

State Capital: Global and Australian Perspectives

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INTRODUCTION

The activities of state-related pools of capital need to be understood within the context of an era of globalization, in which economic and political ties between many jurisdictions are deepening. This increasing economic interdependence between countries also results in jurisdictions increasingly mediating rather than controlling the interests of business that may be conducted within their spheres of influence.¹ One significant effect of globalization has been to further elevate deficits and surpluses run by countries and the subsequent macroeconomic trade imbalances that they bring. As ever with international trade, the political context remains crucial, and almost inevitably, it is intertwined with expectations regarding vested interests. These developments are affecting the sovereignty of jurisdictions as local political priorities become more intertwined with international politics and the requirements of international business. The regulatory world reflects the realities of those domains it purports to influence, and so a major consequence of these developments is that regulatory structures and processes have become more internationalized. A variety of modes of governance are emerging that have a capacity for impacts of broad international scope. This political reality interacts with how state-related pools of capital have been increasing in recent years, not only in their number, but also in the scale of their effect. The rising influence of more proactive state-led capitalism is one of the shaping variables in how the global economy has been changing swiftly

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1. See generally JEFFERY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006); JAN A. SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* (2d ed. 2005); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

in recent decades, and the effects of the Global Financial Crisis (GFC) have arguably accelerated these structural shifts.²

Part I identifies three discrete phenomena in the state capital arena. First, the recent surge in state-led capitalism reflects centuries old traditions in trading and investment in both the Western and Eastern Hemispheres. Secondly, recent rises in state capital investment reflect broader macroeconomic trends, in particular the rising economic influence of Asian economies and the decoupling effect of these structural trends on capital flows in global markets. Thirdly, a key subcategory of state capital actors, Sovereign Wealth Funds (SWFs), is gaining influence in global capital markets. Part II builds on this analysis by considering the regulatory implications of the increasing influence of SWFs, especially in multilateral contexts. These broader international developments have specific national consequences, and Part II focuses in on the foreign investment regulatory regime in Australia. Part III provides a detailed case study of Chinese investment in Australia. The changing patterns of Chinese investment in Australia reflect many of the key structural macroeconomic changes and regulatory governance issues discussed in the earlier parts of this paper. Moreover, the Sino–Australian case study of Part III highlights not only the methodological difficulties associated with researching state capital investment, but also the importance of acknowledging and responding to these methodological challenges in public discourse and policy development on foreign direct investment.

I. STATE CAPITAL IN A GLOBAL CONTEXT

Recent developments regarding rising investment activity by state actors have a sense of *Back to the Future* about them. For example, char-

2. This paper is not focused on the GFC, but there is a substantial literature on its causes and effects, including the following: INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: MEETING NEW CHALLENGES TO STABILITY AND BUILDING A SAFER SYSTEM (2010), available at <http://www.imf.org/External/Pubs/FT/GFSR/2010/01/index.htm>; INT'L MONETARY FUND, FISCAL IMPLICATIONS OF THE GLOBAL ECONOMIC AND FINANCIAL CRISIS (2009), available at <http://www.imf.org/external/pubs/ft/spn/2009/spn0913.pdf>; CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2009); VERDICT ON THE CRASH: CAUSES AND POLICY IMPLICATIONS (Philip Booth ed., 2009) (U.K.), available at <http://www.iea.org.uk/sites/default/files/publications/files/upldbook453pdf.pdf>; Christopher J. Arup, *The Global Financial Crisis: Learning from Regulatory and Governance Studies*, 32 LAW & POL'Y 363 (2010), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2010.00322.x/abstract>; Emiliós Avgouleas, *The Global Financial Crisis: Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy*, 9 J. CORP. L. STUD. 23 (2009) (U.K.), available at <http://www.ingentaconnect.com/content/hart/jcls/2009/00000009/00000001/art00002>; Gary B. Gorton, *Questions and Answers About the Financial Crisis* (Nat'l Bureau of Econ. Research, Working Paper No. 15787, 2010), available at <http://www.nber.org/papers/w15787>; Essential Information & Consumer Educ. Found., *Sold Out: How Wall Street and Washington Betrayed America*, WALL ST. WATCH (Mar. 2009), http://www.wallstreetwatch.org/reports/sold_out.pdf.

ter companies such as the East India Company (EIC) bear similarities to many contemporary state capital actors with their close linkages to state power and, in many cases, an emphasis on trading in commodities.³

The first manifestation of the EIC was established in 1600 during the reign of Queen Elizabeth I as the Governor and Merchants of London Trading with the East Indies.⁴ The EIOC, which evolved through several forms, received monopoly trading advantages and other support from the Crown, including five Acts in 1670 during the reign of Charles II that accorded regal legitimacy to the EIC to command troops, make war and peace, mint money, annex territory, and administer criminal and civil justice over the territory it controlled.⁵

Contemporary state capital actors obviously do not play the same militaristic and governmental roles as the EIC, but they do have close linkages to their national governments and play important roles in facilitating their sovereign's economic and political influence in foreign territories. As discussed below, concern has been voiced in recent years in many quarters about these growing levels of influence, and there has been multilateral regulatory innovation regarding SWFs in particular.⁶ SWFs and other state-related pools of capital, such as State Owned Enterprises (SOEs),⁷ State Pension Funds (SPFs), and Commodity Stabilization Funds (CSFs), are acknowledged as increasingly valuable sources of liquidity in capital markets that have been drained of liquidity in recent years. Many of the intrinsic challenges associated with regulating the international finance sector in a post-GFC era have come into play in recent years in multilateral efforts to mediate the increasing levels of activity and influence exercised by the diverse constituency of financial sector actors that have been bundled together under the state capital la-

3. For a discussion of how various interest groups interacted in shaping the policy priorities of the East India Company, see H.V. BOWEN, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN 1756–1833* (2006).

4. *Id.*

5. 8 *ENCYCLOPÆDIA BRITANNICA* 835 (11th ed. 1911). Similarly, the Dutch East India United Company (EIC), the Vereenigde Oost-indische Compagnie (VOC), was founded in 1602 when the States General of the Netherlands granted the charter company a twenty-one year monopoly to trade and develop Dutch influence in Asia. *Id.* at 834–35. Like the EIC, it was enormously successful in these ventures and they were dominant actors in Asia for 200 years. *Id.* The EIC equivalent in North America was the Hudson Bay Company (HBC), which was incorporated by English royal charter in 1670 to administer trade in the Hudson Bay region and beyond, effecting a monopoly on the fur trade. For many years, the HBC acted as a de facto government across large swathes of territory. See BRYCE GEORGE, *THE REMARKABLE HISTORY OF THE HUDSON'S BAY COMPANY* 12 (1968).

6. The regulatory innovation regarding SWFs is discussed in more detail below, and this paper employs a working definition of SWFs as state owned investment funds comprised of financial assets.

7. A working definition of SOEs is that they are widely deemed to be state-owned operating companies rather than investment mechanisms, such as SWFs.

bel.⁸ These mutual challenges include the following: balancing the interests of state and private actors; the transnational nature of much financial sector activity; creating market regulatory conditions that can deliver appropriate balances between liquidity supply and opportunity for profit; the need to protect the national interest of jurisdictions but not encourage protectionism; and the increasing hybridization of financial sector actors, products, and services.

These challenges have been heightened by GFC ramifications, which continue to impact upon political, economic, and legal agendas. For example, in order to save failing banks, some governments have part-nationalized (e.g., Royal Bank of Scotland and Lloyds in the United Kingdom) or nationalized them (e.g., Fannie Mae and Freddie Mac in the United States, and Northern Rock in the United Kingdom).⁹ An effect of the GFC-induced emergency measures is that the entwined regulatory–investment role of the state becomes cloudier as jurisdictions that might previously have slotted comfortably into the category of recipients of state capital have become more active state capital investment actors themselves. This raises questions about how the state can manage simultaneously the potential conflicts of being an active investment actor, a detached and independent regulator, a recipient of inward investment from both state and non-state sources, and the promoter of the national interest. The increasing investment role of SWFs, SOEs, and other state-related pools of capital reflect changing relationships in the global economy, especially the economic rise of the BRIC countries (Brazil, Russia, India, and China).

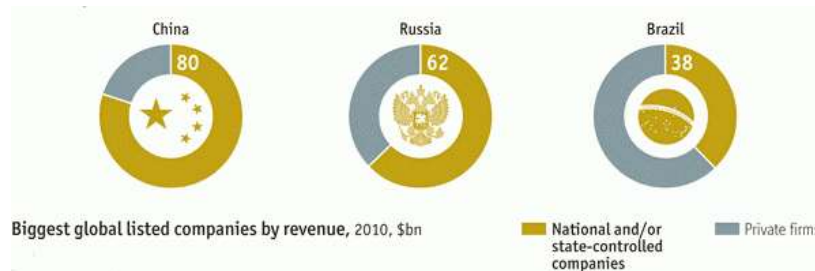
As the strategic economic and political importance of these countries increases, so does the need to understand how international regulatory infrastructures must evolve to accommodate these changes. For example, SOE capitalization constitutes a significant element in three of the BRIC countries. According to the *Economist*, in 2012, SOEs comprised 80% of the value of the stock market in China, 62% in Russia, and 38% in Brazil, as depicted in Figure 1 below; SOEs accounted for one-third of

8. The definitional difficulties of unpacking this label and the practical dilemmas of researching in this area of state capital are an ongoing theme of this paper.

9. There has been significant academic and media coverage of these events and their implications. E.g., Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661 (2010); Roman A. Tomasic, *The Rescue of Northern Rock: Nationalization in the Shadow of Insolvency*, 1 CORP. RESCUE & INSOLVENCY 109 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422571; Dale A. Oesterle, *The Collapse of Fannie Mae and Freddie Mac: Victims or Villains?* (Ohio St. Pub. Law, Working Paper No. 127, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645330; Philip Aldrick, *RBS and Northern Rock to Unveil Radical Strategies*, TELEGRAPH (Feb. 22, 2009, 10:12 PM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4782762/RBS-and-Northern-Rock-to-unveil-radical-strategies.html> (U.K.).

the emerging world's foreign direct investment from 2003–2010.¹⁰ And according to Chinese government records, Chinese foreign direction investment (FDI) was set to increase by 15% in 2013.¹¹

Figure 1: Share of SOE Capitalization on the MSCI National Stock Market Index: Percentage of total, June 2011¹²



This rapidly rising pool of SOE investment capital is part of the story of the decoupling effects of contemporary fundamental changes in East–West capital flows with attendant global imbalances regarding the management of exchange rates and reserves. The most obvious example of this is the rapidly increasing global economic influence of China. For example, China increased its foreign reserves from \$21 billion in 1992 (5% of its annual GDP)¹³ to \$31,202 billion in 2012 (45% of its annual GDP).¹⁴ These decoupling effects are fuelled by the fact that emerging markets have grown at an average of 5.5% (in contrast to 1.6% for developed nations) in recent years, and the activity of these emerging markets is projected to make up half of the world's GDP by 2020 (see Table 1 below).

10. Adrian Wooldridge, *The Visible Hand*, *ECONOMIST*, Jan. 21, 2012, <http://www.economist.com/node/21542931>.

11. KPMG & Univ. of Sydney China Studies Ctr., *Demystifying Chinese Investment in Australia: Update March 2013*, KPMG, 1 (Mar. 15, 2013), <http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-in-australia-march-2013-v2.pdf> (Austl.) [hereinafter *KPMG 2013*].

12. Wooldridge, *supra* note 10.

13. Zheng M. Song, Kjetil Storesletten & Fabrizio Zilibotti, *Growing Like China* (Centre for Econ. Policy Research, Working Paper No. DP7149, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345675.

14. Kenneth Rapoza, *China's Cash Hoard Nearly Half Its GDP*, *FORBES* (May 25, 2012), <http://www.forbes.com/sites/kenrapoza/2012/05/25/chinas-cash-hoard-nearly-half-its-gdp/>.

