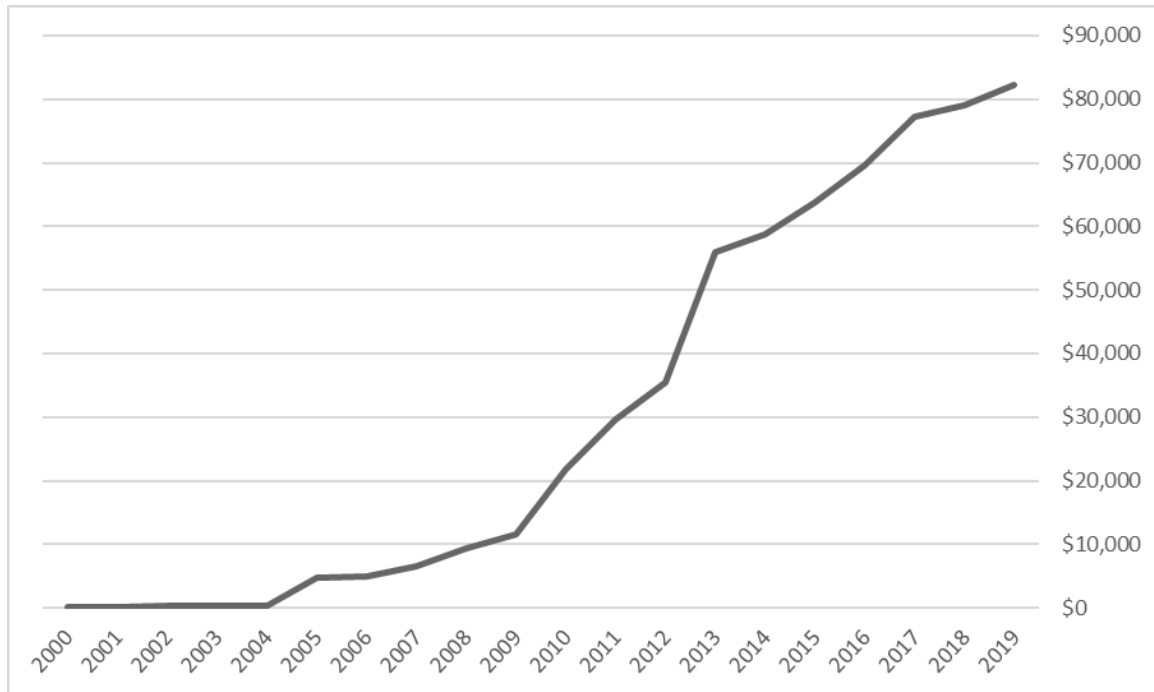


Note: Statistics Canada does not disclose data for investments from the PCR in the year 2006, as well as for investments from Hong Kong between 2006 and 2011.

Source: Figure prepared by the analysts of the Library of Parliament using data from Statistics Canada, [Table 36-10-0008-01 – International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by country, annual \(x 1,000,000\)](#), accessed on 1 September 2020.

8 INDU, [Evidence](#), 18 June 2020, 1630, 1705, 1755 (Gordon Houlden, as an individual).

Figure 4—Total Value of Investments by Chinese Firms in Canadian Companies and Assets, 2000–2019 (in US\$ million)



Source: Figure prepared by the analysts of the Library of Parliament using data from China Institute, [China–Canada Investment Tracker](#), accessed on 4 September 2020.

Some witnesses identified several assets or sectors critical to national security and vulnerable to foreign purchases/takeovers. They include natural resources, food and medical supply lines, infrastructure (telecommunications and transportation), media and culture, the health sector, the hotel industry (given the need to protect personal information), as well as some emerging technologies such as artificial intelligence (AI), quantum information processing, and semiconductors.⁹ Other witnesses also described IP and other intangible assets as especially vulnerable, given the ease and rapidity with which a foreign investor can transfer them abroad.¹⁰

Some witnesses maintained that most foreign investments are beneficial to Canada. Brian Kingston, Vice-President at the Business Council of Canada, insisted that foreign

9 INDU, [Evidence](#), 8 June 2020, 1145, 1150 (Daniel Schwanen, C.D. Howe Institute); INDU, [Evidence](#), 8 June 2020, 1250, 1300 (Burton); INDU, [Evidence](#), 18 June 2020, 1545 (Hahlweg); INDU, [Evidence](#), 18 June 2020, 1720, 1755 (Michelle Travis, UNITE HERE Canada).

10 INDU, [Evidence](#), 18 June 2020, 1630 (Houlden). See also INDU, [Evidence](#), 15 June 2020, 1105 (Jim Balsillie, Council of Canadian Innovators); INDU, [Evidence](#), 15 June 2020, 1140 (Balding).



investment remains central to Canada’s long-term competitiveness and prosperity: it “not only produces jobs, it enables technology adoption, promotes new management techniques and creates market access opportunities.”¹¹ Mitch Davies, Senior Assistant Deputy Minister at Innovation, Science and Economic Development (ISED), expressed similar views.¹² Other witnesses did not hold the same view.¹³

Mr. Hahlweg reported that the COVID-19 pandemic has increased the national security risks of foreign investments. Foreign actors can capitalize on the increased economic vulnerability of Canadian businesses to engage in opportunistic acquisitions.¹⁴ More specifically, Dr. Burton stated that China would likely take advantage of this economic vulnerability to acquire Canadian businesses holding sensitive assets.¹⁵

Daniel Schwanen, Vice-President of the C.D. Howe Institute, argued that Canada’s national security policy should take into account potential vulnerabilities that the pandemic revealed.¹⁶

On 18 April 2020, the federal government released a [*Policy Statement on Foreign Investment Review and COVID-19*](#) (the Policy) that will remain in place “until the economy recovers from the effects of the COVID-19 pandemic.” While the federal government continues to examine investments on a case-by-case basis, the Policy warns it “will scrutinize with particular attention ... foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government.” The federal government also announced it would subject foreign investments made by SOEs to enhanced scrutiny:

Some investments into Canada by state-owned enterprises may be motivated by non-commercial imperatives that could harm Canada's economic or national security interests, a risk that is amplified in the current context. For this reason, the Government will also subject all foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments, to enhanced scrutiny

11 INDU, [Evidence](#), 18 June 2020, 1635 (Brian Kingston, Business Council of Canada). See also INDU, [Evidence](#), 8 June 2020, 1125 (Schwanen).

12 INDU, [Evidence](#), 18 June 2020, 1510 (Mitch Davies, Department of Industry).

13 INDU, [Evidence](#), 8 June 2020, 1155 (Willie Gagnon, Mouvement d’éducation et de défense des actionnaires); INDU, [Evidence](#), 18 June 2020, 1755 (Travis).

14 INDU, [Evidence](#), 18 June 2020, 1505 (Hahlweg). See also INDU, [Evidence](#), 18 June 2020, 1750 (Kingston).

15 INDU, [Evidence](#), 8 June 2020, 1220 (Burton).

16 INDU, [Evidence](#), 8 June 2020, 1125 (Schwanen).

under the Act. This may involve the Minister requesting additional information or extensions of timelines for review as authorized by the ICA, in order to ensure that the Government can fully assess these investments.

Questioned on the meaning of “enhanced scrutiny,” government officials responded that it could involve a closer examination of the potential impact of an investment on the health system and supply chains, including on the biopharmaceutical sector and the supply of personal protection equipment, and that the government could subject investments to longer reviews.¹⁷

NOTIFICATION PROCESS

The notification process allows the federal government to monitor foreign investments made in Canada that fall below net benefit thresholds (see below). Under the ICA, foreign investors acquiring control of a Canadian business or establishing a new business, must notify the federal government “at any time prior to the implementation of the investment or within thirty days thereafter.”¹⁸ Figure 5 shows the number of notifications submitted to the federal government between 2014 and 2019. Figure 6 shows the total enterprise value and asset value of notified foreign investments between 2014 and 2019.

The notification must provide prescribed information on the investor, the investment, and the Canadian business acquired or established. Such information includes, for example, whether a foreign state has a direct or indirect ownership interest in the investor and “if so, the name of the state and the nature and extent of its interest in the investor,” the sources of funding for the investment, as well as a brief “description of the business activities that are or will be carried on by the Canadian business,” including the “products that are or will be manufactured, sold or exported by the Canadian business” and “the services that are or will be provided.”¹⁹

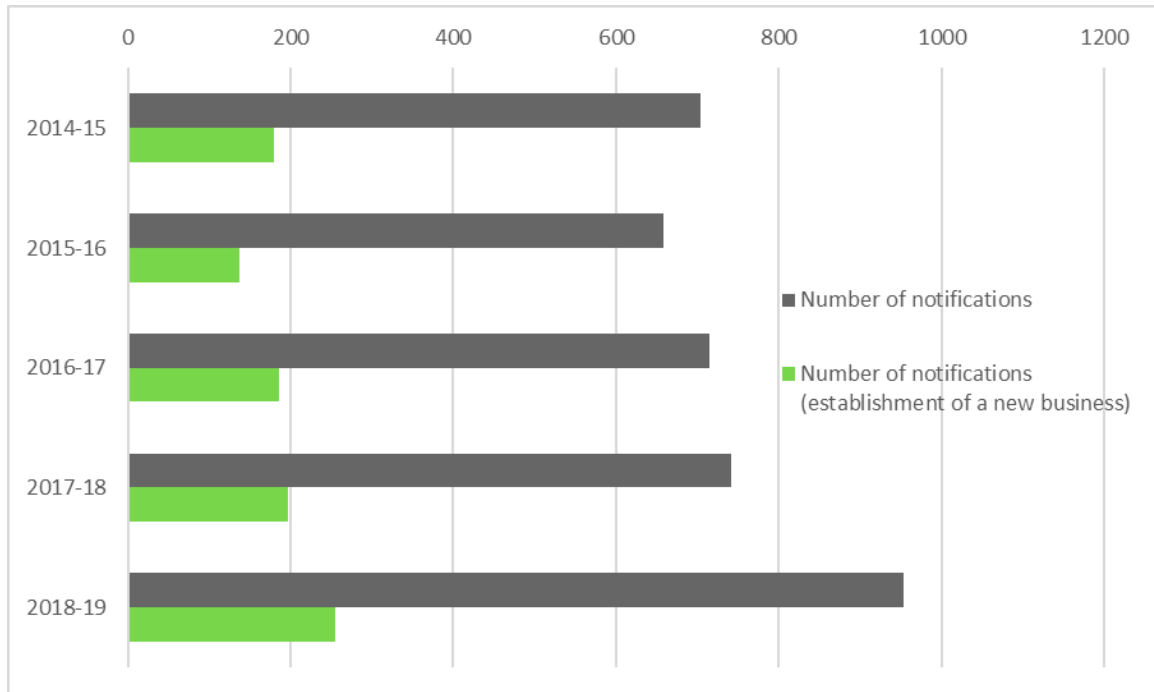
17 INDU, [Evidence](#), 18 June 2020, 1540 (Dominic Rochon, Department of Public Safety and Emergency Preparedness); INDU, [Evidence](#), 18 June 2020, 1600 (Davies).

18 ICA, s. 12. See also ICA, s. 17(1).

19 [Investment Canada Regulations](#), SOR/85-611, Schedule I [ICR]. See also CBA, [Brief](#).