Table 1: GDP Growth: Advanced vs. Emerging Economies¹⁵

	Actual Average Annual Percentage Change							Projected	
	2006	2007	2008	2009	2010	2011	2012	2013	2018
Total Advanced Economies	3.0	2.8	0.1	-3.5	3.0	1.6	1.2	1.2	2.5
E.g., United States	2.7	1.9	-0.3	-3.1	2.4	1.8	2.2	1.9	2.9
Euro Area	3.2	3.0	0.4	-4.4	2.0	1.4	-0.6	-0.3	1.6
Japan	1.7	2.2	-1.0	-5.5	4.7	-0.6	2.0	1.6	1.1
Australia	2.7	4.6	2.7	1.4	2.6	2.4	3.6	3.0	3.2
Total Emerging Economies	8.3	8.8	6.1	2.7	7.6	6.4	5.1	5.3	6.2
E.g., Brazil	4.0	6.1	5.2	-0.3	7.5	2.7	0.9	3.0	4.2
Russia	8.2	8.5	5.2	-7.8	4.5	4.3	3.4	3.4	3.6
India	9.4	10.1	6.2	5.0	11.2	7.7	4.0	5.7	7.0
China	12.7	14.2	9.6	9.2	10.4	9.3	7.8	8.0	8.5
Qatar	26.2	18.0	17.7	12.0	16.7	13.0	6.6	5.2	6.5
Saudi Arabia	5.6	6.0	8.4	1.8	7.4	8.5	6.8	4.4	4.3

This shifting economic gravity towards emerging markets means that a more varied mix of macroeconomic organizational models is shaping the global economy. Significantly, state-directed capital is flowing outward from emerging economies on a global scale. This capital flow is exemplified by China's "Going Out"¹⁶ or "Going Global"¹⁷ strategy, pursuant to which state-owned entities actively seek to *acquire* foreign assets and equity interests as opposed to merely *trading* in global commodities and raw materials.¹⁸ Indeed, China has emerged to rival the United

15. *World Economic Outlook: Hopes, Realities, Risks*, INT'L MONETARY FUND, at 149 tbl.A1, 153–55 tbl.A4 (Apr. 2013), <http://www.imf.org/external/pubs/ft/weo/2013/01/>.

16. See Nicholas Calcina Howson, *China's Acquisitions Abroad—Global Ambitions, Domestic Effects*, LAW QUADRANGLE NOTES 73 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345909.

17. KPMG & Univ. of Sydney China Studies Ctr., *Demystifying Chinese Investment in Australia: Update August 2012*, KPMG, 5 (Aug. 1, 2012), <http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/china-insights/Documents/demystifying-chinese-investment-2012.pdf> (Austl.) [hereinafter *KPMG 2012*].

18. Howson, *supra* note 16, at 73.

States as the most important economy in the world. Wooldridge of the *Economist* writes: “Over the past ten years [China’s] GDP has more than trebled to \$11 trillion. China has taken over from Japan as the world’s second-biggest economy, and from America as the world’s biggest market for many consumer goods.”¹⁹ The top ten biggest companies in the world (by revenue) under 2012 rankings include three Chinese SOEs; this exceeds the number of European and U.K. companies, and comes just behind that of the United States.²⁰

The huge increases in China’s economy and its foreign reserves are testimony to strong underlying growth trends, which commentators and analysts expect to continue. For example, in Table 3 below, using a sample of 122 countries accounting for more than 95% of global GDP, economists Dale Jorgensen and Khuong Vu have predicted how shares of global trade between major trading blocs may change if current growth trends are maintained.²¹

Table 3: Percentage Share of Global GDP²²

	2010 (%)	2020 (%)
China	13.92	20.08
U.S.	20.14	17.44
G 7	40.62	33.30
Asia 7	25.16	33.18
China as % of Asia 7 GDP	55.35	60.52
U.S. as % of G8 GDP	49.59	52.39

By 2020, China will have replaced the United States as the world’s largest economy with 20.08% of global GDP (up from 13.92% in 2010).²³ In the same period, the U.S. share of global GDP is expected to fall from 20.14% to 17.44%.²⁴ This *changing of the economic guard* as it were in terms of the global economy is not confined merely to China and the United States because there are regional forces at work as well, especially in Asia. For example, the G7 (Canada, France, Germany, Italy, Japan, United Kingdom, and United States) share of global GDP is expected to fall from 40.62% in 2010 to 33.30% in 2020, and the Asia 7

19. Wooldridge, *supra* note 10.

20. *Global 500*, CNN MONEY (July 23, 2012), http://money.cnn.com/magazines/fortune/global500/2012/full_list/.

21. See generally Dale W. Jorgensen & Khuong M. Vu, *The Rise of Developing Asia and the New Economic Order* (Lee Kuan Yew Sch. of Pub. Policy, Research Paper No. PP11-21, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904716.

22. See *id.* at 25.

23. *Id.*

24. *Id.*

(China, Hong Kong, India, Indonesia, Singapore, South Korea, and Taiwan) share is expected to rise from 25.16% in 2010 to 33.18% in 2020.²⁵ The United States and China dominate their respective groupings. The U.S. share of the G7 GDP is estimated to be 49.59% in 2010 and 52.385 in 2020.²⁶ China's share of the Asia 7 GDP is estimated to be 55.35% in 2010 and 60.52% in 2020.²⁷

If these trends transpire into reality, which seems likely, then there will be a direct 7%+ transference of total global GDP from the G7 to the Asia 7 in only ten years and further concentration of the strategic significance of China and the United States in their respective groupings. This would be a dramatic shift in economic power, and history demonstrates that such economic shifts influence change in other areas such as foreign policy, strategic alliances, and regulation in multilateral contexts. The economic significance of China and the United States is also clear in Table 4 below, in which a 2013 PwC Economics report projects across a longer time span how the top global economies based on Purchasing Power Parity (PPP) were ranked in 2011 and how they might look in 2030 and 2050.²⁸

Table 4: Actual and Projected Top 20 Economies Ranked Based on GDP (in PPP)²⁹

PPP Rank	2011		2030		2050	
	Country	GDP at PPP (2011 US\$ bn)	Country	Projected GDP at PPP (2011 US\$ bn)	Country	Projected GDP at PPP (2011 US\$ bn)
1	U.S.	15,094	China	30,634	China	53,856
2	China	11,347	U.S.	23,376	U.S.	37,998
3	India	4,531	India	13,716	India	34,704
4	Japan	4,381	Japan	5,842	Brazil	8,825
5	Germany	3,221	Russia	5,308	Japan	8,065
6	Russia	3,031	Brazil	4,685	Russia	8,013
7	Brazil	2,305	Germany	4,118	Mexico	7,409
8	France	2,303	Mexico	3,662	Indonesia	6,346
9	U.K.	2,287	U.K.	3,499	Germany	5,822
10	Italy	1,979	France	3,427	France	5,714

25. *Id.*

26. *Id.*

27. *Id.*

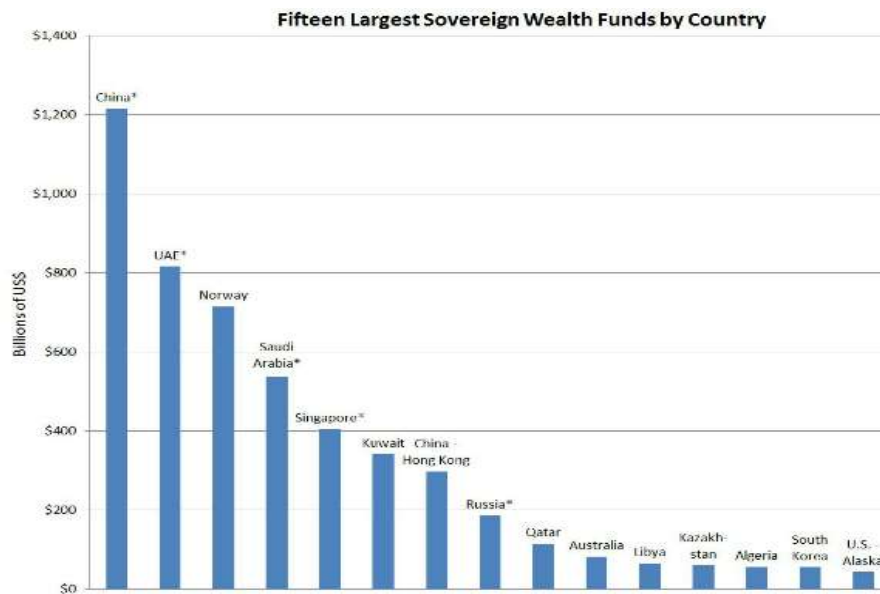
28. *World in 2050, The BRICS and Beyond: Prospects, Challenges and Opportunities*, PwC, 2 (Jan. 2013), <http://www.pwc.com/gx/en/world-2050/the-brics-and-beyond-prospects-challenges-and-opportunities.jhtml>.

29. *Id.*

If these estimates are correct, then China will likely be the dominant economic power globally before the middle of the century. Importantly, China and some of the other fastest-growing economies that feature prominently in these tables have significant state capital investment actors. Indeed, tracing the evolution of SWFs exemplifies the complex forces underpinning the mosaic of contemporary state capital actors.

SWFs are a growing influence in global capital markets. For example, in Table 5 below, Coleman shows the fifteen largest countries with SWFs by assets under management in March 2013 using Sovereign Wealth Funds Institute (SWFI) data.³⁰

Table 5: Sovereign Wealth Fund Rankings 2013³¹



30. Isobel Coleman, *Graph: Sovereign Wealth Funds*, Council on Foreign Relations, COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2013), <http://blogs.cfr.org/coleman/2013/04/24/graph-sovereign-wealth-funds/>.

31. *Id.* “Asterisks indicate where the assets of a country’s multiple SWFs have been added together. The Sovereign Wealth Fund Institute notes that one of the Russian funds ‘includes the oil stabilization fund of Russia’ and that the figure for China’s largest fund ‘is a best guess estimation.’” *Id.*; see also *Sovereign Wealth Fund Rankings*, SOVEREIGN WEALTH FUND INST. (Aug. 2013), <http://www.swfinstitute.org/fund-rankings/> (supplying the data for the graph).

SWFs are increasingly visible and valued players in global financial markets. But even for those with extensive resources, there is a substantial reliance on best guesswork regarding their practices and processes. It can be difficult to gather hard data because often powerful actors are involved who do not welcome scrutiny, which leads to difficulties not only in measuring the scale of the activity and its effects but also in evaluating regulatory responses to such activity. Compounding this empirical uncertainty is the ambiguity that can sometimes surround white-collar crime, financial crime, and state capital investment because their effects can be more diffused. It is this diffusion of effect, especially in geopolitical contexts, which accentuates some of the criticism of state capital, as discussed in more detail below.

There is definitional uncertainty about forms of state-related capital and how they should be classified partly because numerous types of actors have been collapsed into popular understandings of the term. For example, SWFs have probably received more academic scrutiny than other forms of state capital, but there are a wide range of definitions put forward by commentators and organizations. Truman defines SWFs as “a descriptive term for a separate pool of government-owned or government-controlled financial assets that includes some international assets.”³² Lowery, the U.S. Undersecretary for International Affairs at the time, defined SWFs as “a government investment vehicle[,] which is funded by foreign exchange assets, and which manages these assets separately from official reserves.”³³ The European Commission (EC) notes that SWFs are “generally defined as state-owned investment vehicles, which manage a diversified portfolio of domestic and international financial assets.”³⁴ The International Working Group (IWG) sees SWFs as a heterogeneous group with five subcategories based on their main objective: (i) stabilization funds whose primary objective is to help insulate the economy from the effects of commodity (usually oil) price swings; (ii) savings funds for future generations and to mitigate the effects of Dutch disease;³⁵ (iii) reserve investment corporations; (iv) development

32. Edwin M. Truman, *A Blueprint for Sovereign Wealth Fund Best Practices*, PETERSEN INST. INT'L ECON., 1 (2008), <http://www.iie.com/publications/pb/pb08-3.pdf>.

33. Press Release, U.S. Dep't of the Treasury, Remarks by Acting Undersecretary for International Affairs Clay Lowery on Sovereign Wealth Funds and the International Financial System, (June 21, 2007), available at <http://www.treasury.gov/press-center/press-releases/Pages/hp471.aspx>.

34. Comm'n of the European Communities, *Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: A Common European Approach to Sovereign Wealth Funds*, at 4, COM(2008), available at http://ec.europa.eu/internal_market/finances/docs/sovereign_en.pdf.

35. Dutch disease is defined by Investorwords.com: “The deindustrialization of a nation’s economy that occurs when the discovery of a natural resource raises the value of that nation’s currency, making manufactured goods less competitive with other nations, increasing imports and de-

funds; and (v) contingent pension reserve funds that provide for unspecified pension liabilities on the government's balance sheet.³⁶ Jen believes that SWFs have five basic ingredients: (i) sovereign; (ii) high foreign currency exposure; (iii) no explicit liabilities; (iv) high risk tolerance; and (v) long investment horizon.³⁷ A number of SWFs themselves combined as an interest group in 2008 and offered their own definition as part of their Generally Accepted Principles and Practices (GAPP):

SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets.³⁸

So, it can be seen that SWFs are difficult to classify, and there are many grey areas, for example, between central banks' foreign reserves management and other types of investment vehicles. Pension funds are not SWFs even though they may be government sponsored, but they do have a clear link to the beneficiaries via fiduciary duties. Some SWFs are legal entities (e.g., ADIA in Abu Dhabi), others are corporations (e.g., Temasek in Singapore), and others are not legal persons (e.g., Norway Government Global Fund).

Academic interest in the forms of state capital, such as SWFs, appears to be relatively recent. For example, although some SWFs have been in existence for sixty years,³⁹ public recognition of the label SWF is quite recent.⁴⁰ The jurisdictions that operate SWFs and other forms of state capital are extremely diverse; some are authoritarian one-party states, while others are sophisticated democracies, and they range from

creasing exports." INVESTORWORDS, http://www.investorwords.com/1604/dutch_disease.html (last visited Jan. 15, 2014). The term originated in the Netherlands after the discovery of North Sea gas in the 1970s and is an ongoing concern for resource-rich jurisdictions, prompting several to establish SWFs. *Id.*; see also Paul Krugman, *The Narrow Moving Band, the Dutch Disease, and the Competitive Consequences of Mrs. Thatcher*, 27 J. DEV. ECON. 41, 50 (1987), available at <http://www.eco.uc3m.es/~desmet/trade/KrugmanJDE1987.pdf>.

36. *Sovereign Wealth Funds—A Work Agenda*, INT'L MONETARY FUND, 5 (Feb. 29, 2008), <http://www.imf.org/external/np/pp/eng/2008/022908.pdf>.

37. Stephen Jen, *The Definition of a Sovereign Wealth Fund*, MORGAN STANLEY GLOBAL FORUM (Oct. 26, 2007), <http://www.morganstanley.com/views/gef/archive/2007/20071026-Fri.html>.

38. *Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles"*, INT'L WORKING GRP. SOVEREIGN WEALTH FUNDS, 27 (Oct. 2008), <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf> [hereinafter GAPP].

39. The Kuwait Investment Office (KIO) was established in London in 1953 as an asset manager for Kuwait's Foreign Ministry. *Id.* at 38.

40. The term Sovereign Wealth Fund appears to have been introduced by Rozanov in 2005. See Andrew Rozanov, *Who Holds the Wealth of Nations?*, CENTRAL BANKING (May 20, 2005), <http://www.centralbanking.com/central-banking-journal/feature/2072255/holds-wealth-nations>.

highly developed oil/gas exporters in Europe (e.g., Norway, Russia), to less developed ones in the Middle East (e.g., United Arab Emirates, Kuwait), to large and small manufacturing and trading entrepôts in Asia (e.g., China, Korea, Singapore), to broad-based commodity exporters (e.g., Australia, Chile), to smaller emerging economies (e.g., Mauritania, Uzbekistan).⁴¹

It seems inevitable that state capital actors, including SWFs, will get bigger and become increasingly important vehicles for the recycling of global finance, namely, channeling capital from surplus (balance of payments) generating countries to deficit countries. However, their size, number, growth, and scale of activity will still be influenced by the corresponding size and trends in global macroeconomic imbalances themselves. Exchange rate regimes, namely the prevalence or otherwise of dollar-type pegs and domestic inflation issues, will also have an influence on their size, growth, and number. Real and nominal rates of return on benchmark sovereign assets in the major advanced economies will also have an influence in as far as sovereign wealth portfolio shifts are affected. The public accumulation of assets by energy-exporting countries is expected to continue if constraints on energy supply relative to demand remain, which does seem likely over the medium to longer term. It is highly likely that state-capital actors, including SWFs, increasingly will be seen as favored pools of available liquid capital. Continuing relatively low growth rates and subsequently low returns on investment capital can be expected in major advanced economies, so investment will be channeled increasingly into emerging markets, and state capital actors will be an important conduit in such processes.

The last five years have seen a dramatic recasting away from the predominant philosophy that had driven financial markets' development and their regulation in the last three decades—that is, a commitment to free market ideology underpinned by light-touch regulation under the canvas of regulatory competition to attract increasing amounts of inward investment. Since 2008, liquidity in global markets has reduced and concerns about sovereign debt have grown as appetite for risk has diminished globally.⁴² Interwoven with this, a new era of more proactive state-led investment capitalism is emerging with state-related pools of capital key to this process. This significant change has been driven by what

41. *Sovereign Wealth Fund Rankings*, *supra* note 31. The SWFI estimated total SWF funds in July 2013 at \$5,473.3 billion and specified their geographical origins as follows: 40% are in Asia; 35% in the Middle East; 17% in Europe; 3% in Africa; 3% in the Americas; and 2% in other areas of the world. *Id.*

42. Valentin Bruno & Hyun Song-Shin, *Capital Flows, Cross-Border Banking and Global Liquidity*, (Nat'l Bureau of Econ. Research, Working Paper No. 19308, 2013), available at <http://www.nber.org/papers/w19308>.

then-Australian Treasurer Wayne Swan described in 2009 as “spectacular regulatory failure,” stressing the new prevailing international consensus that the state must be a more active investor in markets as well as a more active overseer of their design and regulation.⁴³ This is the new international financial environment and geopolitical reality in which existing and future state-related pools of capital are likely to become increasingly proactive and influential, contributing to financial markets and the broader economy in Australia and around the world.

State capitalism is undeniably on the rise. However, reflecting on geopolitical and geoeconomic realities, U.S. concerns have been pivotal in shaping the discourse on what capitalism is and how it should be constituted. In a post-GFC world, as the twenty-first century progresses and the economic power of Asian countries in particular grow, market perceptions about appropriate levels of activity by the state as an investor in capital markets may well change. Much of the post-GFC global financial reform agenda has focused on leverage and systemic risk issues, and increasing the capability of jurisdictions to know what levels of investment, leverage, and systemic risk are in their markets.⁴⁴ In terms of state-related pools of investment activity, there remains considerable uncertainty and ambiguity about their levels of investment, but in general, they tend to be less leveraged than many of their private sector counterparts and are therefore perceived by some as less of a threat to market stability. Despite these lower leverage ratios, the sheer scale of SWF investments and their growing influence in capital markets means that there is increasing scrutiny of their activities. Indeed, in recent years there has been increased debate about whether there should be specific regulatory requirements for SWFs in particular and state capital in general.⁴⁵ We trace these tensions in the next Part by outlining American and European reactions to state capital investment activity and then by analyzing how this reaction has fed into the emergence of multilateral regulatory initiatives regarding SWFs. We then examine how the foreign investment regulatory regime in Australia has sought to address specific issues raised by increased inward investment from state capital actors.

43. Mark Franklin, *Wayne Swan Calls for New Controls on Free Market*, AUSTRALIAN (Jan. 24, 2009), <http://www.theaustralian.com.au/business/breaking-news/swan-calls-for-reform-of-markets/story-e6frg90f-1111118652144>.

44. *Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations*, BANK INT'L SETTLEMENTS (Nov. 2009), <http://www.bis.org/publ/othp07.htm>.

45. See, e.g., Simone Mezzacapo, *The So-Called “Sovereign Wealth Funds”: Regulatory Issues, Stability and Prudential Supervisions*, EUROPEAN COMM'N (Apr. 2009), http://ec.europa.eu/economy_finance/publications/publication15064_en.pdf.

II. REGULATORY REGIMES AND STATE CAPITAL

The traditional view of state capital actors (especially SWFs) is as long-term investors that can provide liquidity in times of crisis and have large *holding power*. However, there is an increasing trend amongst state capital actors, including SWFs, towards investment diversification and a growing desire and capacity for risk, which has implications for cross-border foreign exchange liquidity. If SWFs are taken as an example of the changing significance of the broader pools of state-related capital, then in recent years they have become more varied and aggressive in their investment strategies, raising fears that forms of financial protectionism will be thrown up by some nation states to defend against such activity.⁴⁶ This section will first explore the effects of multilateral regimes for SWFs and then explore the Australian foreign investment regime.

A. Multilateral Regime for SWFs

Broader macroeconomic factors seem to play an important role in heating or cooling the debate on state-led investments.⁴⁷ For example, protectionist sentiment was stoked by the takeover in 2006 by Dubai Ports World (DPW), a state-owned company in the United Arab Emirates, of the port management businesses of a number of seaports in the United States that were already in foreign ownership by the U.K. firm P&O. Even though the Bush Administration gave approval for the deal, protectionism sentiment stimulated the specter of *cross-border nationalization* because state-related capital was behind DPW, and this gained public and congressional traction, including the House Panel voting 62–2 on March 8, 2006, to block the deal.⁴⁸ In December 2006, the controversy contributed to DPW selling the seaport management businesses to the American International Group.⁴⁹ The DPW controversy attests to sensitivities in the United States towards investment by foreign government entities. One survey of 1,000 registered U.S. voters (weighted by race

46. Steve J. Weisman, *Concern About Sovereign Wealth Funds Spreads to Washington*, N.Y. TIMES (Aug. 20, 2007), http://www.nytimes.com/2007/08/20/business/worldbusiness/20iht-wealth.4.7186699.html?pagewanted=all&_r=0.

47. Some of the media coverage was quite hostile. *E.g.*, David R. Francis, *Will Sovereign Wealth Funds Rule the World?*, CHRISTIAN SCI. MONITOR (Nov. 26, 2007), <http://www.csmonitor.com/2007/1126/p16s01-wmgn.html>.

48. See Carl Levin, U.S. Senator, Opening Remarks at the Senate Armed Services Committee Briefing on Port Security, (Feb. 23, 2006), available at <http://levin.senate.gov/newsroom/release.cfm?id=251838>; Robert Gay, *US Feels Power of Cashed-up Foreign Funds*, AUSTL. FIN. REV., Nov. 29, 2007, at 1.

49. *As AIG Buys DPW's US Assets*, WORLD CARGO NEWS (Dec. 11, 2006), <http://www.worldcargonews.com/html/n20070118.117570.htm>.

and education in an effort to be a representative sample), conducted by Public Strategies Inc., revealed significant levels of distrust about foreign investment in the United States in general and state pools of capital in particular.⁵⁰ Seventy-two percent of respondents believed that foreign governments do not reveal enough about their investment portfolios; sixty-eight percent opposed government investment from Saudi Arabia; and similar scores were recorded for other jurisdictions—for example, Abu Dhabi (62%), China (65%), and Russia (61%).⁵¹ The sample of course was not comprehensively representative of the U.S. population in general, but ongoing public pressure of this sort contributed to legislative change in the form of H.R. 556: Foreign Investment and National Security Act of 2007, which passed in the House 423–0 and was signed into law by President Bush on July 26, 2007. The pressure in the United States continued during the Bush Administration in 2007 with Mr. Henry Paulson, former U.S. Treasury Secretary, voicing concern about political motivations influencing the investments of SWFs and calling for a multilateral regime to monitor their activities.⁵² Also, in 2007, the Committee on Foreign Investment in the United States (CFIUS) raised the requirements around inward sovereign investments and increased the numbers of examinations of such investment.⁵³

Similarly, the EC stated that it “cannot allow non-European funds to be run in an opaque manner or used as an implement of geopolitical strategy” and reserved the right to introduce specific European legislation if increased transparency from SWFs was not achieved through voluntary means.⁵⁴ These concerns largely centered on whether the investment activities of these actors could lead to distortions in asset prices or excessive risk taking. The anxieties on both sides of the Atlantic show that geopolitical security concerns are an inevitable element of SWF reporting. The establishment of the International Working Group of Sovereign Wealth Funds (IWGSWF) and the development of the GAPP can, partially at least, be seen as a response to such political pressures.

The gathering global recession of 2008 coincided with some interesting multilateral developments regarding SWFs and how they chose to

50. *Survey Reveals Voters Wary of Foreign Government Investment*, PUB. STRATEGIES INC. (Feb. 21, 2008), <http://www.pstrategies.com/index.php/survey-reveals-voters-wary-of-foreign-government-investment.htm>.

51. *Id.*

52. See Tony Walker, *Call to Keep Funds Free of Political Bias*, AUSTL. FIN. REV., Oct. 22, 2007.

53. *Section 721 of The Defense Production Act of 1950, Notice*, COMM. ON FOREIGN INVESTMENT U.S. (CFIUS) (Oct. 2007), <http://cfius.us/modules/news/>.

54. Sean O’Grady, *Europe’s Code for Sovereign Wealth Funds*, BUSINESSWEEK (Feb. 26, 2008), <http://www.businessweek.com/stories/2008-02-26/europes-code-for-sovereign-wealth-funds> businessweek-business-news-stock-market-and-financial-advice.

present themselves as a grouping to the world. In May 2008, in Washington D.C., twenty-five SWFs from jurisdictions as varied as Australia, Botswana, Chile, China, Norway, Russia, Singapore, Trinidad and Tobago, the United Arab Emirates, and the United States formed the International Working Group (IWG), in cooperation with the International Monetary Fund (IMF) and the World Bank, as a partial response to some of the criticism about their investment activities and motivations. Composition of the IWG largely comprised representatives of finance industries and central banks. The IWG established a small secretariat and gave it the task of developing a set of principles that reflected the investment practices and objectives of SWFs.⁵⁵ The IMF's role was as a facilitator of the process, and recipient countries were involved. Only five months later, at a meeting in Santiago, Chile, in October 2008, the IWG formally declared the GAPP.⁵⁶ IWG members committed to operate by the GAPP; some of the core twenty-four voluntary principles include good governance, accountability, transparency, and a commitment to financially motivated investment strategies.⁵⁷ Twenty-five very different countries were involved, and a range of highly technical complex issues were covered in a short period of time. The IMF played a key role behind the scenes by moderating media perceptions of SWFs, particularly in calming anxieties surrounding China's state-capital investment policies that had put much of the intensity into contemporary debates about SWFs, especially in the United States.