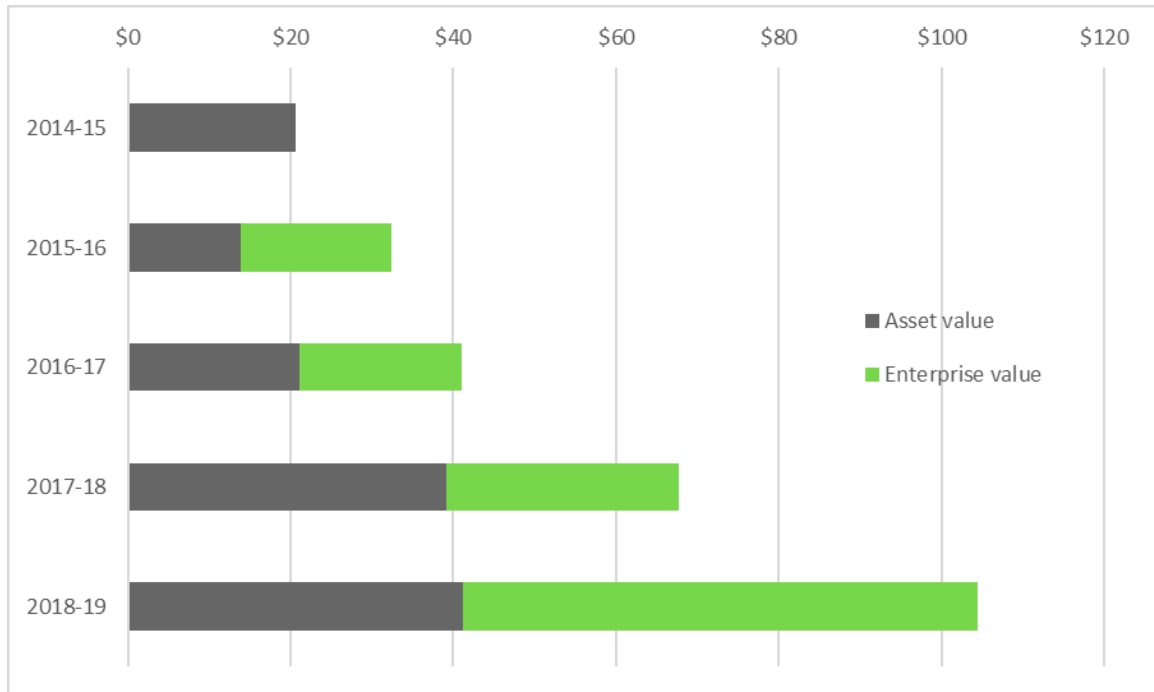


Figure 5—Number of Notifications Between 2014-15 and 2018-19



Source: Figure prepared by analysts of the Library of Parliament using data obtained from Innovation, Science and Economic Development, *Investment Canada Act: Annual Report 2018–2019*, 2019 [ISED, *Annual Report*].

Figure 6—Values of Notified Investments, Between 2014-15 and 2018-19 (in \$ billions)



Source: Figure prepared by analysts of the Library of Parliament using data obtained from ISED, [Annual Report](#).

Some witnesses suggested amending notification requirements for foreign investments targeting sensitive sectors or assets. The ICA requires foreign investors to notify the federal government of an investment at anytime before the closure of an investment or within 30 days thereafter. Post-closure notification requirements would allow a foreign investor to legally acquire a Canadian entity and transfer its sensitive assets before the federal government becomes aware of the transaction. While the federal government could still review the investment, a divestment order could come too late to protect Canada's national security. Parliament could instead consider amending the ICA to require the notification of investments targeting sensitive sectors or assets 30 days before their closure, similarly to US legislation. As the latter, Parliament could exclude foreign investments coming from some trade partners from these new notification requirements.²⁰

20 INDU, [Evidence](#), 15 June 2020, 1255 (Omar Wakil, as an individual); INDU, [Evidence](#), 15 June 2020, 1115, 1255 (Joshua A. Krane, as an individual); CBA, [Brief](#); Facey & Krane, [Brief](#). See also INDU, [Evidence](#), 15 June 2020, 1140 (Balding).



NET BENEFIT REVIEW

The Review Process

The net benefit review process grants the federal government powers to ensure that the acquisition of a significant Canadian business is likely to be to the net benefit of Canada.²¹ Not all foreign investments undergo a net benefit review: the ICA only subjects investments to these reviews when the asset or enterprise value of the acquired business meets or exceeds the applicable financial threshold.²² As seen on Table 1, the *Act* classifies foreign acquisitions in different categories, each of which has its own applicable threshold. Most of these thresholds are indexed on an annual basis.

21 ICA, s. 28(1) (for the meaning of “acquisition of control”).

22 As per the requirements of the ICA and its regulations, the value of an investment is based on “enterprise value” or “asset value” depending on the nature of the investment. The “enterprise value” takes into account market value, debts and cash, while the “asset value” is based on the business’s financial statements (see Innovation, Science and Economic Development, [Investment Canada Act: Annual Report 2018–2019](#), 2019 [ISED, *Annual Report*]).

Table 1—Review Thresholds under the *Investment Canada Act* in 2021

Category of Investment	Description	Threshold
Private sector World Trade Organization (WTO) investments	Investments to directly acquire control of a Canadian business by: <ul style="list-style-type: none"> • WTO investors that are not state-owned enterprises; and • Non-WTO investors that are not state-owned enterprises where the Canadian business that is the subject of the investment is controlled by a WTO investor immediately prior to the implementation of the investment. 	\$1.043 billion in enterprise value
Private sector trade agreement investments	Investments to directly acquire control of a Canadian business by: <ul style="list-style-type: none"> • Trade agreement investors that are not state-owned enterprises; and • Non-trade agreement investors that are not state-owned enterprises where the Canadian business that is the subject of the investment is controlled by a trade agreement investor immediately prior to the implementation of the investment. 	\$1.565 billion in enterprise value
State-owned enterprise WTO investments	Investments to directly acquire control of a Canadian business by: <ul style="list-style-type: none"> • WTO investors that are state-owned enterprises; and • Non-WTO investors that are state-owned enterprises where the Canadian business that is the subject of the investment is controlled by a WTO investor immediately prior to the implementation of the investment. 	\$415 million in asset value
Non-WTO investments and investments in cultural business—direct investments	Investments to acquire control of a Canadian business by: <ul style="list-style-type: none"> • Non-WTO investors where the Canadian business that is the subject of the investment is not controlled by a WTO investor immediately prior to the implementation of the investment; and • All non-Canadian investors where the Canadian business that is the subject of the investment is a cultural business. 	\$5 million in asset value
Non-WTO investments and investments in cultural business—indirect investments	Investments to acquire control of a Canadian business by: <ul style="list-style-type: none"> • Non-WTO investors where the Canadian business that is the subject of the investment is not controlled by a WTO investor immediately prior to the implementation of the investment; and • All non-Canadian investors where the Canadian business that is the subject of the investment is a cultural business 	\$50 million in asset value

Note: While Innovation, Science and Economic Development numbers four categories of foreign investments under the Investment Canada Act, this table presents five such categories to facilitate the distinction between direct and indirect investments by non-WTO investors and investments in cultural businesses, which have different thresholds under the ICA.

Source: Table prepared by analysts of the Library of Parliament based on information obtained from Industry, Science, and Economic Development, [Thresholds](#).



The ICA subjects SOEs to more scrutiny than other foreign investors. Broadly speaking, a SOE is either a foreign government, or an entity or individual that is particularly susceptible to a foreign government’s influence. More specifically, section 3 of the ICA defines a SOE as, either:

- a) the government of a foreign state, whether federal, state or local, or an agency of such a government;
- b) an entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or
- c) an individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency.

Mr. Davies described the legal definition of SOEs as encompassing “direct and indirect influence, influence of individuals,” and allowing “the [Minister] to make a determination after taking into account all of the facts.”²³ As shown in Table 1 (above), a different and significantly lower net benefit review threshold applies to investments made by a SOE from country members of the World Trade Organization (\$415 million in asset value) compared to non-SOE investments originating from the same country (\$1.043 billion in enterprise value).²⁴

The legislation requires net benefit review applications – as well as notifications of foreign investments – to provide information that would reveal a foreign state’s influence over the goals and activities of the foreign investor’s ultimate controller. For example, *Investment Canada Regulations* require the applicant to disclose whether a foreign state has ownership or voting interests in the foreign investor’s ultimate controller, has the power to appoint directors or senior managers to the foreign investor’s ultimate controller, or has legislative authority to direct their strategic or operational decision-making.²⁵

As noted by the Canadian Bar Association (CBA), net benefit thresholds dramatically increased from 2015 to 2020 as planned since at least 2013. For example, the threshold applicable to “private sector trade agreement investments,” increased from \$369 million in book asset value to \$1.613 billion in enterprise value. According to the CBA, the federal government felt confident increasing the thresholds given that it could rely on

23 INDU, *Evidence*, 18 June 2020, 1555 (Davies).

24 See also INDU, *Evidence*, 8 June 2020, 1125 (Schwanen).

25 ICR, s. 5, 6(a), Schedules I, II.

the ICA's national security review process to address problematic investments. The CBA also noted that, since 2009 and as a result of raising review thresholds, the portion of filed foreign investments that undergo a net benefit review fell from 10% to 1%.²⁶

The net benefit review process formally begins with the foreign investor filing an application with ISED's Investment Review Division (the Division). The [Investment Canada Regulations](#) (the Regulations) prescribe the form and the content of the application, though the Division's Director of Investments (the Director) may require the foreign investor to provide additional information. The foreign investor may also submit written undertakings (or "commitments") that would ensure that the acquisition would likely be to the net benefit of Canada.²⁷ Such commitments, once accepted by the federal government, become enforceable.²⁸ With a few exceptions, the ICA prohibits a foreign investor from acquiring a Canadian business when the investment meets or exceeds the applicable threshold until after Minister of Innovation (the Minister) reviews the investment and "is satisfied or is deemed satisfied that [it] is likely to be of net benefit to Canada."²⁹

Figure 7 shows the number of net benefit review applications and their value since 2014–2015. In 2019, ISED reported that the federal government received and approved nine applications under the net benefit review process in 2018–2019.

26 CBA, [Brief](#).

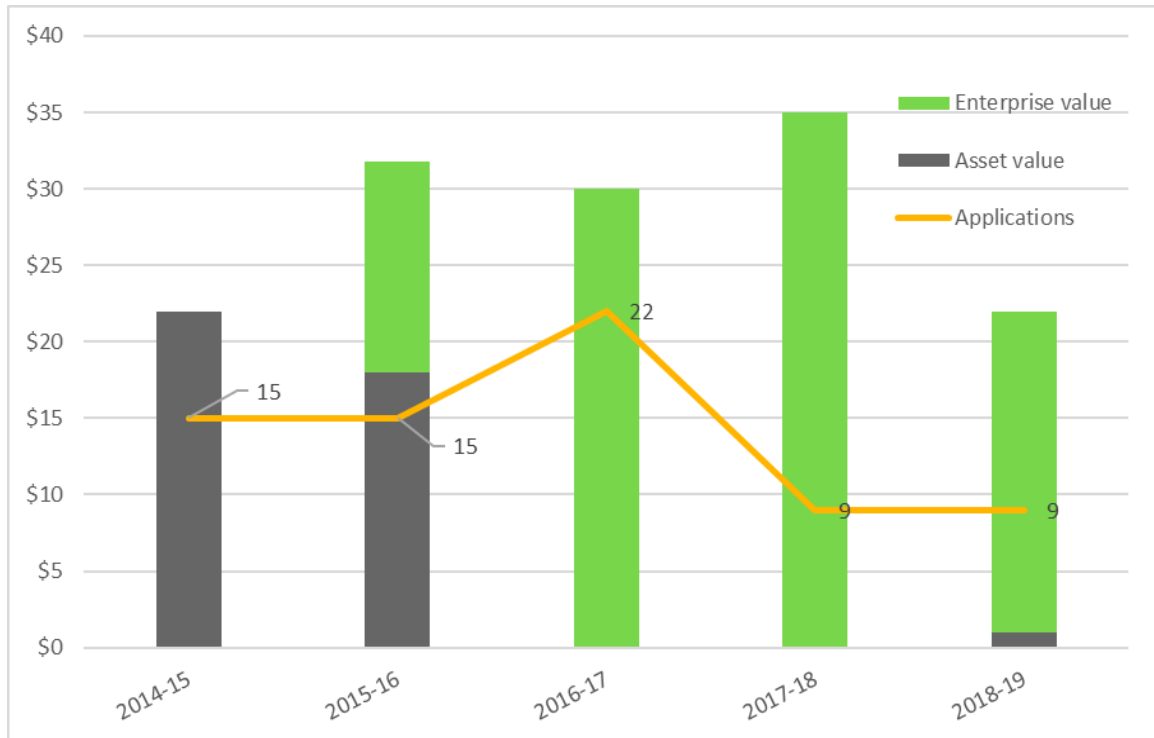
27 ICA, s. 17-19; ICR, s. 6, Schedules II-III.

28 INDU, [Evidence](#), 18 June 2020, 1530 (Davies).

29 ICA, s. 16(1).



Figure 7—Number and value (in \$ billion) of approved net benefit review applications, 2014-2015 to 2018-2019



Note: ISED did not disclose the specific asset value of an application made in 2018–19 in order to preserve commercial confidentiality.

Source: Figure prepared by analysts of the Library of Parliament based on data published in ISED, [Annual Report](#).

Starting on the date the Director deems the application complete, the Minister has initially 45 days to conduct the net benefit review. However, the ICA provides ways for the federal government to extend the review, typically in increments of up to 30 days.³⁰ While the Act does not define “net benefit” nor does it detail which foreign investments are “likely to the net benefit of Canada,” its section 20 provides the list of factors the Minister must consider, when relevant:

- a) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the

30 *Ibid.*, s. 21, 22.

effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

- b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;
- c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- d) the effect of the investment on competition within any industry or industries in Canada;
- e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- f) the contribution of the investment to Canada's ability to compete in world markets.

According to guidelines issued by the federal government, the fact that an investor is or is ultimately controlled by a SOE will also affect the focus of the net benefit review, notably to ensure that the acquiring party operates on a commercial basis and in accordance with proper corporate governance standards:

It is the policy of the Government of Canada to ensure that the governance and commercial orientation of SOEs are considered in determining whether reviewable acquisitions of control in Canada by the SOE are of net benefit to Canada. In doing so, investors will be expected to address in their plans and undertakings, the inherent characteristics of SOEs, specifically that they are susceptible to state influence. Investors will also need to demonstrate their strong commitment to transparent and commercial operations.

...

Furthermore, the Minister will assess whether a Canadian business to be acquired by a non-Canadian that is an SOE will likely operate on a commercial basis.³¹

31 See also INDU, [Evidence](#), 15 June 2020, 1110 (Wakil).



According to Omar Wakil, partner at Torys LLP, commitments from SOEs last in perpetuity and the federal government actively monitors them.³² Prof. Houlden commented that some foreign investors can hardly be categorized as either SOE or not. Though such investors may not be masquerading, the possibility remains that a SOE would unduly avoid scrutiny under the ICA.³³

If the Minister does not notify the applicant that they are satisfied that the foreign acquisition will be to the likely net benefit of Canada within the standard or extended duration of the review, the Minister is deemed to be so satisfied. After the Minister authorizes an investment under the net benefit review process, the Director may require the foreign investor to periodically submit information to ensure that the investment is implemented in accordance with representations and undertakings made by the investor.³⁴

If the Minister notifies the applicant that they are not satisfied that the foreign acquisition will be of a net benefit to Canada, the applicant will have an opportunity for further representations and undertakings, after which the Minister will make a final decision. If the Minister remains unsatisfied, the foreign investor will not be permitted to implement the acquisition or, if the acquisition was already implemented, the investor must divest control of the relevant Canadian business(es). While the ICA requires that the Minister explain why the investment was not approved, the Minister can but is not required to provide an explanation for approvals.³⁵

Potential Avenues for Change

Reducing Value Thresholds

Parliament could subject more foreign investments to net benefit reviews by reducing applicable value thresholds, and potentially prevent opportunistic investment behaviour targeting Canadian firms which have suffered valuation losses due to the pandemic. Willie Gagnon, Director of the Mouvement d'éducation et de défense des actionnaires, noted that current review thresholds remain too high to capture the foreign acquisition of important Canadian businesses, citing Bombardier as an example.³⁶ Dr. Burton also

32 Ibid.

33 INDU, *Evidence*, 18 June 2020, 1730 (Houlden).

34 ICA, s. 21(1), 21(9), 22(2).

35 Ibid., s. 23-24(1), s. 25.

36 INDU, *Evidence*, 8 June 2020, 1155 (Gagnon).

testified that China exploits high thresholds by acquiring Canadian businesses through multiple transactions by different firms that individually fall under the relevant thresholds, and thus avoids subjecting these investments to net benefit reviews.³⁷ One witness who submitted a brief to this Committee disagreed with this testimony.³⁸

Several witnesses, however, warned that Canada's international trade obligations may limit Parliament's ability to amend and reduce these thresholds, even when responding to a public health emergency.³⁹ Indeed, the CBA cited commitments made in the Canada–United States–Mexico Agreement and the Comprehensive Economic and Trade Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and General Agreement on Trade in Services as examples of trade agreements that would require Canada to maintain current thresholds.⁴⁰ Given these agreements, reducing thresholds in a unilateral manner could lead to other countries taking legal action or responding in kind.⁴¹

Other witnesses still argued that it is neither necessary nor practical to reduce net benefit review thresholds in response to the COVID-19 pandemic. Mr. Kingston argued that rebounding stock markets have largely eliminated the threat of opportunistic investments.⁴² Mr. Schwanen added that Canadian firms have avoided massive devaluation due to the support they received from Canadian governments. The global scale of the economic consequences of the pandemic also helps reducing the likelihood of opportunistic investments given that potential investors are struggling as much as Canadian firms.⁴³

Witnesses generally favourable to foreign investments added that they would prove essential to Canada's economic recovery, pleading for the federal government to facilitate rather than hinder these investments.⁴⁴ Even so, the ICA applies significantly lower review thresholds on foreign investments from SOEs compared to non-SOEs,

37 INDU, [Evidence](#), 8 June 2020, 1145 (Burton).

38 INDU, [Evidence](#), 15 June 2020, 1240 (Krane); Facey & Krane, [Brief](#).

39 INDU, [Evidence](#), 18 June 2020, 1555 (Davies); INDU, [Evidence](#), 18 June 2020, 1645 (Michael Kilby, Canadian Bar Association); INDU, [Evidence](#), 18 June 2020, 1650 (Peter Glossop, as an individual).

40 INDU, [Evidence](#), 15 June 2020, 1110 (Wakil).

41 Ibid.

42 INDU, [Evidence](#), 18 June 2020, 1635 (Kingston).

43 INDU, [Evidence](#), 8 June 2020, 1125-1130 (Schwanen).

44 INDU, [Evidence](#), 15 June 2020, 1115 (Krane); INDU, [Evidence](#), 15 June 2020, 1110 (Wakil); INDU, [Evidence](#), 18 June 2020, 1510 (Davies); INDU, [Evidence](#), 18 June 2020, 1650 (Glossop); INDU, [Evidence](#), 18 June 2020, 1635 (Kingston).



which would limit opportunistic investment behaviour from these investors during the pandemic.⁴⁵ Mr. Schwanen added that maintaining a fair valuation of Canadian firms and ensuring a robust economic recovery, notably through relief measures, offer more rapid and effective protection against opportunistic investment behaviour than amending review thresholds.⁴⁶

Rethinking the Treatment of Intangible Assets Under the Act

Jim Balsillie, Chair of the Council of Canadian Innovators, heavily criticized the treatment of intangible assets under the ICA. According to Mr. Balsillie, the *Act* does not appropriately reflect the considerations that should guide foreign investment policy to an innovation-based economy. At the core of Mr. Balsillie’s argument is the premise that a country only benefits from a foreign investment if the value of the transaction accurately reflects the full value of the acquired entity or assets.⁴⁷

Mr. Balsillie argues that, with its emphasis on value thresholds, the net benefit review process reflects a paradigm in which tangible assets drive economic growth through increased production capacity. In a production economy, the value of a foreign investment will likely reflect the full value of the tangible assets held by the acquired entity. Consequently, the value of the foreign investment usually offers a good indicator of whether the investment, by virtue of the “size” of its economic footprint, is significant enough to warrant government attention, which in turn justifies government intervention based on value thresholds.⁴⁸

In contrast, in a modern, innovation-based economy, economic growth is driven by intangible assets such as IP, data, and expertise. According to Mr. Balsillie, much of the value of intangible assets lies in their positive spillover effect: the capacity of informational and non-rival goods to benefit and generate value for third parties. Indeed, intangible assets not only generate value for those that directly hold and exploit them, but also for others who can access and build on these assets to create new products and services. Contrary to foreign investments targeting businesses that primarily hold tangible assets, the amount of a transaction to acquire a business that primarily holds intangible assets tends to ignore the value of their outside holdings.