At the media conference formally announcing the Santiago Principles, the IWG drafting Chair, Mr. David Murray (at the time, Chairman of Australia's Future Fund), stated that the key task was to establish trust in recipient countries based on notions of openness and legitimacy.⁵⁸ His sentiments were echoed by Joaquín Almunia, European Commissioner for Economic and Monetary Affairs, who also added that the long-term investment horizons of state-related pools of capital like SWFs would be extremely important in preserving mutual trust across international financial markets and their associated regulatory environments.⁵⁹

55. See generally INT'L WORKING GROUP SOVEREIGN WEALTH FUNDS, <http://www.iwg-swf.org/> (last visited Nov. 25, 2013).

56. GAPP, *supra* note 38.

57. *Id.*

58. Press Conference Working Call: International Working Group of Sovereign Wealth Funds, INT'L WORKING GROUP SOVEREIGN WEALTH FUNDS (Sept. 2, 2008), <http://www.iwg-swf.org/tr/swftr0801.htm>.

59. Simon Willson, *Wealth Funds Group Publishes 24-Point Voluntary Principles*, INT'L MONETARY FUND (Oct. 15, 2008), <http://www.imf.org/external/pubs/ft/survey/so/2008/new101508b.htm>.

The IWG evolved into the International Forum of Sovereign Wealth Funds (IFSFW), the latter being formally established by the IWG in Kuwait City, in April 2009, to meet and exchange views, facilitate the GAPP, and encourage cooperation with recipient countries, international organizations, and capital markets actors.⁶⁰ Since then, the IFSWF has met in Baku, Azerbaijan (October 2009), Sydney, Australia (May 2010), Beijing, China (May 2011), and Mexico City, Mexico (September 2012) and is scheduled to meet in Oslo, Norway in October 2013.

The IFSWF operates in a fairly discreet manner with very limited published material, but in July 2011, it did publish a report about IFSWF Members' Investment and Operational Practices with a particular emphasis on the GAPP.⁶¹ The report reveals that approximately 80% of Members participated in the IFSWF surveys, that their investment activities are commercially motivated, that there were differing levels of compliance with the GAPP amongst Members, and that, in the view of the IFSWF, it was not reasonable or possible to expect uniform compliance with the GAPP from all IFSWF Members. So, although the GAPP, the IFSWF, and the report demonstrate some progress in transparency regarding SWFs, the comments in 2007 of the IMF still carry weight: "[T]here's a lot we don't know about sovereign funds. Very few of them publish information about their assets, liabilities, or investment strategies."⁶² Some state capital actors may be a little more open, but with a significant number of sovereign states involved having authoritarian political regimes, it is unsurprising that it can be hard to easily evaluate levels and locations of investment activity.

In considering the issue of how state capital actors such as SWFs might be regulated in multilateral contexts, it is not feasible or likely desirable under pragmatic political realities that responsibility should lie with any international regulatory body. Rather, any exercise of regulatory fiat should be exercised by the *recipient* jurisdictions and the domestic regulation, which inevitably impacts upon inward investment actors. This pragmatic stance is consistent with how investment norms are shaped and operationalized in international financial markets.

Past attempts by international organizations to embed a top-down multilateral regulatory infrastructure to shape behavior by investment actors have not been notably successful. This lack of success was

60. 'Kuwait Declaration': *Establishment of the International Forum of Sovereign Wealth Funds*, INT'L WORKING GRP. SOVEREIGN WEALTH FUNDS (Apr. 6, 2009), <http://www.iwg-swf.org/mis/kuwaitdec.htm>.

61. *IFSFW Members' Experiences in the Application of the Santiago Principles*, INT'L FORUM OF SOVEREIGN WEALTH FUNDS (July 7, 2011), www.ifswf.org/pst/stp070711.pdf.

62. Simon Johnson, *The Rise of Sovereign Wealth Funds*, 44 FIN. & DEV. 56, 57 (2007), available at <http://www.imf.org/external/pubs/ft/fandd/2007/09/straight.htm>.

demonstrated by the OECD's failure regarding its proposed Multilateral Agreement on Investment (MAI) in the late 1990s.⁶³ The key reason why the MAI failed was its lack of process legitimacy to jurisdictions that were not committed or bound by its central tenets. This lack of legitimacy obviously creates difficulties for organizations, such as the OECD, that are seeking to promote certain investment protocols as standard business practice via, for example, the OECD Declaration on International Investment and Multinational Enterprises⁶⁴ and the OECD Codes of Liberalisation of Capital Movements.⁶⁵ The latter has sought to counter protectionist activity, such as establishing artificial barriers to market entry. OECD Members are bound by these level-playing-field protocols, and not unexpectedly, many countries who are not members of the OECD have engaged in a certain amount of *gaming* of these protocols. In response to such political and commercial realities, the OECD is engaging in new strategies of enforcement. For example, in July 2012, it delegated full decision-making powers on the Codes of Liberalisation to the Investment Committee, which would be enlarged to include non-OECD Members prepared to meet the same obligations as OECD Members but, in return, would have the same rights as those Members.⁶⁶ It will be interesting to see how many jurisdictions consider such an initiative a sufficiently attractive inducement. However, if international regulatory mechanisms are to emerge for SWFs, then inherent process legitimacy will be essential.⁶⁷

If further SWF and other state capital actor-related regulatory initiatives are to emerge, it is unlikely to be through specialist regulatory agencies. Rather, it is likely to be through codes of best practice, such as

63. *Multilateral Agreement on Investment*, ORGANISATION ECON. CO-OPERATION & DEV., <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (Fr.) (last visited Sept. 28, 2013) [hereinafter *MAI*]. For an examination of the MAI and why it failed, see Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Policy Network: Case Study for the UN Vision Project on Global Public Policy Networks*, GLOBAL PUB. POL'Y INST. (2000), http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf.

64. *OECD Declaration and Decisions on International Investment and Multinational Enterprises*, ORGANISATION ECON. CO-OPERATION & DEV., <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (Fr.) (last visited Sept. 28, 2013).

65. ORGANISATION FOR ECON. CO-OPERATION & DEV., *OECD CODES OF LIBERALISATION OF CAPITAL MOVEMENTS AND OF CURRENT INVISIBLE OPERATIONS: USER'S GUIDE* (2003) (Fr.), available at browse.oecdbookshop.org/oecd/pdfs/product/2003021e.pdf

66. ORGANISATION FOR ECON. CO-OPERATION & DEV., *OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS* (2013) (Fr.), available at www.oecd.org/daf/inv/investment-policy/capitalmovements_webenglish.pdf.

67. For a critical analysis of the paramount importance of legitimacy in multilateral regulatory activity in the financial sector, see George Gilligan, *Multi-Lateral Regulatory Initiatives—A Legitimation-Based Approach*, in *GOVERNING THE CORPORATION: REGULATION AND CORPORATE GOVERNANCE IN AN AGE OF SCANDAL AND GLOBAL MARKETS* 121 (Justin O' Brien ed., 2005).

the GAPP, and thence multilateral agreements brokered by international organizations, such as the Financial Stability Board (FSB)⁶⁸ under its G20⁶⁹ imprimatur or the OECD. As long ago as 2005, the OECD issued its guidelines on corporate governance of state-owned enterprises,⁷⁰ but political economy and commercial realities have limited the scale of influence of the OECD. The key avenue for multilateral regulatory progress post-GFC has been the G20. In Toronto in June 2010, the G20 announced a financial sector reform agenda based on four pillars: (i) a strong regulatory framework; (ii) effective supervision; (iii) resolution and addressing systemic institutions; and (iv) transparent international assessment and peer review. The G20 Declaration stated: “[T]he core of the financial sector reform agenda rests on improving the strength of capital and liquidity and discouraging excessive leverage.”⁷¹ However, with regard to multilateral arenas, the constitutional and jurisdictional challenges for post-crisis regulatory reform are obviously much greater than in national contexts.⁷² They represent substantial changes in the calibration of international capital frameworks and are intended to militate against future global financial crises. Political economy factors have been and will continue to be crucial in shaping these international reform processes. This emphasis on intermediation, rather than new regulatory institutions, and an evolutionary approach is not only congruent with market realities, but it also constitutes a more legitimate use of regulatory power.

Most recipient countries, including the United States, have foreign investment regimes to help in monitoring and partially controlling in-

68. See FIN. STABILITY BD., www.financialstabilityboard.org (last visited Sept. 28, 2013).

69. The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy. The inaugural meeting of the G-20 took place in Berlin on December 15–16, 1999, hosted by the German and Canadian Finance Ministers. The G-20 is made up of the Finance Ministers and Central Bank Governors of nineteen countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, and the United States of America. The European Union, who is represented by the rotating Council presidency and the European Central Bank, is the 20th member of the G-20. See *About G20*, http://www.g20.org/about_what_is_g20.aspx (last visited Sept. 29, 2013).

70. ORGANISATION FOR ECON. CO-OPERATION & DEV., *OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES* (2005) (Fr.), available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>.

71. *The G-20 Toronto Summit Declaration*, G20 TORONTO CANADA, 15 (June 26–27, 2010), <http://www.treasury.gov/resource-center/international/Documents/The%20G-20%20Toronto%20Summit%20Declaration.pdf>.

72. For a discussion of these issues with a focus on initiatives in the United Kingdom and how they are affected by European Union responsibilities, see Julia Black, *Managing the Financial Crisis—The Constitutional Dimension* (LSE Legal Studies, Working Paper No. 12/2010, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619784.

ward investment, but they are of course sensitive to the ongoing need to balance the national interest with trade openness and the inevitable regulatory competition between jurisdictions as they seek to attract capital. In addition, most countries are capital dependent, and it is not feasible to screen all inward investment, so most will inevitably be approved. It is also important to note that many jurisdictions with SWFs, such as Australia and Norway, are not only recipient countries of SWF investment but also have high levels of foreign investment generally. The activities of state capital actors, including SWFs, raise issues of the implications of cross-nationalization of assets and industries for jurisdictions all over the world. For example, states that are downstream consumers of commodities could potentially use their state-related pools of capital and investment vehicles to acquire the foreign companies that produce or own the rights to such commodities, thus leading to possible entrapments of governance in some domestic contexts. Scenarios of this nature could have far-reaching implications for securities regulation, corporate governance, competition, and tax policies in the recipient countries of such investment, and governments around the world are increasingly taking note of these issues.⁷³ There is an understandably strong desire across political party lines within most recipient countries to protect national interests. For example, the Economics References Committee of the Commonwealth Senate of Australia stated, “The committee believes that the best way for Australia to regulate the conduct of foreign investors (be they SWF, SOE, or private commercial operator) is through developing robust domestic legislation.”⁷⁴

B. The Australian Foreign Investment Regime

Foreign investment in Australia is regulated under the legislative framework of the Foreign Acquisitions and Takeover Act 1975 (FATA). The other key component of Australia’s foreign investment regime is Australia’s Foreign Investment Policy (the Policy), which acknowledges the need that Australia has for foreign capital, reviewing foreign investment proposals in relation to the national interest on a case-by-case basis and setting out its approach in terms of who needs to apply, when they should apply, what the government is looking for, and how long before a

73. See, e.g., Australian Government, ‘Greater Certainty for Sovereign Investments—The Framework Rules’ (Consultation Paper, The Treasury, June 2010), available at http://archive.treasury.gov.au/documents/1842/PDF/Sovereign_Immunity_Consultation_paper.pdf.

74. Senate Economic References Committee, Parliament of Australia, *Foreign Investment by State-Owned Entities* (2009) 47, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/firb_09/report/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/firb_09/report/report_pdf.ashx.

decision is made.⁷⁵ The Australian Federal Treasurer has ultimate responsibility for decision making under Australia's foreign investment regime and has broad discretion to decline any foreign investment applications he or she considers to be against the national interest.⁷⁶ FATA defines foreign persons but does not define the national interest.⁷⁷ The Treasurer receives recommendations on specific foreign investment proposals from the Foreign Investment Review Board (FIRB), which is a non-statutory body that administers FATA and the Policy.⁷⁸ However, FIRB's functions are advisory only, and decision making resides with the Treasurer. Nevertheless, the substantial portion of activity under Australia's foreign investment regime is handled by the conventional civil bureaucracy, specifically the Foreign Investment and Trade Policy Division of the Treasury (the Division), which provides secretariat services through approximately twenty staff to the FIRB.⁷⁹ Under an ongoing authorization from the Treasurer (effectively a delegation), the Division evaluates proposals and makes decisions on those that are Policy conforming, lacking special sensitivity, or both. The vast majority of foreign investment applications fall into this category; for example, in 2011–2012, more than 92% of proposals were decided under this delegated authority.⁸⁰ Nevertheless, the FIRB is an advisory body and not a policy-making entity. It is the government of the day that decides and expresses the Policy, and provides guidance on national interest in relation to foreign acquisitions through that Policy. Thus, Australian inward foreign investment and politics, and unfortunately on occasion, populism, are linked—especially, it would seem, in more recent times.