45 INDU, *Evidence*, 18 June 2020, 1530 (Davies).

46 INDU, *Evidence*, 8 June 2020, 1150 (Schwanen).

47 INDU, *Evidence*, 15 June 2020, 1105, 1140 (Balsillie).

48 Ibid.

Therefore, such foreign investments often fail to reach the relevant threshold that would trigger a net benefit review, even though they should warrant government attention.⁴⁹

Mr. Balsillie argued that because of the ICA's inadequate valuation of intangible assets and contrary to prevalent opinion, foreign investments targeting intangible assets often result in a net loss to Canada by channelling technology and knowledge outward. He found these losses especially regrettable when they involve assets that have been developed with the help of public funds, such as within the AI field. Canadians thus invest and participate in the creation of intangible assets, but our legislative framework contributes to transferring their ownership and benefits to foreign investors. Mr. Balsillie also testified that the federal government has insufficient awareness of the valuable intangible assets Canadian businesses hold, which further aggravates the situation. He criticized policymakers and decision makers for being overly focused on issues that are not relevant to an innovation economy.⁵⁰

Mr. Balsillie proposed that the ICA adapt to a modern, innovation-based economy. As a starting point, he suggested that the federal government maintain a list of (economically) strategic intangible assets and of the actors controlling them. He cited Canadian entities holding IP in AI, quantum computing, renewable energy, clean agriculture, biomedical and bio-technology, emerging fin-tech, or space technology as examples of actors and assets that should appear on that list. A new ICA would require listed actors to notify the government of any proposed transaction or agreement that would result in transferring these assets to non-Canadians: not only acquisitions of control, but also indirect investments, licensing arrangements, and research partnerships. He implied that even the hiring of a Canadian individual holding special expertise in a sensitive field should be subject to notification.⁵¹

The Act would further require that the federal government subject the notified transaction to a net benefit review, no matter the value of the transaction. Mr. Balsillie suggested drawing inspiration from the US, which he testified is in the process of reviewing its own foreign investment policy along these lines. He rejected the counter-argument that his proposed reforms would discourage much-needed foreign investment in Canada on account that, because of our current legislative framework,

49 Ibid. See also INDU, *Evidence*, 18 June 2020, 1755 (Houlden).

50 INDU, *Evidence*, 15 June 2020, 1105, 1210-1215 (Balsillie).

51 Ibid., 1105, 1150, 1205-1215, 1230, 1245.



investments targeting businesses holding intangible assets extract value from Canada and are thus not to its net benefit.⁵²

Some witnesses disagreed with Mr. Balsillie. They argued that the net benefit and the national security review processes both assess the intangible assets held by a Canadian business targeted by a reviewable investment, that their value will be taken into account when determining the overall value of a transaction, and that the national security review process will cover an investment that may involve sensitive intangible assets no matter their value.⁵³

However, the Committee's understanding is that Mr. Balsillie does not argue that the ICA and its administration ignore intangible assets, but that the net benefit review process - specifically – gives intangible assets neither sufficient nor proper weight to determine when and how the federal government should conduct a net benefit review. Mr. Schwanen and Prof. Leblond provided a stronger response by arguing that, while the federal government can and should ensure that public investments made to develop intangible assets benefit Canadians, it has other means to do so than restricting foreign investments.⁵⁴

Other Considerations

Marc-André Viau, Director of government relations at Équiterre, proposed including environmental considerations in the factors the Minister must consider in net benefit reviews. More specifically, he recommended that Parliament amend section 20(e) of the ICA to add the factor of “environmental compatibility,”⁵⁵ adding that when “there are environmental costs associated with investments, there cannot be a net benefit to Canada.”⁵⁶ Prof. Houlden also argued that foreign investors acquiring Canadian businesses holding sensitive assets or operating in “an environmentally delicate space,”

52 Ibid. See also INDU, [Evidence](#), 18 June 2020, 1705 (Houlden). But see INDU, [Evidence](#), 15 June 2020, 1255 (Krane).

53 INDU, [Evidence](#), 15 June 2020, 1240 (Krane), 1255; INDU, [Evidence](#), 15 June 2020, 1250-1255 (Wakil); INDU, [Evidence](#), 18 June 2020, 1535 (Davies).

54 INDU, [Evidence](#), 8 June 2020, 1250 (Patrick Leblond, as an individual); INDU, [Evidence](#), 8 June 2020, 1255 (Schwanen). See also INDU, [Evidence](#), 18 June 2020, 1635-1640 (Kingston).

55 INDU, [Evidence](#), 18 June 2020, 1645 (Marc-André Viau, Équiterre).

56 Ibid., 1720.

should demonstrate the capacity, experience and know-how to take over the assets and operations of the acquired business.⁵⁷

Mr. Gagnon argued that Canadian governments could help prevent foreign acquisitions of Canadian businesses through changes in corporation law, as opposed to the ICA. Federal and provincial legislatures could, for example, impose fiduciary duties to directors towards stakeholders other than beyond their corporation's shareholders. These rules would require that directors consider a broader range of interests when making decisions affecting the future of their corporations, including when seeking foreign investments. Canadian governments could also restrict the acquisition of voting shares by a foreign investor or their ability to direct a firm's operation shortly after its acquisition, for example by staggering the terms of directorship. Mr. Gagnon thus envisions a national framework in which each level of government contributes to restricting foreign acquisitions, above and beyond the provisions of the ICA.⁵⁸

NATIONAL SECURITY REVIEW

The Review Process

The national security review process is another core component of the Canadian legislative framework for foreign investments. The process gives the federal government the powers to ensure that no foreign investor implements an investment that would be injurious to Canada's national security. The national security review process differs from the net benefit review in at least three key aspects. First, there are no thresholds: the federal government can subject any foreign investment to a national security review, no matter the value of the investment.⁵⁹ Second, while the Minister retains a key role, a broader range of government actors participate in the decision-making process. Finally, Parliament granted the federal government more discretionary power in the context of national security than it did in the context of the net benefit review.

The national security review process applies in respect to any investment to establish a new Canadian business or acquire control of an existing Canadian business.⁶⁰ The ICA defines an acquisition of control of a Canadian business under its section 28(1). In broad

57 INDU, *Evidence*, 18 June 2020, 1740 (Houlden).

58 INDU, *Evidence*, 8 June 2020, 1130-1135, 1155, 1230, 1255 (Gagnon).

59 INDU, *Evidence*, 8 June 2020, 1245 (Leblond); INDU, *Evidence*, 8 June 2020, 1125 (Schwanen); INDU, *Evidence*, 18 June 2020, 1530 (Davies).

60 ICA, s. 25.1(a)-25.1(b).



terms, the Act's national security provisions apply to an acquisition of control of a Canadian business as a whole, including through "the acquisition of all or substantially all of the assets used in carrying on the Canadian business."⁶¹ National security provisions also apply on any investment to establish or acquire, in whole or in part, an entity carrying all or any part of its operations in Canada, providing the entity has, either: a place of operations in Canada; individuals employed or self-employed in Canada in connection with the entity's operations; or assets located in Canada and used to carry the entity's operations.⁶²

In practice, all foreign investments filed with the federal government through the notification or net benefit review process undergo a preliminary national security screening.⁶³ If the investment raises a national security concern, the Minister will formally trigger the process by notifying the foreign investor that the Governor in Council may order a national security review of their investment. The Minister must issue such a notification up to 45 days after the foreign investor submits an application or notification to the federal government, as detailed above, or 45 days after the investment comes to the Minister's attention in any other case. If the investment has not yet been implemented, the investor is prohibited from doing so until the completion of the review process.⁶⁴ If the Minister triggers the national security review process with respect to a foreign investment that is also subjected to a net benefit review, the latter review is suspended until the conclusion of the national security review.⁶⁵

The foreign investment will undergo a national security review if, within 45 days after sending the above notice to the foreign investor, the Governor in Council orders it on the recommendation of the Minister. If so, the Minister notifies the investor of the order. The Minister will have 45 more days to conduct the national security review, during which the foreign investor will be given the opportunity to make representations. The ICA provides the Minister with the power to extend the duration of the review to either up to 45 additional days, or to a later date agreed upon by the Minister and the foreign investor.⁶⁶

61 Ibid., s. 28(1)(c). See also *ibid.*, s. 3 (the term "assets" "includes tangible and intangible property of any value").

62 Ibid., s. 25.1(c).

63 INDU, *Evidence*, 18 June 2020, 1515 (Rochon); CBA, *Brief*.

64 ICA, s. 25.2; *National Security Review of Investments Regulations*, SOR/2009-271, s. 2 [NSRIR].

65 ICA, s. 21(3)-(8).

66 Ibid., s. 25.3(1)-(5), 25.3(7); NSRIR, s. 4.

Upon the conclusion of the review, the ICA provides two options to the Minister. If the Minister concludes that the foreign investment would not be injurious to national security, the Minister must send a notice to that effect to the foreign investor. If the Minister finds that the foreign investment would be injurious to national security or cannot do so based on the available information, the Minister must refer the matter to the Governor in Council along with a report on their findings and recommendations.⁶⁷

Upon being referred the matter by the Minister, the Governor in Council will have up to 20 days to review their report and make a final decision on whether to allow the foreign investment with or without condition, or, depending on the circumstances, to prohibit its implementation or require the divestment of an already implemented investment. The Minister will then notify the foreign investor of the decision of the Governor in Council.⁶⁸

The ICA requires the Minister to formally consult the Minister of Public Safety at two key moments in the national security review process. The Minister must first do so before recommending to the Governor in Council to order a national security review. The Minister must do so again before deciding to either refer the investment to the Governor in Council or notify the foreign investor that they conclude that their investment would not be injurious to national security. The ICA does not detail the substance of this consultation, nor does it require the Minister to consult the Minister of Public Safety only on these two separate occasions.⁶⁹

Government officials who testified before the Committee portrayed the review process as much more collaborative than the ICA formally requires. As soon as an investment raises a national security concern, Public Safety Canada (PSC) coordinates a review process involving 18 different federal departments and agencies, including the CSIS, the Communications Security Establishment (CSE), the Department of National Defence, the Royal Canadian Mounted Police (RCMP), Global Affairs Canada, Natural Resources Canada, Public Health Agency, and the Department of Finance. Dominic Rochon, Senior Assistant Deputy Minister at PSC, stated that such a “whole-of-government approach brings the relevant expertise to bear as we assess the national security risks of each transaction.”⁷⁰ For its part, Mr. Hahlweg added that the CSIS focuses its efforts and

67 ICA, s. 25.3(6); NSRIR, s. 5, 5.1.

68 ICA, s. 25.4(1); NSRIR, s. 6.

69 ICA, s. 25.3(1), 25.3(6).

70 INDU, *Evidence*, 18 June 2020, 1515 (Rochon). See also INDU, *Evidence*, 18 June 2020, 1535, 1600 (Hahlweg).



attention more particularly on “acquisitions by shell companies, [SOEs], or ones directly linked to intelligence services or foreign governments.”⁷¹

The ICA does not define the phrase “national security.” Both Mr. Rochon and Mr. Davies described the lack of a definition as a distinct advantage allowing the federal government to adapt to complex and ever-changing potential threats. Indeed, the federal government has wide discretion to determine which foreign investment should undergo a national security review, what each review should entail and focus on, and the measures that should be taken with respect to the investment. A case-by-case approach remains a staple of the review process.⁷²

Unlike for the net benefit review process, the ICA does not provide factors the Minister or the Governor in Council should consider when reviewing a foreign investment under national security lenses. Still, Mr. Rochon enumerated factors the federal government will usually consider:

The review takes into account a variety of factors, including the potential effects on Canada’s defence capabilities and interests; the potential effects on the transfer of sensitive technology or know-how outside of Canada; involvement in the research, manufacture or sale of goods or technology important to Canada’s national defence; the potential impact on the security of Canada’s critical infrastructure; the potential to enable foreign surveillance and espionage; the potential to hinder current or future intelligence or law enforcement operations; the potential impact on Canada’s international interests, including foreign relationships; and the potential to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.⁷³

Since the ICA’s national security provision came into force in 2009, the Minister has issued 28 notices indicating that an investment be subjected to a national security review, while the Governor in Council has ordered 22 such reviews.⁷⁴ To Joshua Krane, partner at Blake, Cassels and Graydon LLP, the fact that each year the federal government subjects only a handful of the nearly thousand notified foreign investments to a national security review shows that it accurately identifies which investments

71 INDU, [Evidence](#), 18 June 2020, 1520 (Hahlweg).

72 INDU, [Evidence](#), 18 June 2020, 1510, 1525 (Davies); INDU, [Evidence](#), 18 June 2020, 1515, 1600 (Rochon).

73 INDU, [Evidence](#), 18 June 2020, 1515 (Rochon). See also INDU, [Evidence](#), 18 June 2020, 1710 (Debbie Salzberger, Canadian Bar Association); Innovation, Science and Economic Development, [Guidelines on the National Security Review of Investments](#).

74 ISED, [Annual Report](#).

should undergo such a review.⁷⁵ Table 2 presents the outcome of investments subject to orders for review since 2012–2013, as well as their country of origin and industry sector.

**Table 2—Investments Subject to Governor in Council Orders under
National Security Review, 2012–2013 to 2018–2019**

Year	Origin	Industry Sector	Outcome Following the Order
2018–2019	China	Urban transit systems	Divestiture
2018–2019	China	Commercial and service industry machinery manufacturing	Withdrawal
2018–2019	Singapore	Hardware manufacturing	Withdrawal
2018–2019	Switzerland	Engine, turbine and power transmission equipment manufacturing	Divestiture
2018–2019	China	Activities related to credit intermediation	No further action required under the ICA
2018–2019	China	Electronic shopping and mail-order houses	No further action required under the ICA
2018–2019	Switzerland	Other general-purpose machinery manufacturing	No further action required under the ICA
2017–2018	China	Pharmaceutical and medicine manufacturing	Withdrawal
2017–2018	China	Other heavy and civil engineering construction	Block
2016–2017	China	Manufacturing Industries – Communications Equipment	Conditions Imposed
2016–2017	China	Other communications	Divestiture
2016–2017	China	Ship and boat building	Divestiture
2016–2017	China	Other electrical equipment and component manufacturing	Conditions Imposed
2016–2017	Cyprus	Rail transportation	Divestiture

75 INDU, *Evidence*, 15 June 2020, 1145 (Krane).



2014–2015	China	Manufacturing Industries – Telecommunications Equipment Industry	Divestiture
2014–2015	China	Manufacturing Industries – Other Communication and Electronic Equipment Industries	Conditions Imposed
2014–2015	China	Business Services Industries – Computer and Related Services	Conditions Imposed
2014–2015	Russia	Mining & Quarrying & Oil Well Industries – Crude Petroleum and Natural Gas Industries	Block
2014–2015	United Kingdom	Business Service Industries – Computer and Related Services	Divestiture
2013–2014	Egypt	Manufacturing Industries – Telecommunications Equipment Industry	Divestiture
2012–2013	China	Business Service Industries – Computer and Related Services	Block
2012–2013	Russia	Communications & Other Utility Industries – Telecommunication Carriers Industry	Withdrawal

Note: The “Origin” column provides the country of origin of the ultimate controller of the investor and the industry sector is based on the [North American Industry Classification System](#) or the [Standard Industry Classification](#) system.

Source: Table reproduced from ISED, [Annual Report](#).

Testimonies from government officials emphasized the importance of public outreach and awareness in the administration of the ICA. They described how the federal government conducts public outreach activities with Canadian entities, especially small and medium businesses, to assist them in assessing their vulnerability and protecting themselves against state-sponsored espionage and foreign acquisitions that may endanger national security. They also encouraged businesses to contact the federal government if they suspect foreign agents target them.⁷⁶ More generally, Mr. Davies portrayed the ICA as a reserve instrument for when parties fail to take national security

76 INDU, [Evidence](#), 18 June 2020, 1550 (Davies); INDU, [Evidence](#), 18 June 2020, 1550 (Hahlweg); INDU, [Evidence](#), 18 June 2020, 1555 (Rochon).

(or Canada's net benefit) into account, and that raising public awareness on its requirements would likely facilitate foreign investment.⁷⁷

Potential Avenues for Change

Imposing a Moratorium

In response to national security concerns over Chinese investments, Dr. Burton proposed imposing a temporary moratorium on foreign investments from authoritarian countries. This moratorium would last until Parliament identifies and fixes potential gaps in the ICA. Another witness noted that the pre-existing economic leverage that China has in Canada – important Canadian firms that have extensive business dealings with Chinese Communist networks and at the same time have influence over decision makers, particularly in the Prime Minister's Office – has inhibited our ability to properly review whether Chinese investments in Canada are in the net benefit of Canada. This particularly leads to what Professor Paris referred to as economic leverage. Ultimately, Dr. Burton believes Canada's policy should adopt the principle of reciprocity: just as China forbids foreign firms from acquiring Chinese natural resources on national security grounds, so should Canada with regard to Chinese investments. He also supported Canada limiting Chinese investments to sanction violations of international rules.⁷⁸

Several witnesses opposed a temporary moratorium on foreign investments to protect Canada's national security, even in response to the pandemic. They expressed concern that it risks portraying Canada as a difficult place to invest in, whereas attracting foreign investment requires a stable and transparent regulatory environment that provides certainty to would-be investors. They also warned that other countries could retaliate by restricting Canadian investments abroad. For these reasons, Patrick Leblond, associate professor at the University of Ottawa, added that the ICA should only be amended in response to structural economic changes in the Canadian and global economy, as opposed to punctual events.⁷⁹

Other witnesses commented on the practical difficulties of imposing a moratorium. They argued that a blanket approach would only limit the federal government's ability to assess investments on a case-by-case basis, resulting in the blocking of legitimate

77 INDU, [Evidence](#), 18 June 2020, 1605 (Davies). But see INDU, [Evidence](#), 15 June 2020, 1225 (Balsillie).

78 INDU, [Evidence](#), 8 June 2020, 1115, 1145, 1215, 1235, 1245, 1250 (Burton). See also INDU, [Evidence](#), 8 June 2020, 1255 (Gagnon).

79 INDU, [Evidence](#), 8 June 2020, 1115 (Leblond); INDU, [Evidence](#), 15 June 2020, 1115 (Krane); INDU, [Evidence](#), 18 June 2020, 1650 (Glossop); INDU, [Evidence](#), 18 June 2020, 1635 (Kingston); Facey & Krane, [Brief](#).



investments that do not undermine national security. They also expect it would be difficult to define or identify authoritarian countries without uncertainty or controversy. Moreover, a moratorium could increase the difficulty of procuring PPE, vaccines, and other critical supplies, and reduce financing options available to Canadian firms seeking to recover from an economic downturn. As a result, a moratorium risks proving counter-productive when compared to the current case-by-base approach, even during the pandemic.⁸⁰

However, some witnesses noted that many countries – and China in particular – do not follow the same free-market, open and transparent rules as Canada and other G7 countries do. In particular, Dr. Christopher Balding, Association Professor Fullbright University, Vietnam, noted that:

Given the clear risks we see associated with investment from China, I believe it is in the best interest of Canada to seriously think about the risk associated with a country that has demonstrated a clear pattern of threatening and predatory investment behaviour.⁸¹

Dr. Balding noted that China provides a state-owned or -linked companies enormous state largess to help them expand abroad; tries different methods to avoid scrutiny of its investment activity and uses a variety of measures to disguise its activity; and keeps detailed records about intellectual property held by firms, with a range of related information that value the asset.

However, some legal experts who testified before the Committee believed the current provisions of the ICA sufficiently protect Canada's national security from opportunistic foreign investments. They emphasized the broad discretion it provides the federal government to review on national security grounds, no matter the investment value, as well as sufficient time and extensive powers to conduct in-depth, case-by-case assessments. They pointed to the Policy as evidence of the broad powers provided to the federal government and of how it could adapt the application of the ICA to our current circumstances.⁸²

80 INDU, [Evidence](#), 8 June 2020, 1150 (Schwanen); INDU, [Evidence](#), 15 June 2020, 1115, 1235 (Krane); INDU, [Evidence](#), 18 June 2020, 1650 (Glossop); INDU, [Evidence](#), 15 June 2020, 1110 (Wakil); CBA, [Brief](#); Facey & Krane, [Brief](#).

81 INDU, [Evidence](#), 15 June 2020, 1120 (Balding).

82 INDU, [Evidence](#), 15 June 2020, 1110 (Wakil); INDU, [Evidence](#), 18 June 2020, 1640 (Salzberger); Canadian Bar Association, [Brief Submitted to INDU](#), 17 June 2020 [CBA, [Brief](#)]; Brian A. Facey & Joshua A. Krane, [Brief Submitted to INDU](#), 30 June 2020 [Facey & Krane, [Brief](#)].

Making More Foreign Investments Reviewable under the ICA

Witnesses discussed options to expand foreign investment reviews, notably by extending the scope of the ICA. This could be done by amending the *Act* so that certain types of transactions trigger a review. Many witnesses testified that the majority of foreign investments already fall under the ICA's national security provisions, including partial or indirect acquisitions of control as well as non-notifiable, minority investments.⁸³ However, Mr. Wakil noted that transactions that do not involve acquiring ownership interests in a Canadian business or entity, such as the acquisition of a single or limited number of its assets, would not fall under the *Act*, even if they undermine national security.⁸⁴ In other words:

[If] you acquire a company with sensitive IP, that is subject to review. If that company enters into an agreement with a foreign entity to transfer that IP to the foreign entity, that's not subject to review. The effect is the same – the foreign buyer, the foreign entity, has control of the IP or has access to the IP – but one type of commercial arrangement is subject to review and scrutiny, and the other type of commercial transaction, commercial arrangement, is not subject to review and scrutiny.⁸⁵

The question remains, however, whether the ICA is the right vehicle to regulate these transactions, as opposed to other federal legislation regulating specific sectors of activities, such as telecommunications or transportation, or legislation governing the trade or exportation of sensitive assets or “controlled goods.”⁸⁶ Parliament could also broaden the scope of the ICA by granting the federal government jurisdiction over transactions that do not involve acquisitions of control, such as acquisitions of material minority interests.⁸⁷

Michelle Travis, research director at UNITE HERE Canada, questioned whether the federal government could order the divestment of ICA-approved acquisition of a Canadian business by a foreign investor after the same investor is subsequently taken over by another foreign entity. As a means of illustration, Ms. Travis pointed to the (direct or indirect) acquisition of Canadian hotels and long-term care homes by Anbang, a Beijing-based firm. The Chinese government seized then Anbang not long after the firm acquired these businesses. Ms. Travis had misgivings over the review process that

83 INDU, [Evidence](#), 18 June 2020, 1610 (Davies); INDU, [Evidence](#), 18 June 2020, 1515 (Rochon); INDU, [Evidence](#), 18 June 2020, 1710-1715 (Salzberger).