For the most part, there is little controversy surrounding the overwhelming majority of foreign investment applications. The context of where foreign investment is coming from and where it invests in Australia is discussed in more detail below in Part III. Rejection of foreign investment applications is not a statistically common event. For example, in 2011–2012, 10,703 applications for foreign investment proposals were approved with 5,803 subject to conditions specified by FIRB and 4,900 not subject to any conditions imposed by FIRB. Thirteen were rejected,

75. Treasury, Austl. Gov't, *Australia's Foreign Investment Policy*, FOREIGN INVESTMENT REV. BOARD (Mar. 4, 2013), www.firb.gov.au/content/_downloads/AFIP_2013.pdf [hereinafter *Australia's Foreign Investment Policy*].

76. *Id.*

77. *Id.*

78. See generally FOREIGN INVESTMENT REV. BOARD, www.firb.gov.au/content/default.asp (last visited Nov. 25, 2013) (Austl.).

79. See generally *id.*

80. *Annual Report 2011–12*, FOREIGN INVESTMENT REV. BOARD, 6 (Dec. 20, 2012), http://www.firb.gov.au/content/Publications/AnnualReports/2011-2012/_downloads/FIRB-Annual-Report-2011-12_v4.pdf (Austl.).

534 proposals were withdrawn, and 170 were deemed exempt from conditions under the Policy.⁸¹ It is noticeable that real estate comprised the vast bulk of activity with 10,118 (94.5%) of the approvals and all of the thirteen rejections.⁸² Until relatively recently, there had been only one rejection of a substantial corporate transaction, and that occurred in 2001 when Shell proposed that they acquire 100% of Woodside Petroleum, a proposal that was rejected by then-Treasurer Peter Costello.⁸³

However, in recent years the increased desire of state capital actors to invest in Australia, especially regarding the acquisition of Australian resources assets, has seen politics and populism assume a higher profile in the discourse on Australian foreign investment. Arguably, a sense of jingoism has always been lurking in the DNA of this discourse, as admitted in a 2012 interview by the Chair of the FIRB, Brian Wilson: “The Foreign Acquisitions and Takeovers Act was put in place in 1975, when there was a huge backlash against Australia being sold off to the Japanese.”⁸⁴ Almost forty years later, Australia is of course not a Japanese outpost, and it is likely that some of the scaremongering about inward Chinese investment to Australia in recent years may similarly have been overplayed.

Nevertheless, there have been specific Australian regulatory responses to this specter of Chinese state capital inflows. For example, during 2008, a Chinese SOE, Chinalco, first sought to take a significant stake in major Australian miner Rio Tinto, and there was heated public debate about potential threats posed by state capital interests owning strategically important Australian entities. Two weeks later, on February 17, 2008, then-Treasurer Mr. Wayne Swan released six principles to improve the transparency of foreign investment screening processes that more clearly distinguish between investments by private entities and by foreign governments.⁸⁵ Eventually, on August 24, 2008, the Treasurer did grant approval to Chinalco to acquire up to 14.99% of Rio Tinto because Chinalco had undertaken to the Treasurer not to raise its holdings without seeking fresh approval from the Australian government and not to

81. *Id.* at 19–20.

82. *Id.* at 19, 23.

83. *Foreign Investment Proposal—Shell Australia Investments Limited’s Acquisition of Woodside Petroleum Limited*, PETER COSTELLO (Apr. 23, 2001), <http://www.petercostello.com.au/press/2001/2429-foreign-investment-proposal-shell-australia-investments-limited-a-s-shell>.

84. Glenda Korporaal, *New FIRB Boss Keen to Lift Lid on Agency*, AUSTRALIAN (May 12, 2012), <http://www.theaustralian.com.au/business/financial-services/new-firb-boss-keen-to-lift-lid-on-agency/story-fn91wd6x-1226353377917>.

85. Wayne Swan, ‘Government Improves Transparency of Foreign Investment Screening Process’ (Media Release, No. 009, Feb. 17, 2008) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType=0>.

seek to appoint a director to Rio Tinto PLC or Rio Tinto Limited.⁸⁶ Similarly, on March 27, 2009, the Treasurer announced that China Minmetals Non-Ferrous Metals Co. Ltd. could not make a 100% acquisition of Oz Minerals if it included the Prominent Hill mining operations located within the Woomera Prohibited Area in southern Australia.⁸⁷ On April 23, 2009, the Treasurer did give approval, but it excluded the Prominent Hill mine and numerous other undertakings from China Minmetals Non-Ferrous Metals Co. Ltd.⁸⁸

These are just a sampling of the decisions made in recent years under Australia's foreign investment regime that have resulted in increased tensions because Chinese interests view them as discriminatory. Recently, this disquiet has received media coverage when the high-profile Australian government delegation traveled to China in April 2013 led by then-Prime Minister Julia Gillard. The delegation undertook trade and other inter-governmental negotiations. At that time, the Trade Minister Craig Emerson "admitted that talks on a free-trade deal with China had stalled because of a dispute over restrictions on investment in Australia by Chinese state-owned enterprises."⁸⁹ It is clear that this issue will play a prominent role in Sino-Australian relations for years to come, but what is the picture in recent years regarding inward foreign investment into Australia?

III. CHINESE INVESTMENT IN AUSTRALIA

Parts I and II pinpointed the global momentum of state-directed capitalization and mobilization from emerging economies, particularly China, which has important implications for foreign direct investment (FDI) into Australia. Indeed, Chinese investment into Australia represents a national strategic issue given that, first, China has become Australia's most significant two-way trading partner and, second, Australia's stability and economic well-being is increasingly intertwined with neighboring jurisdictions in the Asian region. Table 6 below, using official

86. Wayne Swan, 'Chinalco's Acquisition Shares Rio Tinto' (Media Release, No.094, Aug. 24, 2008) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/094.htm&pageID=003&min=wms&Year=2008&DocType=0>.

87. Wayne Swan, 'Foreign Investment' (Media Release, No. 029, Mar. 27, 2009) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=2009&DocType=0>.

88. Wayne Swan, 'Foreign Investment Decision' (Media Release, No. 043, Apr. 23, 2009) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/043.htm&pageID=003&min=wms&Year=&DocType=>.

89. John Kerin & Natalie Gerritsen, *Curbs on State Business Stall China Deal*, AUSTL. FIN. REV., Apr. 19, 2013, at 9.

Department of Foreign Affairs and Trade (DFAT) data, demonstrates this economic reality very clearly: in terms of two-way trade, China is top with 19.9%, followed by Japan (11.9%), the United States (8.9%), South Korea (5.4%), and Singapore rounds out the top five with 4.6%.⁹⁰

Table 6: Australia's Top 10 Two-Way Trading Partners, 2011
(US\$ billion)⁹¹

	Goods^(a)	Services^(b)	Total^{(c)(d)}	% Share
1. China	113.6	7.4	121.1	19.9
2. Japan	68.4	4.0	72.5	11.9
3. United States ^(e)	38.1	16.1	54.2	8.9
4. Republic of Korea	30.4	2.2	32.7	5.4
5. Singapore	20.5	7.1	27.7	4.6
6. United Kingdom	14.3	8.7	23.0	3.8
7. New Zealand	15.3	6.3	21.6	3.5
8. India	17.5	2.9	20.3	3.3
9. Thailand	15.2	3.3	18.5	3.0
10. Malaysia	13.1	3.0	16.0	2.6
Total two-way trade^(b)	499.1	109.1	608.2	100.0

This Part tracks the flow and pattern of Chinese state capital investment in Australia over time, utilizing data from Australian and international sources. It demonstrates that China is an increasingly significant investor in Australia, albeit not the largest, and that investments are predominantly made in natural resources with emerging diversification toward energy and agriculture. Moreover, data in this Part evince a particular hallmark of Chinese investment being SOE mobilization as the dominant investment modality. As outlined in Part II, this modality has raised

90. *Trade at a Glance 2012*, DEP'T FOREIGN AFFAIRS & TRADE, 6 (Oct. 2012), <http://www.dfat.gov.au/publications/trade/trade-at-a-glance-2012.pdf> (Austl.); see also *infra* note 91.

91. *Trade at a Glance 2012*, *supra* note 90. Superscript in Table 6: (a) Recorded trade basis; (b) Balance of payments basis; (c) Excludes imports of aircraft from regional import total from September 2008 onwards (excluding the United States—see (e), which has a significant impact on import totals for France); (d) Total may not sum due to rounding; (e) Based on unpublished Australian Bureau of Statistics data and includes confidential aircraft imports for the United States only. *Id.*

specific concerns and questions for investee nations, including Australia, about the motivations of investing corporations. Accordingly, this Part clarifies the inherent characteristics of SOEs that capture media and policy imagination, details SOE-specific investment data, and raises some key issues to help researchers of state capital better investigate the purpose of SOE-led Chinese investment.

A. Investment from China: Flows, Patterns, and Sectors

This section details general Chinese investment flows and patterns in Australia to highlight the volume, value, and sectors of such investment, particularly in light of total and cross-comparative direct investment flows. Tracking these investment patterns shows the evolution over time and the growing significance of Chinese investment in Australia.

1. FIRB: Approved Proposed Investment from China

FIRB data provides a useful means of tracking government agency decision-making outcomes on foreign investment, as demonstrated below. Part II outlined the role of FIRB as the federal government's advisory body and delegated decision-making authority for specific foreign investment proposals. FIRB Annual Reports provide breakdowns of foreign investment applications considered and decided by value, sector, and investor country per fiscal year. However, these reports track only approved proposed investment, and proposals may not necessarily proceed to completion. Thus, FIRB data are limited as a lone tool of investment analysis and must be supplemented with further data regarding actual investments, as detailed in the next subsection.

According to FIRB Annual Reports, approved proposed Chinese investment contracts from 2011–2012 comprised nearly half of the total number for all foreign countries, making China the largest proposed investor by contract *volume* (see Table 7 below).⁹² However, in dollar *value*, proposed Chinese investment into Australia during that same period equated to AU\$16.19 billion, making China the third largest proposed investor to Australia behind the United States (AU\$36.613 billion) and the United Kingdom (AU\$20.343 billion).⁹³

92. *Annual Report 2011–12*, *supra* note 80, at 30.

93. *Id.*

Table 7: FIRB Approved Proposed Investment: 2011/2012

Approved Proposed Investment	Deal Value (AU\$ billions)	Number of Contracts
Total	170.71	10,703
Top 5 Countries by Proposed Investment Value		
United States	36.613	268
UK	20.343	1,018
China	16.190	4,752
Japan	13.920	324
Canada	8.871	131

Indeed, looking longitudinally at proposed Chinese investment patterns, the value of approved proposed Chinese investment into Australia has risen and fallen since 2005/2006, yet China has maintained a steady top three ranking during the past four years (Table 8).⁹⁴

94. A timeline comparison for the period 2005/2006–2011/2012 of contracts approved for single countries (e.g., China) is skewed by an aberrative figure in the 2008/2009 FIRB Annual Report. Table 2.11 in that report lists the number of all approvals per country. The total for all approvals is given as 568 contracts. But then Table 2.1 in the same report lists the same total contract approvals for the period as 5,352. Table 2.11 is the only FIRB table in the annual reports that gives a breakdown of contracts per country. The figure (in total and therefore by aggregate country) is extremely low and inconsistent with other contract numbers in the same report. See *Annual Report 2008–09*, FOREIGN INVESTMENT REV. BOARD, 33 (Mar. 18, 2010), http://www.firb.gov.au/content/publications/annualreports/2008-2009/_downloads/2008-09_FIRB_AR.pdf. However, the figures for approval by value are consistent when cross-checked throughout the tables of each annual report for the period 2005/2006–2011/2012 (Austl.).