84 INDU, [Evidence](#), 15 June 2020, 1200, 1225 (Wakil).

85 Ibid., 1225. Compare with INDU, [Evidence](#), 15 June 2020, 1240 (Krane).

86 INDU, [Evidence](#), 8 June 2020, 1125 (Schwanen); INDU, [Evidence](#), 18 June 2020, 1800 (Kilby).

87 INDU, [Evidence](#), 15 June 2020, 1115 (Wakil).



led to the approval of these transactions, the management of the acquired Canadian businesses, and whether Canadians could trust their ultimate owners with the personal information they hold.⁸⁸

When questioned on the matter, Mr. Davies testified that the takeover, by a foreign entity, of another foreign entity that controls a Canadian business could potentially trigger a national security review under the ICA: “if there’s a Canadian business where the control is taken over, that’s a control change, and if it’s a foreign controller, then it could well be something that we could review under the Act.”⁸⁹ This review could lead to the federal government ordering the divestment of the Canadian business. However, Mr. Davies added that the review would be contingent on the facts of the case and on whether the government could assert jurisdiction under the ICA.⁹⁰

Focusing the Review Process on Strategic Sectors

Another way to formally review more foreign investments would be to systematically subject investments targeting a business or an entity operating in predetermined sectors of activity to a national security review. These sectors could be defined in terms of industries (e.g. mining or telecommunications) or sectors of activity (e.g. AI or energy storing). According to several witnesses, the current legislative framework already enables the federal government to do so, though many suggested that it release policies or guidelines that clarify the practice to potential investors.⁹¹

Prof. Leblond argued that if the federal government chose to systematically review foreign investments targeting specific sectors, the task of identifying these sectors should be left to experts. Doing so would prevent it from devolving into an entirely political exercise in which stakeholders representing different regions and sectors of activity evoke national security concerns to protect their own economic interests. This would include stakeholders testifying (perhaps wrongly) that an asset or sector is not critical to Canada’s national security in order to attract and facilitate foreign investments.⁹²

88 INDU, [Evidence](#), 18 June 2020, 1655, 1725 (Travis).

89 INDU, [Evidence](#), 18 June 2020, 1610 (Davies).

90 Ibid.

91 INDU, [Evidence](#), 8 June 2020, 1150 (Leblond).

92 Ibid., 1115-1120, 1150; INDU, [Evidence](#), 8 June 2020, 1145-1150 (Schwanen). See also CBA, [Brief](#).

ADMINISTRATION OF THE ACT

Several witnesses emphasized that the ICA's legislative framework will only yield benefits if the federal government dedicates enough resources to effectively monitor and review foreign investments. While Prof. Houlden recognized that the ICA provides the federal government the legal capacity to effectively review foreign investments, he questioned whether the federal government has enough qualified personnel to do so, especially given the difficulty of securing the expertise required to review Chinese investments.⁹³ Other witnesses argued that providing the Division with enough resources and staff, starting with appointing a permanent Director for the Division, would increase the speed of the review processes and thus facilitate foreign investments.⁹⁴ Government witnesses noted that the federal government increased the funding allocated to the Division and indicated that recent increases of the maximum duration of review periods provide sufficient time to screen foreign investments.⁹⁵

Some witnesses raised doubt as to whether undertakings accepted under the ICA are strong or last long enough. They emphasized the difficulty of ensuring that a foreign acquirer does not replace the management of a Canadian business or transfer its assets, as Prof. Balding noted Chinese investors are prone to do.⁹⁶ The effectiveness of undertakings thus depends on the capacity and willingness of the federal government to monitor and enforce them.⁹⁷ Ms. Travis argued that the federal government should have the power to review and change undertakings after an investment has been approved.⁹⁸

Though determining the origin of a foreign investment is not always a straightforward affair, some witnesses suggested that the ICA provides the federal government with effective powers to accurately identify foreign investors and their ultimate controller – starting with the notification process.⁹⁹ Mr. Krane added that the ICA imposes steep penalties for failing to comply with its disclosure requirements, and

93 INDU, [Evidence](#), 18 June 2020, 1730, 1740 (Houlden).

94 INDU, [Evidence](#), 8 June 2020, 1130 (Schwanen); INDU, [Evidence](#), 15 June 2020, 1115-1120 (Krane); INDU, [Evidence](#), 15 June 2020, 1115 (Wakil); Facey & Krane, [Brief](#).

95 INDU, [Evidence](#), 18 June 2020, 1530, 1555 (Davies). See also INDU, [Evidence](#), 18 June 2020, 1555 (Rochon).

96 INDU, [Evidence](#), 8 June 2020, 1300 (Burton); INDU, [Evidence](#), 15 June 2020, 1130 (Balding).

97 INDU, [Evidence](#), 8 June 2020, 1240-1245 (Leblond); INDU, [Evidence](#), 18 June 2020, 1730 (Houlden).

98 INDU, [Evidence](#), 18 June 2020, 1750 (Travis).

99 INDU, [Evidence](#), 18 June 2020, 1530 (Davies); INDU, [Evidence](#), 18 June 2020, 1715 (Glossop). See also INDU, [Evidence](#), 18 June 2020, 1545 (Hahlweg).



that there is no evidence that foreign investors avoid filing notifications.¹⁰⁰ Still, Ms. Travis, maintained that the ICA review processes led to foreign acquisitions by investors whose ultimate ownership remains opaque.¹⁰¹

Many witnesses suggested increasing the transparency of the administration of the ICA, though for different reasons. ISED releases information on the administration of the ICA in annual reports as well as in formal policies and guidelines. However, some witnesses wish for more transparency to increase the efficiency of the review process, to the benefit of foreign investors. Others pursue it to increase the accountability of the Act's administration, to the benefit the general public.¹⁰²

Legal practitioners proposed that the federal government disclose more information on the review process generally, for example by disclosing the sectors of activity in which a foreign investment would be more likely to raise national security concerns. They also proposed increasing case-specific guidance, for example by sharing thorough information with a foreign investor on the national security concerns raised by their investment. Such disclosure would increase the certainty and speed of the review process, and provide more opportunities for foreign investors to make relevant undertakings.¹⁰³

Witnesses holding the “transparency for accountability” position proposed to release more information on specific, post-review cases. They suggested that enabling increased scrutiny from the general public over ICA’s decision-making process – including the nature of commitments offered, requested, and agreed upon – would help ensure its effective and rigorous administration.¹⁰⁴

The ICA generally treats all information the federal government obtains about a person in the application of the ICA as privileged – including the foreign investor or a Canadian business being acquired or established as a result of their investment. The *Act* thus requires that no one “knowingly communicate or allow to be communicated any such

100 INDU, [Evidence](#), 15 June 2020, 1240 (Krane).

101 INDU, [Evidence](#), 18 June 2020, 1655, 1720 (Travis).

102 INDU, [Evidence](#), 18 June 2020, 1510, 1530 (Davies).

103 INDU, [Evidence](#), 8 June 2020, 1130, 1220-1225 (Schwanen); INDU, [Evidence](#), 15 June 2020, 1120, 1135 (Krane); INDU, [Evidence](#), 15 June 2020, 1115, 1135 (Wakil); INDU, [Evidence](#), 18 June 2020, 1800 (Salzberger); Facey & Krane, [Brief](#). See also INDU, [Evidence](#), 8 June 2020, 1300 (Gagnon); INDU, [Evidence](#), 8 June 2020, 1120 (Leblond). But see INDU, [Evidence](#), 15 June 2020, 1225 (Wakil).

104 INDU, [Evidence](#), 8 June 2020, 1145 (Burton); INDU, [Evidence](#), 8 June 2020, 1155, 1300 (Gagnon); INDU, [Evidence](#), 18 June 2020, 1750 (Travis).

information or allow anyone to inspect or to have access to any such information.”¹⁰⁵
However, the *Act* provides numerous exceptions to this general rule.¹⁰⁶

Calls for increased transparency did not come without warning. Prof. Balding cautioned that China uses “transparency against governments like Canada’s and has taken steps to make sure that its investments avoid scrutiny or regulatory detection,” and appropriate sensitive assets before authorities can react.¹⁰⁷ Mr. Wakil called for caution regarding the public disclosure of previous review cases, given that “investors take great comfort in the fact that” the ICA treats “their sensitive business information ... confidentially in the context of the review.”¹⁰⁸

While he agreed that ICA’s administration would benefit from empirical assessments of the actual net benefits of approved investments, Mr. Wakil warned it would face practical difficulties:

A problem we would have is one that I began to flag in my earlier comment, which is the “but for” scenario to the extent that...and that's the problem with the assessment of investments now. For example, the government's trying to predict the future. What is the likely one, two, three or four years going to look like for the Canadian business and how does that align with the investor's plans, and is that beneficial or not? Is there a benefit to proceeding with the transaction based on the likely future outcome of the Canadian business? That's a very tricky and complicated assessment to make.

We have a similar problem with respect to the ex post review of an investment that's completed. What would have happened if the investment hadn't happened? Do we have the information available? Conceptually, I think it would be worthwhile to look back and see whether or not it would be possible to construct a test to evaluate the

105 ICA, s. 36(1). See also [Access to Information Act](#), R.S.C. 1985, c. A-1, s. 24(1), Schedule II [AIA].

106 Notably, they allow the federal government to communicate or disclose information contained in notices issued under the ICA and in written undertakings relating to an investment approved under the net benefit review process. The ICA does not prohibit the federal government from communicating or disclosing information contained in reasons given by the Minister on whether or not they were satisfied that a foreign investment is likely to be to the net benefit of Canada. However, the Minister must refrain from divulging financial, commercial, scientific or technical information if doing so would prejudice the person who provided the information. The ICA also allows the federal to disclose information contained in the final decision of the Governor in Council taken under the national security review process. Excluding the nature of the final decision—i.e. blocking the investment, authorizing it with or without condition, or requiring a divestment—the Minister must refrain from sharing such information if doing so would prejudice the person who provided the information (see generally *ibid.*, s. 36; compare with AIA, s. 20(1)(b)).

107 INDU, [Evidence](#), 15 June 2020, 1140 (Balding).

108 INDU, [Evidence](#), 15 June 2020, 1215 (Wakil).



success of the legislation, but I can see that there would be a lot of practical challenges with that.¹⁰⁹

Despite these challenges, Mr. Wakil said he “would be agreeable to a proposal to engage in an *ex post* review of investments to measure the effectiveness of the [ICA],” provided the federal government respects the confidentiality of the foreign investors’ information.¹¹⁰

Finally, raising doubt as to the effectiveness of reviews conducted under the Act, Ms. Travis argued that all foreign investment should attract enhanced scrutiny, even beyond the pandemic. Such enhanced scrutiny would involve more rigorous reviews and stricter enforcement of undertakings.¹¹¹ In contrast, while Mr. Kingston supported subjecting foreign investments to enhanced scrutiny during the pandemic, these measures should cease once circumstances return to normal to further attract and facilitate foreign investment.¹¹² Summing up his position, Mr. Schwanen maintained that a sound administration of the Act would prevent “a foreign investor by itself—because of who controls foreign investors, for example—” from threatening Canada’s sovereignty: the ability of a Canadian government to “enforce its own rules, regulations, labour laws, etc., over its own territory.” Therefore, the federal government should approve an investment if all available information shows the foreign investor will comply with Canadian law after they implement the investment.¹¹³

COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

The Committee undertook to review the ICA, bearing in mind both the domestic and international contexts. Domestically, the CSIS released a report in April 2020 highlighting the risk posed by foreign takeovers as a continued danger to Canadian national security. Specifically, CSIS warned that Canada’s “economic wealth, open business and scientific environments, and advanced workforce and infrastructure”¹¹⁴ posed an enticing target to foreign investors.

109 Ibid., 1250.

110 Ibid., 1215.

111 INDU, *Evidence*, 18 June 2020, 1655, 1720 (Travis).

112 INDU, *Evidence*, 18 June 2020, 1635 (Kingston).

113 INDU, *Evidence*, 8 June 2020, 1205 (Schwanen).

114 Canadian Security Intelligence Service, *CSIS Public Report 2019*, 2020, p. 17.

The CSIS said that while most foreign investors are not hostile, those from SOEs and firms with close ties to governments or intelligence services need to be weighed very carefully:

Corporate acquisitions by these entities pose potential risks related to vulnerabilities in critical infrastructure, control over strategic sectors, espionage and foreign influenced activities, and illegal transfer of technology and expertise.¹¹⁵

The report stated: “as difficult as it is to measure, this damage to our collective prosperity is very real.”¹¹⁶

On the international front, Committee members are acutely aware that several countries around the world have recently imposed limitations or restrictions on investments from SOEs. For example, Japan had been tightening its national security review mechanisms for inbound investments even before the outbreak of COVID-19. Given concern over losing critical technologies related to national security and defence to foreign countries, particularly China, the government amended the *Foreign Exchange and Foreign Trade Act* in May 2019 and expanded the scope of restricted business sectors to include information and communication technologies.

In addition, the government of Australia announced temporary changes in March to its foreign investment review framework. The new framework subjects all proposed foreign investment regardless of the amount, to the Foreign Investment Review Board’s pre-screening. The new policy applies to all sectors and types of foreign investors. India also amended its policy on FDI in April to prevent opportunistic foreign takeovers of domestic firms by any country sharing a land border. As a result, in addition to Pakistan and Bangladesh, India now examines all incoming FDI from countries bordering it by land, China included.

The European Union is also implementing an investment-screening framework in order to limit foreign threats to “critical infrastructure” as well as “critical technologies” such as semiconductors, robotics and artificial intelligence.

The Committee heard compelling testimony from witnesses with different perspectives on whether Canada should introduce a moratorium on all investments from SOEs. We also heard testimony about the importance of foreign investment to the Canadian economy, as well as the importance of maintaining a welcoming environment for future

115 Ibid.

116 Ibid.



investments. The Committee is of the view that a balance should be struck between maintaining an “open borders” policy for investments while ensuring that investments benefit our country and do not endanger our national security during the COVID-19 pandemic when many businesses might be vulnerable. The Committee believes that lowering the review thresholds in certain cases will help to accomplish this goal.

Recommendation 1

That the Government of Canada introduce legislation amending the *Investment Canada Act* to reduce the current valuation threshold for prospective acquisition of control by either state-owned or state-controlled enterprises to zero, so that every transaction triggers a review, including a net benefit test and a national security test.

Recommendation 2

That the Government of Canada introduce legislation to amend the *Investment Canada Act* so that thresholds are reviewed on an annual basis.

The Committee heard testimony, primarily from Mr. Balsillie, that the net benefit review process is not properly adapted to a modern, innovation-based economy. There is much merit in investigating whether the net benefit review process continues to serve the economic interests of Canadians. Indeed, the increasing role intangible assets play in the Canadian economy is precisely the kind of structural economic change Prof. Leblond argued would justify reforming the ICA.

Recommendation 3

That the Government of Canada review the provisions and administration of the *Investment Canada Act* to determine how to improve the treatment of intangible assets under the net benefit review process in the context of the knowledge economy, and report on its findings to the House of Commons Standing Committee on Industry, Science and Technology within one year.

Recommendation 4

That the Government of Canada protect strategic sectors, including, but not limited to: health, the pharmaceutical industry, agri-food, manufacturing, natural resources, and intangibles related to innovation, intellectual property, data and expertise.

Recommendation 5

That the Minister of Innovation, Science and Industry justify their decision whether or not a transaction is to Canada's net advantage, that the Minister then explain the factors leading to this decision, and that the Minister make public the conditions imposed on a buyer in the case of a transaction involving a foreign investor.

More specifically, the Committee finds it fair that the federal government should ensure that intangible assets developed with the help of federal subsidies are only transferred to foreign entities when doing so would demonstrably benefit Canada. Of course, circumstances surrounding the development of each intangible asset will vary, including the level of federal funding involved and how benefits to Canadians will materialize. This said, this principle should guide the federal government's innovation policy, including in but not limited to its administration of the ICA's net benefit review process. This principle should extend to the conditions under which the federal government funds research and development.

Recommendation 6

That the Government of Canada encourage Canadian entities to keep ownership of intangible assets developed with federal funds, including intellectual property, by requiring, when appropriate, that they return moneys received from federal programs or subsidies in full or in part.

The question is not whether a foreign investment can threaten Canada's national security – virtually all witnesses recognized as much. Rather, the question is whether the ICA and its administration effectively protect Canada's national security in our evolving circumstances. The Committee cannot ignore that some national security experts that provided testimony acknowledged having limited knowledge of the relevant ICA provisions. However, many legal experts who defended the *Act* also identified potential gaps in the legislation. Given that the federal government now benefits from more than ten years of experience administering the ICA, it is not implausible it should find room for improvement.

Since 2009 and as of 2018–2019, 15 of all 22 national security reviews ordered by the Governor in Council targeted investments by investors whose ultimate controller(s) originated from China. Of these 15 investments that underwent a national security review, nine were either blocked, divested, or withdrawn, four were approved with conditions imposed, and two were approved without condition (see Table 2, above). Russian and Swiss investments follow in second place, each attracting two national security review orders. It is therefore fair to say that the federal government's



administration of the ICA has so far largely focused on Chinese investments even though China provides a fraction of incoming FDI.

The federal government should have the power to block the transfer of a sensitive (tangible or intangible) asset to a non-Canadian in order to preserve Canada's national security. As underlined by Mr. Wakil's testimony and as far as protecting national security is concerned, there is no difference between the acquisition of a sensitive asset and the acquisition of a Canadian business or entity that holds this asset. However, while the ICA already grants the federal government the power to block the foreign acquisition of a Canadian business or entity that holds such an asset, the same does not appear to be the case for the transfer of that asset.

Recommendation 7

That the Government of Canada review its legislation framework and implement legal measures necessary to:

- **Block any transaction that would undermine Canada's national security by transferring a sensitive asset to a non-Canadian entity; and**
- **Require a Canadian business or entity holding a sensitive asset to notify the federal government thirty days before implementing the transfer of that asset to a non-Canadian entity.**

Recommendation 8

That the Government of Canada immediately introduce legislation amending the *Investment Canada Act* to allow for the review of and the ability to prevent the subsequent takeover by a state-owned enterprise of a previously ICA approved acquisition of a Canadian firm or assets by a foreign privately owned corporation.

The Committee acknowledges that the administration of the ICA benefits from the work of knowledgeable and dedicated public servants. The Committee also acknowledges that several witnesses have questioned whether the federal government commits enough resources to ISED's Investment Review Division, including qualified personnel to effectively and rigorously review foreign investments. The Committee is also acutely aware that the CSIS, the RCMP, and the CSE have sophisticated capabilities and expertise to analyze and review national security threats. The Committee would welcome enhanced cooperation between the Minister and these agencies.

Recommendation 9

That the Government of Canada immediately introduce legislation amending the *Investment Canada Act* to compel the Minister to consult with the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, and the Canadian Security Establishment in the national security process.

APPENDIX A LIST OF WITNESSES

The following table lists the witnesses who appeared before the committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the committee's [webpage for this study](#).

43RD Parliament – 2ND Session

Organizations and Individuals	Date	Meeting
<p>As an individual</p> <p>Charles Burton, Senior Fellow Centre for Advancing Canada's Interests Abroad, Macdonald-Laurier Institute</p> <p>Patrick Leblond, Associate Professor Public and International Affairs, Faculty of Social Sciences, University of Ottawa</p>	2020/06/08	22
<p>C.D. Howe Institute</p> <p>Daniel Schwanen, Vice-President Research</p>	2020/06/08	22
<p>Mouvement d'éducation et de défense des actionnaires</p> <p>Willie Gagnon, Director</p>	2020/06/08	22
<p>As an individual</p> <p>Omar Wakil, Partner Torys LLP</p>	2020/06/11	23
<p>Canadian Security Intelligence Service</p> <p>Tim Hahlweg, Assistant Director Requirements</p>	2020/06/11	23
<p>Department of Industry</p> <p>Mitch Davies, Senior Assistant Deputy Minister Industry Sector</p>	2020/06/11	23

Organizations and Individuals	Date	Meeting
<p>Department of Public Safety and Emergency Preparedness</p> <p>Dominic Rochon, Senior Assistant Deputy Minister National Security and Cyber Security Branch</p>	2020/06/11	23
<p>UNITE HERE Canada</p> <p>Michelle Travis, Research Director</p>	2020/06/11	23
<p>As an individual</p> <p>Christopher Balding, Associate Professor Fulbright University Vietnam</p> <p>Omar Wakil, Partner Torys LLP</p>	2020/06/15	24
<p>Blake, Cassels and Graydon LLP</p> <p>Joshua Krane, Partner Competition, Antitrust and Foreign Investment Group</p>	2020/06/15	24
<p>Council of Canadian Innovators</p> <p>Jim Balsillie, Chair</p>	2020/06/15	24
<p>As an individual</p> <p>Peter Glossop, Partner Competition, Osler, Hoskin and Harcourt LLP</p> <p>Gordon Houlden, Director China Institute, University of Alberta</p>	2020/06/18	25
<p>Business Council of Canada</p> <p>Brian Kingston, Vice-President Policy, International and Fiscal</p>	2020/06/18	25
<p>Canadian Bar Association</p> <p>Michael Kilby, Vice-Chair Foreign Investment Review Committee, Competition Law Section and Partner, Stikeman Elliott LLP</p> <p>Marc-André O'Rourke, Lawyer Advocacy</p> <p>Debbie Salzberger, Chair Foreign Investment Review Committee, Competition Law Section and Partner, McCarthy Tetrault LLP</p>	2020/06/18	25
<p>Canadian Security Intelligence Service</p> <p>Tim Hahlweg, Assistant Director Requirements</p>	2020/06/18	25

Organizations and Individuals	Date	Meeting
Department of Industry Mitch Davies, Senior Assistant Deputy Minister Industry Sector	2020/06/18	25
Department of Public Safety and Emergency Preparedness Dominic Rochon, Senior Assistant Deputy Minister National Security and Cyber Security Branch	2020/06/18	25
Équiterre Marc-André Viau, Director Government Relations	2020/06/18	25
Stand.earth Tzeborah Berman, Director International Program	2020/06/18	25
UNITE HERE Canada Michelle Travis, Research Director	2020/06/18	25

APPENDIX B LIST OF BRIEFS

The following is an alphabetical list of organizations and individuals who submitted briefs to the committee related to this report. For more information, please consult the committee's [webpage for this study](#).

43RD Parliament – 1ST Session

Blake, Cassels and Graydon LLP

Canadian Bar Association

MINUTES OF PROCEEDINGS

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 22, 23, 24, 25 and 29](#)) from the 43rd Parliament, First Session and ([Meetings Nos. 11, 13 and 16](#)) from the 43rd Parliament, Second Session is tabled.

Respectfully submitted,

Sherry Romanado
Chair

Dissenting Opinion of the Liberal Party of Canada

As referenced above, in June 2020 the Standing Committee on Industry, Science and Technology (the Committee) adopted a motion to study the *Investment Canada Act* (“ICA”), with particular attention to be devoted to the impacts of the COVID-19 pandemic on foreign-direct investment and the acquisition of potentially vulnerable or distressed assets of Canadian firms. The Liberal members of the Committee supported and actively participated in this study given its critical importance to ensuring the vitality of our businesses, the prospects of their employees and workers, and its overall impact on the prosperity of the Canadian economy.

Our interest in this study stemmed from our appreciation and acknowledgement that foreign investment continues to serve an important role in Canada's economy. However, we recognize that while the current pandemic has had a disruptive effect on our economy, opportunistic investors may attempt to take advantage of economic disruptions and the concomitant vulnerability of certain business sectors. Consequently, we welcomed our Government's timely commitment to ensure that until the Canadian economy recovers from COVID-19, foreign investments—especially those affecting public health and the supply of critical goods and services— will be subject to enhanced scrutiny under the ICA. Moreover, we appreciate full well that investments into Canada by foreign state-owned and/or -aligned enterprises may be driven by non-commercial considerations that may harm or undermine our country's economic or security interests. For this reason, we are pleased to emphasize that the Government of Canada has also prudently subjected investments by state-owned investors to enhanced scrutiny under the ICA.