Table 8: FIRB Approved Proposed Investment by Value (AU\$ billions):
2005/2006 – 2011/2012⁹⁵

	05/06	06/07	07/08	08/09	09/10	10/11	Total
Total Approved Value	85.75	156.39	191.88	181.35	139.50	176.67	1102.25
China Approved Value	7.26	2.64	7.48	26.60	16.28	14.98	91.43
China's % of Total Approval Value	8.5%	1.7%	3.9%	14.7%	11.7%	8.5%	
China's Country Rank by Investment Value	3	11	6	2	3	3	

In terms of specific investment targets, mineral exploitation and development has been the consistent prime locus of proposed Chinese inward investment into Australia (Table 9). Proposed investment in this sector remains high at nearly 70% of total investment in 2011/2012, even though it has decreased since 2005 (despite an anomalous year in 2006/2007 of less than 50%). Real estate is the second largest proposed investment target, at approximately one-quarter of total proposed Chinese investment in 2011/2012.⁹⁶ The areas of consistently least interest

95. *Annual Report 2005–06*, FOREIGN INVESTMENT REV. BOARD (Dec. 11, 2006), http://www.firb.gov.au/content/publications/annualreports/2005-2006/_downloads/2005-06_FIRB_AR.pdf (Austl.); *Annual Report 2006–07*, FOREIGN INVESTMENT REV. BOARD (Mar. 14, 2008), http://www.firb.gov.au/content/Publications/AnnualReports/2006-2007/_downloads/2006-07_FIRB_AR.pdf (Austl.); *Annual Report 2007–08*, FOREIGN INVESTMENT REV. BOARD (July 20, 2009), http://www.firb.gov.au/content/Publications/AnnualReports/2007-2008/_downloads/2007-08_FIRB_AR.pdf (Austl.); *Annual Report 2008–09*, *supra* note 94; *Annual Report 2009–10*, FOREIGN INVESTMENT REV. BOARD (Jan. 25, 2011), http://www.firb.gov.au/content/Publications/AnnualReports/2009-2010/_downloads/2009-10_FIRB_AR.pdf (Austl.); *Annual Report 2010–11*, FOREIGN INVESTMENT REV. BOARD (Apr. 15, 2012), http://www.firb.gov.au/content/Publications/AnnualReports/2010-2011/_downloads/2010-11_FIRB_AR.pdf (Austl.); *Annual Report 2011–12*, *supra* note 80.

96. Note, however, that figures can jump between years due to policy changes in thresholds per sector and factors such as screening in real estate. Different sectors have different capital threshold levels, and proposals below sector threshold levels are not recorded. Various changes to FIRB threshold procedure policies over the years mean that comparability across periods using FIRB statistics can be misleading. For example, the reintroduction from April 24, 2010, of screening temporary residents purchasing residential real estate is largely responsible for the jump to 9,771 approvals in the real estate sector in 2010–2011, compared to 3,897 approvals in 2009–2010. *Annual Report 2011–12*, *supra* note 80, at xi. Furthermore, while all deal types are recorded in FIRB statistics, not all necessarily reflect a change in foreign ownership. In some cases, both the investor and the target are foreign persons. *Id.* at 16. Moreover, FIRB figures are based on the assumption that all investment funds will be sourced from overseas. In reality, however, Australians may contribute some

for proposed Chinese investment are tourism; resource processing; agriculture, forestry, and fishing; and finance and insurance.

Table 9: Chinese Proposed Sector Investment Breakdown (% of value):
2005/2006 – 2011/2012⁹⁷

SECTOR	05/06	06/07	07/08	08/09	09/10	10/11	11/12
Agriculture, forestry & fishing	-	0.57	-	-	-	0.03	0.17
Finance and Insurance	-	-	5.62	0.16	-	3.73	0.37
Manufacturing	3.10	26.5	-	0.31	1.22	2.78	3.32
Mineral exploitation & development	93.10	45.57	71	98.70	78.84	65.16	64.90
Real Estate	3.80	26.97	19.94	-	14.87	27.44	25.86
Resource Processing	-	-	1.83	0.61	4.67	0.88	1.48
Services	-	0.38	1.35	0.20	4.40	0.11	3.92
Tourism	-	0.04	0.27	0.02	-	-	-

2. Actual Investment Flows from China

Proposed investment flows, as documented above, give a good snapshot of FIRB approvals/decision-making outcomes and projected investment patterns. However, proposed investment data does not accurately reflect the investment environment in real terms. For example, from January 1, 2006, to December 31, 2012, Australian Bureau of Statistics' (ABS) figures provide that total *actual* Chinese investment into Australia equaled AU\$57.3 billion (Table 12 below),⁹⁸ which is a very different figure to FIRB's total approved *proposed* investment of AU\$91.4 billion (Table 8 above).⁹⁹ More specifically, for that same period, 196 Chinese investments were announced in the energy and resources sectors, amounting to a *proposed* value of AU\$100.7 billion.¹⁰⁰ However, 83% of those deals were completed, which equates to *actual* investment into Australian mining and energy worth AU\$50.4 bil-

funds, for example, where they are in partnership with foreign interests or where the investment is financed from existing Australian operations. *Id.*

97. *Id.*

98. *International Investment Position, Australia: Supplementary Statistics*, AUSTL. BUREAU STAT., tbl.2 (May 2, 2013), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02012?OpenDocument>.

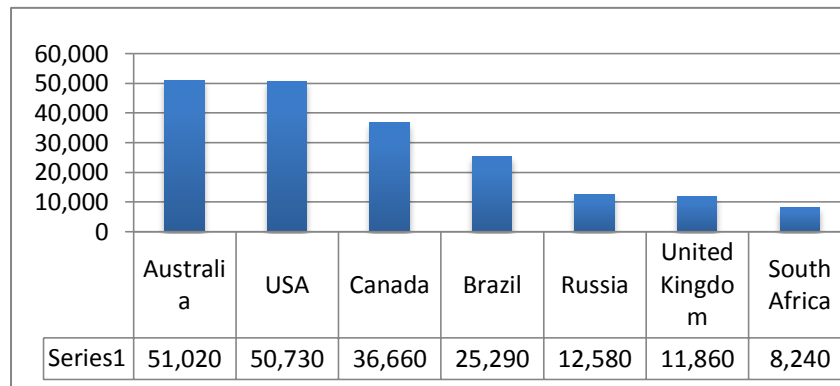
99. See *supra* Table 8 and sources cited *supra* note 95.

100. CLAYTON UTZ, DIGGING DEEP: CHINESE INVESTMENT IN AUSTRALIAN ENERGY AND RESOURCES 8 (2013).

lion¹⁰¹—that is, around half of the proposed figure. Accordingly, actual investment data rather than proposed investment figures provide a more reliable evidentiary basis for analysis and discussion of Chinese investment into Australia.

Australia is currently the top destination for actual Chinese investment, narrowly ahead of the United States (Table 10 below).¹⁰² However, while Australia is the largest recipient of Chinese FDI, China is not Australia's largest investor (Table 11 below).¹⁰³ The ABS data for the calendar year periods from 2006 to 2012 show that accumulated actual direct investment in Australia from the United States equated to AU\$747 billion, being a 24% share of Australia's total foreign direct investment stock. This compares strikingly to China's direct investment for that same period which equated to only AU\$57.3 billion or 2% share of the total. Accordingly, by the end of 2012, China was Australia's ninth largest direct investor, which may be lower than that assumed by many in the community given the high media coverage of China as Australia's most important trading partner.¹⁰⁴

Table 10: Accumulated Chinese Investment by Country for Deals Above US\$100 million: January 1, 2005–December 31, 2012 (US\$ millions)



101. *Id.* Clayton Utz's data comprises only the energy and resources sectors, which includes renewables but excludes power generation. *Id.* at 28.

102. *China Global Investment Tracker Interactive Map*, HERITAGE FOUNDATION (2013), <http://www.heritage.org/research/projects/china-global-investment-tracker-interactive-map>; see also *KPMG 2013*, *supra* note 11, at 2.

103. See AUSTL. BUREAU OF STATISTICS, *supra* note 98.

104. Indeed, Clayton Utz asserts that the value of completed Chinese investment in mining and energy sectors would "likely amount to considerably less than 10%" of the total value of resources and energy projects in Australia. UTZ, *supra* note 100, at 9.

Table 11: Accumulated Chinese Investment by Country for Deals Above US\$100 million: January 1, 2005–December 31, 2005 (US\$ Million)

Top Countries	Value	Percentage of Total	Investor Ranking
United States	746,792	24.1%	1
United Kingdom	443,804	14.3%	2
Japan	303,638	9.8%	3
Netherlands	196,334	6.3%	4
Switzerland	136,602	4.4%	5
China (excluding SARs & Taiwan)	57,340	1.9%	9
Hong Kong (China SAR)	47,992	1.5%	10
Total: All Countries	3,099,195		

Nonetheless, Table 12 below reveals the pattern of actual Chinese investment in Australia over the six-year period from 2006 to 2012: It shows that investment has increased significantly year after year.¹⁰⁵ This increase is partly due to resurging energy and metals investments,¹⁰⁶ and while natural resources and mining sector investments dominate, Chinese investment in Australia is diversifying towards energy (gas and renewables) and agriculture (Table 13 below).¹⁰⁷

Table 12: Chinese Investment in Australia:
January 1, 2006–December 31, 2012 (AU\$ millions)

2006	2007	2008	2009	2010	2011	2012	Total
550	Not published	3,643	9,058	12,944	14,404	16,741	57,340

105. AUSTL. BUREAU OF STATISTICS, *supra* note 98.

106. HERITAGE FOUNDATION, *supra* note 102.

107. KPMG 2013, *supra* note 11, at 6–7, 12–13. Note that KPMG data comprises deals valued US\$5 million and above, hence the slight disparity in total value 2006–2012 between ABS and KPMG figures. Also, figures are not exact because agriculture sectoral investment for South Australia is not specified in the report.

Table 13: Chinese Investment in Australia by Industry of Deals Above US\$5 million: September 2006–December 2012 vs. 2012 (US\$ millions)

	2006–2012		2012	
	By volume	By value	By volume	By value
Mining	73%	\$36,874.95	48%	\$5,471.46
Gas	18%	\$8,867.01	42%	\$4,785.20
Renewable energy	4%	\$2,212.60	2%	\$182.60
Agriculture	>2%*	>\$843.16*	2.6%	\$182.60
Other (e.g., logistic equipment & services; finance; architecture)	<3%*	<\$1994.16*	5.4%	\$919.64
Total	100%	\$50, 791.88	100%	\$11,383.46

Indeed, patterns of investment diversification are evidenced over time. According to the Heritage Foundation, forty-six Chinese investment deals valued above US\$100 million were completed in Australia during the last seven years.¹⁰⁸ Of this number, deals in the steel and aluminum industries occurred only during 2005–2009;¹⁰⁹ energy deals in the gas and coal industries commenced from 2008 and 2007 respectively.¹¹⁰

These investment patterns correspond to a number of external economic and internal Chinese policy factors. The 2008–2009 period marked the financial vulnerability of Australian companies due to the GFC and also China's increased domestic measures to stimulate its economy.¹¹¹ It is not surprising that, during this period, China completed 96% of announced energy and resources deals; however, as the GFC receded, the completion rate dropped markedly to only 22%.¹¹² Moreover, the diversification away from mining toward energy reflects an increased global demand for liquefied natural gas (LNG) in conjunction with China's plan to diversify its energy consumption structure beyond coal.¹¹³ Further, aall large agriculture deals occurred only in the past two years¹¹⁴

108. HERITAGE FOUNDATION, *supra* note 102.

109. *Id.*

110. *Id.*; see also UTZ, *supra* note 100, at 12.

111. UTZ, *supra* note 100, at 12.

112. *Id.* at 9.

113. KPMG 2013, *supra* note 11, at 9.

114. HERITAGE FOUNDATION, *supra* note 102.

with increasing Chinese investment in Australian agriculture and real estate sectors predicted for 2013.¹¹⁵

B. Primary Modality of Chinese Investment: SOEs

The preceding section showed that actual Chinese investments are being made predominantly in mining and natural resources sectors with diversification emerging toward energy and agricultural sectors. But how and by whom are these investments being made? The data indicate that a notable aspect of Chinese FDI is the mobilization of SOEs as China's preferred investment modality.

The data clearly show that SOE-led investments dominate the Sino–Australian investment landscape. According to recent KPMG reports, total Chinese inward investment (valued at US\$5 million and above) to Australia from the period of September 2006 to June 2012 comprised 116 deals by volume of which nearly 80% were made by 45 SOEs; over 95% of deal *value* involved SOEs during this same timeframe (Table 14 below).¹¹⁶ Those percentages are notably higher than average SOE investment figures of deal value in the United States (65%) and Europe (72%).¹¹⁷ More specifically, in the Australian mining and energy sectors, Clayton Utz reports that for the slightly longer period of January 2005 to December 2012, SOEs accounted for 76% of deal volume, 100% of *all* deals greater than AU\$250 million, and 97% of the accumulated *value* of those actual investments.¹¹⁸

Table 14: Chinese Investment into Australia:
September 2006–December 2012 vs. 2012¹¹⁹

115. KPMG 2012, *supra* note 17, at 18.

116. *Id.* at 9. In 2012 alone, SOEs completed 74% of all deals (valued at US\$5 million and above) by volume and 87% by deal value of the total Chinese inward investment into Australia: KPMG 2013, *supra* note 103, at 1. Note, however, that the KPMG reports do not reveal original sources of their SOE figures.

117. See Daniel H. Rosen & Thilo Hanemann, *An American Open Door? Maximizing the Benefits of Chinese Foreign Direct Investment*, ASIA SOC'Y, 33 (May 4, 2011), http://www.ogilvypr.com/files/anamericanopendoor_china_fdi_study.pdf (noting that SOE investment in the U.S. by deal volume is much less at 26%); Thilo Hanemann & Daniel H. Rosen, *China Invests in Europe: Patterns, Impacts and Policy Implications*, RHODIUM GRP., 4, 45 (June 7, 2012), http://rhg.com/wp-content/uploads/2012/06/RHG_ChinaInvestsInEurope_June2012pdf (noting that SOE investment in Europe by deal volume is only 33%). Chinese statistics of SOE-led outward foreign investment is approximately 70%. 2010 Statistical Bulletin of China's Outward Foreign Direct Investment, MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA (Sept. 16, 2011), <http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201109/20110907742320.shtml>.

118. UTZ, *supra* note 100, at 4.

119. KPMG 2013, *supra* note 11, at 1, 15.

	2006–2012		2012	
	By volume	By deal value	By volume	By deal value
SOE share of capital invested	80%	94%	74%	87%
Private (non-state) investment	20%	6%	26%	13%

The above figures reflect two key factors: First, traditional areas of investment concern for SOEs are mining, energy, and resources; second, Australia has a relative abundance of natural resources, giving it a comparative advantage as an investment destination in these sectors.

Moreover, the SOE investment figures in Australia echo the momentum of SOE-led investment from emerging economies throughout the world as depicted in Part I. Yet this strong SOE capitalization and mobilization has instigated concern within some Anglo-American nations about SOE acquisition in contrast to other investment modalities. Concerns about one state owning another state's key resources or assets through strategic SOE corporate activity is not new; however, concerns have manifested recently due to the confluence of two phenomena outlined in Parts I and II: (1) the vulnerability of some Western economies and the legitimacy crisis of liberal capitalism post-GFC; and (2) the rise of state-led capital in emerging economies that are now beginning to look outward. These concerns center upon perceptions of risk to national security, energy security, and economic security (control over wealth-creating assets).¹²⁰ Additionally or alternatively, these concerns center upon fear of the other.¹²¹

Part II demonstrated that foreign investment, politics, and populism are increasingly linked in recent times. Nowhere is this more evident than in relation to SOE-directed foreign investment. The intrinsic nature of an SOE seems to capture media sensationalism and influence public discourse and policy. For example, recent media headlines in Australia include, "China's State-Owned Enterprises Obtain FIRB Approval by Stealth,"¹²² and "Don't Mix Politics and Deals: FIRB in Warning to

120. See, e.g., Luke Hurst, Peter Yuan Cai & Christopher Findlay, *Chinese Direct Investment in Australia: Public Reaction, Policy Response, Investor Adaptation* (E. Asian Bureau of Econ. Research, Working Paper No. 81, 2012), available at <http://www.eaber.org/sites/default/files/documents/Chinese%20direct%20investment%20in%20Australia%20-%20By%20Luke%20Hurst,%20Peter%20Yuan%20Cai%20and%20Christopher%20Findlay.pdf>; Howson, *supra* note 16.

121. See, e.g., Hurst, Yuan Cai & Findlay, *supra* note 120.

122. Bryan Frith, *China's State-Owned Enterprises Obtain FIRB Approval by Stealth*, AUSTRALIAN (Mar. 13, 2013), <http://www.theaustralian.com.au/business/opinion/chinas-state-owned-enterprises-obtain-firb-approval-by-stealth/story-e6frg9kx-1226595937750>.

State-Owned Investors.”¹²³ FIRB did, in fact, amend Australia’s Foreign Investment Policy on March 4, 2013, to extend the concept of direct investments of less than 10% to cover scenarios in which investor consortia that include foreign investors may be amassing strategic stakes in target investments.¹²⁴ Yet concern is not limited to Australia. For example, the revised Canadian investment policy guidelines to the Investment Canada Act provide explicitly, “[I]nvestors will be expected to address[,] in their plans and undertakings, *the inherent characteristics of SOEs, specifically that they are susceptible to state influence*,”¹²⁵ and entities that are “owned, controlled or influenced, directly or indirectly by a foreign government” must satisfy the Canadian Minister of Industry that the project is commercial and free from political influence.¹²⁶ Similarly, political decisions are not immune, as illustrated by the Australian government’s exclusion of Huawei from the National Broadband Network bidding based on security concerns in 2012¹²⁷ and President Barack Obama’s Executive Order to prohibit Ralls Corporation from owning several wind farm projects in Oregon in 2013 for similar reasons.¹²⁸

But why is there such concern about SOE-led investment over and above other modalities of investment? Scholars Clarke and Howson,¹²⁹ and Ruskola¹³⁰ give valuable insight into the multi-faceted dimensions of Chinese SOEs and how they link into the shifting political economy of center-province and intra-province relations. The traditional Chinese SOE was an organizational form, not a legal form. The economic reforms from the 1970s first took place in rural China, whereby the agri-

123. Enda Curran & Michael Sainsbury, *Don't Mix Politics and Deals: FIRB in Warning to State-Owned Investors*, AUSTRALIAN (Aug. 7, 2012), <http://www.theaustralian.com.au/national-affairs/foreign-affairs/dont-mix-politics-and-deals-firb-in-warning-to-state-owned-investors/story-fn59nm2j-1226444324395>.

124. *Australia's Foreign Investment Policy*, *supra* note 75, at 14.

125. *Guidelines—Investment by State-Owned Enterprises—Net Benefit Assessment*, INDUSTRY CAN. (Dec. 7, 2012), www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html (emphasis added).

126. *Id.*

127. Maggie Lu Yueyang, *Australia Bars Huawei from Broadband Project*, N.Y. TIMES (Mar. 26, 2012), http://www.nytimes.com/2012/03/27/technology/australia-bars-huawei-from-broadband-project.html?_r=0.

128. *Order Signed by the President Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation*, WHITE HOUSE (Sept. 28, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>. Ralls Corporation is controlled by two executives of Sany Heavy Industry Co. Ltd., a Chinese multinational listed publicly on the Shanghai Stock Exchange that is *not* an SOE.

129. Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative actions in the People's Republic of China*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH* 243 (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012).

130. TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (Harvard Univ. Press, 2013).

cultural industry was decentralized to local governments, and commercial “township and village enterprises” (TVEs) emerged as an early form of SOEs. Thus, historically, state players in SOE control were local or provincial governments, not central agencies.¹³¹ Moreover, an SOE did not have separate legal personality nor issue stock or equity (ownership) in itself; instead, it was administratively controlled by the state, which had the right to appoint management and appropriate revenues or profits. One can therefore assume that an SOE’s original *raison d’être* was to pursue state purposes as opposed to market freedoms; yet to what purpose remains clouded.

Since commencement of the Chinese corporatization program, as expressed in the 1994 Company Law and 2006 PRC Company law, Chinese companies can take one of three legal forms: (i) a company limited by shares (CLS); (ii) a company limited by liability (LLC); or (iii) a company wholly owned by a state agency (WSOC). However, Clarke and Howson are clear that this legal process has not resulted in widespread private corporate ownership; rather, Chinese companies are now corporatized, not privatized.¹³² Indeed, an SOE is now administratively *and* financially controlled by an entity of the state (central or local). Whereas in the United States or Australia, for example, that entity would more likely be owned by private institutional investors. Consequently, a controlling shareholder of an SOE in China has political as well as economic dominance, which has important implications for the nature of a state-controlled corporation and who it seeks to serve.

Yet, is there a documented cause for the type of concerns that have manifested in media and policy circles? SOE-specific data, over and above data about general Chinese investment flows and patterns as depicted in Part III.A, are required to accurately answer this question.

FIRB Annual Reports for 2005/06 through 2011/12 do not differentiate between SOE and non-SOE investments in Australia (whether from China or elsewhere). Thus, SOE-specific information must be extracted from multiple other sources such as government agency sources, for example, ABS, DFAT, Ministry of Commerce of the Republic of China (MOFCOM), China State Asset Supervision and Administration (SASAC), and the National Bureau of Statistics of China (NBS), as well as industry sources such as Clayton Utz solicitors, KPMG, and The Heritage Foundation.

It is important to note that, at the outset, these different datasets are not easily compared due to a number of differences between the sources

131. *Id.* at 60–107.

132. Clarke & Howson, *supra* note 129, at 245–49.

regarding deal value,¹³³ deal type,¹³⁴ investor location,¹³⁵ and compilation methodology.¹³⁶ Being mindful of disparities between data collection methods enables more accurate SOE investigation.

Traditionally, SOEs by their nature have tended to invest in areas of nationwide priority: natural resources, utilities, telecommunication services, and defense. However, Lee specifies that Chinese SOEs now operate in *all* major sectors except export manufacturing:

[E]very important sector in the economy—from commodities, utilities, chemicals and heavy industry to infrastructure, construction and shipping, to banking, finance and insurance, to media and education, to renewable, information technology (IT) and advanced IT platforms and technologies—these are SOE-dominated.¹³⁷

Moreover, economists Marchick and Bowles note that privately-held companies are populating the Chinese economy; however, most of these companies are very small and lack the wherewithal to invest heavily overseas.¹³⁸ Certainly, private enterprises have not accounted for any energy or resources investments in Australia above AU\$250 million.¹³⁹ Further, Lee evidences that SOEs comprise 950 of the 1,000 largest firms in China, and all but 100 of the 2,037 firms listed on the stock exchange

133. The Heritage Foundation tracks deals only above US\$100 million; KPMG tracks deals above US\$5 million; and the Clayton Utz Merger & Acquisition (M&A) database tracks deals only above AU\$50 million. See HERITAGE FOUNDATION, *supra* note 102; KPMG 2013, *supra* note 11, preamble; *The Real Deal: M&A Trends and Developments*, CLAYTON UTZ, 72 (2013 ed.), http://www.claytonutz.com/docs/Real_Deal_Mar_2013.pdf.

134. FIRB collates “approved proposed investment” figures, whereas sources such as ABS, the Heritage Foundation, MOFCOM, and Clayton Utz produce “actual” or “completed” investment figures. Moreover, different sources tend to cover different methods of investment, being M&A, joint ventures, greenfield projects, and, or alternatively, Chinese stock/bond acquisitions.

135. That is, most sources do not include deals by investors located in Special Administrative Regions (SARs)—such as Hong Kong and Macao—or Taiwan. One exception is KPMG, which tracks investments by subsidiaries or special purpose vehicles (SPVs) based in Hong Kong and Singapore. KPMG 2013, *supra* note 11, preamble.

136. The ABS has noted a lack of international standardization in this regard, detailing difficulties where figures are compiled using different rationales, the most basic issue being measurement. The Balance of Payment Manual 5th edition (BPM5) recommends that direct investment flows, income transactions, and stocks be valued at market value. However, an entity may choose to use cost measurement over market value, in which case figures will not align at all. See *FDI Data Collection: Overcoming Hurdles and Obstacles in FDI Measurement and Collection*, AUSTL. BUREAU STAT. (Aug. 8, 2003), <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5370.0.55.001>; *Revision of the Balance of Payments Manual, Fifth Edition (Annotated Online)*, INT’L MONETARY FUND, (Apr. 2004), <http://www.imf.org/external/np/sta/bop/pdf/ao.pdf>.

137. John Lee, *The Re-Emergence of China: Economic and Strategic Implications for Australia*, 45 AUSTL. ECON. REV. 484, 484 (2012).

138. David M. Marchick, *Fostering Greater Chinese Investment in the United States*, COUNCIL ON FOREIGN RELATIONS (Feb. 9, 2012), <http://www.cfr.org/china/fostering-greater-chinese-investment-united-states/p27310>.

139. UTZ, *supra* note 100, at 9.

in 2012 were SOEs.¹⁴⁰ These empirical realities place SOEs at the heart of not only China's economy but also the social, political (including foreign policy), and cultural infrastructures that depend upon that economic substructure.