However, we are dismayed that the safeguards adopted by the Government of Canada in reaction to the COVID-19 pandemic neither seem to have been fully understood nor were accurately reflected in the recommendations adopted by a majority of the members tasked with shaping and approving the content of this Committee Report. Moreover, we are cognizant that certain recommendations included in this report neither adequately align with either the testimony of expert witnesses the Committee had occasion to hear from, nor conform with the practises informed by provisions currently embedded in the ICA. Specifically, our dissenting report would like to highlight and amplify the following:

- Recommendation 1:
 - o Adjustments to the current valuation thresholds are redundant and entirely unnecessary given that the ICA triggers an automatic national security review, irrespective of the prescribed valuation thresholds.
- Recommendation 2:
 - o Under the ICA, the annual net benefit review thresholds are reviewed and revised by the Minister on an annual basis, rendering the proposed legislative amendments unnecessary.
- Recommendation 5:
 - o Given the commercially and politically-sensitive nature of foreign investments and acquisitions, mandating such disclosures by the Minister or any other government official would not only impair international commercial undertakings, norms, and best practices, but would also inadvertently serve to undermine Canada's strategic and competitive interests.
- Recommendation 7:

- Robust and effective mechanisms as contemplated in this recommendation already exist within the current ICA regime, rendering the proposed legislative reviews redundant and entirely unnecessary.
- Recommendation 8:
 - Robust and effective mechanisms to this effect already exist within the current ICA regime, rendering any proposed legislative reviews redundant and entirely unnecessary.
- Recommendation 9:
 - Such consultations have already been contemplated, rendering any new legislative amendments redundant and entirely unnecessary.

While we are receptive to practical recommendations that could potentially strengthen the ICA, it is unfortunate that a majority of the members of the Committee chose to unduly politicize this important report by making ill-advised, rudimentary, and unnecessary recommendations that fail to adequately address the issues at hand. An even-handed, non-partisan, and evidence-based approach would have better served both the Committee and Canadians as a whole, but was sorely lacking in the approach adopted by the members opposite.

The Liberal members of the Committee would like to thank the House of Commons analysts and clerks for their hard work on this important study as well as the expert testimony of witnesses that helped inform the substance of this report. Our dissenting report in no way attempts to cast aspersions on their hard work, professionalism, or expertise, but rather to elucidate and cure the inherent shortcomings cited in recommendations adopted by a majority of our honourable colleagues on this Committee.

Better Protecting Our Companies

Bloc Québécois Supplementary Opinion

The industry committee's report is an important and welcome change in terms of foreign investment control. The Bloc Québécois welcomes this shift after a decade of inaction, but we would have liked the committee to go even further.

In our opinion, the report should have suggested that the government bring the review threshold for foreign investments down to a reasonable level so that it can determine which investments are truly beneficial. Hence this supplementary opinion.

Floundering on foreign investments

The federal government's foreign investment policy these past years can be summarized in two words: deregulation and permissiveness.

The policy provides for increased scrutiny when national security is at stake, and ongoing oversight when investors are foreign countries. The fear of China is real.

However, the floodgates are open for all other foreign investments, which are approved automatically and without review. Statutory review mechanisms, which the government readily insists on protecting in every trade agreement that it signs, are essentially rendered ineffective for foreign investments.

In 2013, the Conservatives set the tone by announcing that they would raise the review threshold used by the federal government to determine whether foreign investments are truly beneficial. From 2015 on, the Liberals have been doubling down on this change.

Between 2015 and 2020, the threshold applicable to "private sector trade agreement investments" increased from \$369 million to \$1.613 billion. The result is striking: the share of reviewed foreign investments fell from 10% in 2009 to 1% in 2019.

You read that right: under the current rules, 99% of foreign investments are now approved automatically and without review.

This lack of oversight comes at a bad time. Over the past 30 years, the nature of foreign investment in OECD countries has changed. New investments are down, while investments in the form of mergers and acquisitions of existing companies are up.

Between 2010 and 2015, only 54% of foreign investments in Canada went toward new entities, while the remaining 46% went toward mergers and acquisitions, where foreign investors took over a number of our companies, either in part or in full.

Canada is doing significantly worse than other industrialized countries in this regard. New entities receive 72% of foreign investment in the U.S. and 78% in France, compared

to only 54% in Canada. And the trend continues to this day: from 2018 to 2020, mergers and acquisitions accounted for \$90 billion of the \$244 billion in foreign investments in Canada.

Simply put, over the past three years, foreign companies have invested \$90 billion to take over a number of Canadian companies in part or in full. This \$90 billion in takeovers led to the downfall of head offices and turned them into regional offices with little power.

“We do not condemn the rising tide; we build levees”

Quebec has gained significant economic and financial leverage since the Quiet Revolution, enabling it to pursue a policy of economic nationalism—the intensity of which varies from one government to the next—that gives Quebeckers greater control over their economy.

Our economic nationalism has two components.

On the one hand, we are open to foreign investment as a driver of growth and development. On the other hand, we invest in Quebec companies to keep them intact and fuel their growth. And we protect our head offices because we know how important they are as decision makers.

Quebec does not, however, want to shut the door to foreign investment. Our economy is and will always be open to the world, and openness toward foreign investment is essential for enabling Quebec to access major trade networks, which is crucial for guaranteeing the prosperity of our relatively small-scale economy.

As Jacques Parizeau wrote in 2001, even before China joined the World Trade Organization, “we do not condemn the rising tide; we build levees to protect ourselves.”

Unfortunately, weakening the *Investment Canada Act* has caused those levees to break.

Quebec and Ottawa: Two conflicting policies

One striking realisation is that the federal foreign investment legislation was being gutted at a time when Quebec was becoming concerned about foreign takeovers and the collapse of our companies’ head offices.

In 2013, the same year that Ottawa announced that it would raise the threshold for reviews under the *Investment Canada Act*, Quebec went in the opposite direction and established the Task Force on the Protection of Québec Businesses.

The task force was established by a Parti Québécois government, co-chaired by a former Liberal finance minister and composed mostly of businesspeople. It reflected Quebec’s consensus for protecting our businesses.

The task force began by noting that Quebec's 578 head offices provide 50,000 jobs that pay twice the average salary in Quebec, in addition to 20,000 jobs for specialized service (accounting, legal, financial and IT) providers.

In addition, Quebec companies tend to favour Quebec suppliers, while foreign companies with a foothold here rely more on global supply chains, which has an obvious impact on our SMEs, particularly in rural Quebec. As we have seen during the pandemic, global supply chains are fragile and make us entirely dependent on foreign entities.

Furthermore, head offices are essential for Montreal's financial sector, which is in turn essential for SMEs across Quebec, since it gives them the financial tools needed to spur their development. Quebec's financial sector is responsible for 150,000 jobs and generates \$20 billion, or 6.3%, of its GDP. A large part (close to 100,000) of these jobs are in Montreal, which ranks 13th among the world's financial centres according to the Global Financial Centres Index.

Lastly, companies tend to concentrate their strategic planning, scientific research and technological development where their head office is. In other words, a subsidiary economy is a less innovative economy.

The task force's recommendations were mainly addressed to the Quebec government: make more equity investments in companies, facilitate the distribution of employee shares and better equip boards of directors against hostile takeovers.

However, the power to legally regulate foreign takeovers to ensure that they are beneficial for the economy and society is in Ottawa's hands. And at a time when Quebec was concerned about foreign takeovers of its key economic assets, the federal government chose to relinquish its power to keep foreign investments in check.

Quebec and Canada: Two contrasting economies

While Quebec upholds economic nationalism, Canada focuses on deregulation. That is because our economies are different.

Quebec's economic nationalism encourages Quebec companies to grow. However, Canada's economy is largely based on major foreign companies' subsidiaries. Whether in the automobile (Ford Canada, GM Canada and so on) or oil (Shell Canada and Imperial Oil) industries, Canada has had a subsidiary economy for a long time.

As for Canada's large companies, they operate in industries that are protected against foreign takeovers by federal law, such as finance, rail and telecommunications.

Canada, unlike Quebec, cares very little about protecting head offices because it does not believe that doing so is in its national interest. Nevertheless, Canada's stance is informed by policy difference, not contempt for Quebec's interests.

A welcome albeit incomplete shift

A new wave of major investments from companies linked to the Chinese government has been a game changer. Canada is starting to realize that it needs to better control foreign investments and make sure that they are in fact beneficial before greenlighting them.

The Bloc Québécois is pleased that this issue has finally surfaced in the context of a study and in the committee's report.

The report suggests that the government should tighten restrictions on investments from foreign governments and investments that could impact national security; better protect strategic sectors of the economy; better protect intellectual property to ensure that China cannot access our technology; and increase the transparency of the government's net benefit review process.

The Bloc Québécois fully supports all of these proposals.

However, the committee did not take the next step needed to protect our economy, businesses and head offices, namely, lowering the review threshold. Hence this supplementary opinion, in which the Bloc Québécois speaks on behalf of a broad consensus of Quebeckers.

Even if the committee did not adopt our proposal, we hope that it will provide the government with some food for thought. After all, the pandemic has shown us that global supply chains are fragile and that it is unwise to be completely dependent on foreign decision-makers. All the more reason to protect our companies here at home.

NDP SUPPLEMENTAL RECOMMENDATION

The Investment Canada Act needs modernization to adjust to the globalized marketplace of the twenty-first century. This involves direct investments, mergers and acquisitions from countries and state-owned enterprises that were not active when the ICA was initially drafted. Along with dubious tactics and strategies that are deployed to circumvent the present reviews and regulations of the ICA and undermine commitments, issues such as consumer privacy and data collection need to be addressed and ameliorated.

Protecting Canadians' privacy and digital rights in the ICA

Case Example

Chinese company Bluesky, a suspected Anbang linked company, took over InnVest, Canada's largest hotel operator. It is alleged that Bluesky is just a front for Anbang since that company initially wanted to acquire InnVest and the executive in charge of Bluesky is a former employee of Anbang. Investment Canada reviewed the takeover and approved it. Anbang was seized by the Chinese government which holds a 98 percent ownership stake.

This development raised significant concerns regarding privacy issues and the Chinese government's long history of spying on its citizens and others who are dissidents or critical of their policies. It is widely known, as reported in the media, that Chinese government intelligence services have on going operations in Canada and other countries to spy on, intimidate, and harass individuals. In other countries Chinese intelligence services have abducted people and taken them to China.

China's Ministry of State Security was reportedly behind the massive cyberattack against the Marriott hotel chain compromising the personal information of 500 million guests which has heightened the concerns of the employees and guests of InnVest hotels. Its security apparatus has been documented as being involved in cyberintrusions in other countries.

Accordingly, the following recommendation is necessary to protect the privacy and digital rights of Canadians in the law to prevent future abuse:

Recommendation

That the government of Canada immediately introduce legislation amending the *Investment Canada Act* to allow for the establishment of a privacy protection review of and the ability to enforce Canadians' privacy and digital rights in any ICA approved acquisition, merger, or investment.