Table 15 below identifies the ten largest Chinese corporate investors in Australia, which all happen to be SOEs. These ten SOEs accounted for US\$39 billion out of a total accumulated direct investment of US\$51 billion for January 2005 to December 2012, which equates to 76% of accumulated Chinese direct investment into Australia over the past seven years.¹⁴¹

Table 15: Largest Investors in Australia:
January 1, 2005–December 31, 2012 (US\$ millions)¹⁴²

Rank	Company Name	Enterprise Type	Level (%) of State Ownership	Managing Owner	Sector (sub-sector) of investment	Accumulated Value
1	Chinalco (Shining Prospect Pte. Ltd.)	SOE	Central (100%)	Chinalco	Metals (aluminium)	\$14,300
2	Yanzhou Coal Mining Co.	SOE	Shandong (52.86%)	Yankuang Group	Energy (coal)	\$6,590
3	Sinopec Corp.	SOE	Central (75.84%)	Sinopec Group	Energy (oil & gas)	\$3,070
4	CITIC ¹⁴³	SOE	Central (100%)	CITIC Group Corp.	Metals (steel), Energy (coal)	\$3,020
5	Minmetals Resource Ltd.	SOE	Central (71.56%)	China Minmetals Corp.	Metals	\$2,960
Rank	Company Name	Enterprise Type	Level (%) of State Ownership	Managing Owner	Sector (sub-sector) of investment	Accumulated Value
6	Taurus	SOE	Central (100%)	Guangdong Nuclear Group	Metals	\$2,280
7	CNOOC Ltd.	SOE	Central (64.43%)	CNOOC Group	Energy (gas)	\$2,200

140. Lee, *supra* note 137, at 484.

141. HERITAGE FOUNDATION, *supra* note 102. Note that these figures comprise deals valued at US\$100 million and above.

142. *Id.*; KPMG 2012, *supra* note 17, at 14; KPMG 2013, *supra* note 11, at 23 (individual company websites).

143. The accumulated value for "Citic" is an aggregated total of investments by different subsidiaries of the CITIC group, namely, CITIC Pacific, CITIC Resources, CITIC Construction, and CITIC Group.

8	China Datang Corp Renewable Power Co.	SOE	Central (88.4%)	China Datang Corp.	Energy (alternatives)	\$2,030
9	Sinosteel	SOE	Central (100%)	Sinosteel Corp.	Metals (steel)	\$1,460
10	China Metallurgical Corp.	SOE	Central (64.18%)	Metallurgical Group Corp.	Metals (steel)	\$1,090
Total						\$39,000

The central government has over 50% control of the vast majority of these SOEs. Only one firm in the top ten largest Chinese investors, Yanzhou Coal, is a local SOE (Shandong). As such, we can infer that any high-value investment by a large Chinese firm in Australia is being made via an SOE whose majority shareholder is a central state entity.

C. Chinese Investment or 'China Incorporated'?

The largest Chinese investors in Australia are SOEs and their sectoral investment continues to focus on resources, particularly in metals and mining. However, investment is diversifying into energy, particularly gas, as well as food production. These sectors clearly represent China's national interest in supporting a rapidly urbanizing population that exceeds indigenous resources on a per capita basis.

Yet, one challenge for commentators of state capital is to discern and appreciate the impacts on foreign investment of intra-China tensions— first, between the goals of central and provincial state entities and second, between the goals of central state actors and SOE boards. On the first point, Ruskola's depiction of local, not central, government actors as germane to the commercial success of traditional TVEs and SOEs is relevant. Fragmentation of SOE ownership and thus potentially competing priorities between levels of government add internal complexity to SOE investment behavior. However, nine out of ten of the current largest Chinese corporate investors in Australia are central government-controlled SOEs. Therefore, such complexity is less compelling in this jurisdiction.

On the second point, SOEs may be exercising independence from the government entities that formally own or control them. The State-Owned Assets Supervision and Administration Commission (SASAC) provides the operating framework for SOEs. In March 2012, SASAC issued new regulations requiring central state-controlled SOEs to do the following: register with SASAC before undertaking "key investment projects" in their core businesses; obtain SASAC approval prior to investing

overseas in non-core areas of business; and lodge details with SASAC of sources of investment and financing for proposed non-core area investments.¹⁴⁴ Despite the SASAC framework, there is some evidence to suggest that the “Going Out” strategy is being led by Chinese firms rather than central government. The Peterson Institute for International Economics asserts that SOEs operate and make investment decisions not as agents of the state but similar to any other corporation.¹⁴⁵ Howson makes a similar claim, citing the action of CNOOC Ltd. in bidding for Unocal in 2005 despite central government opposition.¹⁴⁶ Similarly, KPMG argues that Chinese SOEs abroad have shown strong commercial motivations, similar to those of multinational corporations from developed countries.¹⁴⁷ Commercial motivations are evinced by SOE capital investments to secure stable and high-quality supplies of natural resources, and mergers and acquisitions to acquire new brands and technology, accessing new markets and exporting Chinese brands.

Moreover, multiple external parties are involved in Chinese SOE investment decision making abroad, including domestic consultants, corporate partners, and financiers such that decisions cannot be made solely by a government entity. Importantly, statistics show that Chinese investors rely heavily on local talent to manage Australian companies in which the investor gains a controlling interest. For example, during the period from January 1, 2005, to December 31, 2012, Chinese nationals were appointed as chief executive officer in only 32% of acquisitions in the energy and resources sectors and as chief operating officer in only 10% of the same.¹⁴⁸

This evidence gives rational cause to seriously question a “China Inc.” central domination strategy as sensationalized in Western media and feared by politicians. Specifically, the data detailed and discussed above show the following: China is an increasingly significant investor in Australia but not the largest investor; Chinese investments are occurring predominantly in mining and natural resources with emerging diversification toward energy and agriculture; and corporate control of acquired companies tends to remain with local actors. Thus, one can make

144. For details, see Wei Chen & Jiahao Xie, *New SASAC Rules Enacted to Consummate Outbound Investment Supervisory System for Central SOEs*, INT’L INST. STUDY CROSS-BORDER INVESTMENT & M&A (July 4, 2012), <http://xbma.org/forum/chinese-update-new-sasac-rules-enacted-to-consummate-outbound-investment-supervisory-system-for-central-soes/>.

145. Barbara Kotschwar, Theodore H. Moran & Julia Muir, *Chinese Investment in Latin American Resources: The Good, the Bad, and the Ugly* (Peterson Inst. for Int’l Econ., Working Paper No. 12-3, 2012), available at <http://www.iie.com/publications/wp/wp12-3.pdf>.

146. Howson makes this point in relation to the CNOOC bid for Unocal, which was opposed by Chinese central government actors. Howson, *supra* note 16, at 73.

147. KPMG 2012, *supra* note 17, at 13.

148. UTZ, *supra* note 100, at 25.

a compelling argument that China is behaving like a nation that seeks to secure resources, energy, and food for growing domestic demand that will soon far exceed domestic supply as opposed to embodying a politically charged and malevolent avarice. Certainly, the data evidence that SOEs are the primary modality of Chinese investment in Australia and that the largest Chinese investors are central government-controlled. However, these SOEs appear to be pursuing commercial opportunities in source-rich foreign jurisdictions in much the same way as Western multinational corporations have done abroad and continue to do so.

Concrete conclusions about the intent of Chinese governments and their corporate champions as investors in foreign jurisdictions can only be formed after further empirical investigation. Thus far, however, the data tend to indicate that media and policy concerns have been overplayed in Australia. Given the growing importance of Chinese trade with and investment in Australia, and Australia's need to retain competitive advantage in the region for the long-term, pursuing evidence-based conclusions ought to be a priority of national interest.

IV. CONCLUSION

In a post-GFC world, as the twenty-first century progresses and the economic power of certain Asian countries grows, market perceptions about appropriate levels of activity by the state as an investor in capital markets may well change. These changes are likely to reflect trends in the composition of the global economy and projections regarding which nations will be losers and winners. In recent years, Australia has been a winner. However, given the extent to which Australia's economic well-being is tied to China's future growth, determining how to manage inward capital investment, particularly from state pools of capital, has significant corporate, legal, and policy implications.

The May 2013 release of *Energy in Australia*, by the Commonwealth Government's Bureau of Resources and Energy Economics (BREE), fueled the debate about whether Australia's so-called "resources boom" has peaked.¹⁴⁹ The BREE is the key forecaster on commodities for the federal government, and it delivered a number of chilly messages on the near-term projections for Australia's resources and energy sector, despite the current rosy picture. For example, on the plus side, Australia's energy sector accounts for 6% of Australia's total industry value and has provided \$77 billion of energy exports in 2011–2012; currently, it has committed and potential projects totaling \$350 billion

149. *Energy in Australia*, DEP'T RES., ENERGY & TOURISM, BUREAU RES. & ENERGY ECON. (May 2013), <http://www.bree.gov.au/publications/energy-in-aust.html> (Austl.).

(approximately 18% of GDP). However, on the negative side, the value of committed and potential projects is expected to fall to \$25 billion in 2018. This dramatic downturn has already been signaled during the last year by the setting aside of \$150 billion in energy and mining projects including Aquila's West Pilbara iron ore mine in Western Australia, BHP's Olympic Dam expansion in South Australia, and Woodside Petroleum's Browse LNG project in Western Australia. The bad news concerning shelved projects such as these is amplified by revelations of cost blowouts of more than \$29 billion regarding existing projects. A 96% fall in large-scale investment in energy and resources in only five years is a massive slide and prompted a flurry of headlines proclaiming that Australia's resources boom has indeed ended.¹⁵⁰

These gloomy statistics may be preemptively negative; time will tell. However, it is certain that Australia will remain a net importer of capital in a world in which competition for that investment dollar is increasing from many countries. How much the twin pressures of increased investment capital competition and Australia's seemingly reduced attractiveness as a target for that inward investment capital will impact upon the *realpolitik* of Australia's foreign investment regulatory regime over the coming years is unknown. Nonetheless, the inevitable political influence on that investment regime was clear in the June 2013 final report of the Senate Rural and Regional Affairs and Transport Committee, which had a particular focus on foreign investment into Australian agriculture.¹⁵¹ The Committee made twenty-nine general recommendations and highlighted the limitations of FATA in a contemporary investment setting.¹⁵² The Committee's key findings and recommendations included the following: there is a significant lack of detailed and accurate information regarding foreign investment in the Australian agricultural sector; there

150. Paul Garvey, *Resources Boom Is Truly over, Says Focus Minerals Chair Don Taig*, AUSTRALIAN (May 15, 2013), <http://www.theaustralian.com.au/national-affairs/treasury/resources-boom-is-truly-over-says-focus-minerals-chair-don-taig/story-fnhi8df6-1226642524237>; Gemma Daley, *The Party's Over: Resources Boom Has Peaked, Says Chief Commodities Forecaster*, BUS. REV. WEEKLY (May 23, 2013), http://www.brw.com.au/p/business/forecaster_party_over_resources_xmIAuQKUh2Iq3Yx4cbYtIN (Austl.).

151. See generally Senate Standing Committees on Rural and Regional Affairs and Transport, Parliament of Australia, *Foreign Investment and the National Interest* (2013) (Austl.), available at http://www.aph.gov.au/~media/wopapub/senate/committee/rrat_ctte/completed_inquiries/2010-13/firb_2011/report/report.ashx.

152. The Committee released an interim report in November 2012 in which it made six recommendations specific to tax arrangements for foreign investment in agriculture. Senate Standing Committees on Rural and Regional Affairs and Transport, Parliament of Australia, *Examination of the Foreign Investment Review Board National Interest Test: Interim report: Tax Arrangements for Foreign Investment in Agriculture and the Limitations of the Foreign Acquisitions and Takeovers Act 1975* (2012), available at http://www.beefcentral.com/u/lib/cms/rrat_ctte_firb_2011_interim_report_repor.pdf.

are significant shortcomings in the transparency of the FIRB process and in the scrutiny of the national interest test; the current investment threshold of AU\$248 million to trigger a FIRB review of proposed private foreign investments in the agriculture industry is far too high; and there are problems with current legislative definitions of “rural land,” “urban land,” and “direct investment.” Importantly, the Committee recommended certain steps that the federal government ought to take to develop a more rigorous and transparent system for examining cases of foreign agricultural investment in Australia. The Committee recommended establishing an Independent Commission of Audit into Agribusiness to develop a comprehensive policy approach to Australian agriculture investment and creating a national register for foreign ownership of agricultural land as the primary mechanism for collecting and publishing information about such foreign investment. Specifically, the Committee recommended forensic examination of company structures (including management relationships in joint Australian–foreign ventures); the relationship between a foreign government’s acquisitions strategy (such as food security) and the commercial operation of their subsidiary businesses in Australia; and ways of setting clear and auditable ongoing undertakings that are in the “national interest.”

This paper has examined many of the factors that underpin debates on these specific issues and foreign investment in general. In particular, the paper has focused on the increasingly strategic role that state capital is likely to play in global and Australian contexts. Therefore, it is vital that national and international policy development in this area is underpinned by accurate data, as stressed by the Senate Committee in relation to foreign investment in Australian agriculture. The discussion on the methodological difficulties associated with evaluating the extent and impact of investment by state capital actors illustrates that it will be a challenging yet essential process to chart these developments.