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International Business and Trade Law

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Abstract

Cryptocurrencies and blockchain technology underpin a rapidly expanding industry and smart contracts are a key area of this blockchain innovation. A smart contract is an agreement in digital form that is self executing and thus. whereas smart contract automatically enforce obligations. Compare signing a contract to purchase an item versus purchasing an item from a vending machine. Like the smart contract, the vending machine will automatically complete the transaction by dispensing the item, whereas a paper contract for the sale of an item does not actually force the sale, and thus can be reneged by breaching the contract.

Smart contracts have the potential to transform supply chain management, contracting, payment and banking services, and perform real estate transactions. It is noted that smart contract technology is still in its nascent stage and that there are few examples of practicable use cases.

I. Introduction

The federal government has created several programmes and organizations, as well as entered into numerous international agreements, to increase the country's attractiveness as an investment destination. At the same time, territorial, provincial, and municipal governments compete aggressively to attract FDI. Sub-national governments offer investors a number of incentives to invest locally, including tax holidays, ow-cost land and energy, as well as other inducements to reduce investors' cost of doing business.

In spite of such initiatives, Canada is routinely criticized as being The federal Investment Canada Act ("ICA"), the cornerstone of Canada's regime for reviewing foreign investment, is often the focus of such censure.Canada ignores criticisms of the ICA at its peril.

As a trade-exposed nation with a competitive advantage in capital-intensive natural resource industries, Canada is economically dependent on foreign investment and must be cognizant of how the ICA impactsforeign investors' perception of Canada.6 This paper argues that the ICA fails to strike the right balance between encouraging foreign investment and protecting

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Canada's economic security. It argues that the ICA's economic investment review, the so-called "net benefit test", should be replaced with a "national interest" standard to liberalize the Act.

II. FDI Provides a Number of Economic Advantages

Foreign direct investment is an investment in an enterprise located in a "host country"; a country distinct from that in which the investor resides. FDI reflects the objective of establishing a long-term interest in the host country and a significant degree of control over the management of the investment enterprise.

At the macroeconomic level, foreign investment, whether through the acquisition of an existing company or the establishment of a "greenfield" business, typically results in higher living tandards by promoting necessary elements of long-term economic growth. For instance, when a foreign investor acquires a domestic business, the investor may implement innovative technologies or adopt new management practices at that business. At the firm level, these investments may, and generally do, contribute to higher labour productivity. The acquisition by the foreign investor may also inject capital into the business. Increased capital may fuel the company's growth, encouraging economies of scale and enhanced competitiveness. A number of studies support the proposition that FDI drives greater business productivity and efficiency. Statistics Canada has found that foreign-controlled firms in Canada tend to be larger, have higher labour productivity, innovate more frequently, and are more likely to have a research and Foreign investment often increases demand for local inputs, spurring the growth of domestic suppliers FDI may also enhance the competitiveness of domestic firms by allowing them to gain access to a larger variety of newer and higher-quality imported inputs through creating new linkages to global markets.Further, as domestic workers at foreign-controlled firms change jobs or start their own businesses, they may disseminate superior business practices and technologies throughout the national economy, improving domestic Customers also tend to benefit from foreign investment. Enhanced business efficiency and competitiveness typically drives down the costs of goods and services or enhances their quality, increasing consumers' purchasing power and utility.

III. Countries Restrict FDI for Economic, Security, and Cultural Reasons

Despite its potential benefits, foreign investment has received "bad press" in Canada.Not only have the benefits of FDI been questioned, but many concerns with foreign investment have been raised.18 These concerns are often linked to sovereignty. It is argued that foreign ownership of a country's businesses may lead to a number of economic harms, including: (1) the host country losing control over its economy, (2) the host country having difficulty subjecting foreign investors to the host country's economic laws and regulations, and (3) foreign-controlled businesses becoming a conduit for foreign economic interference within the host country. Other concerns include harms to the host country's (4) national security and (5) cultural distinctiveness.

FDI: Diminishing Control and Influence Over the Domestic Economy

One of the most cited concerns associated with FDI is that foreign ownership of domestic businesses will reduce Canada's control and influence over the national economy. In its simplest form, detractors of foreign investment fear that FDI will transform Canada into a "branch plant", an economy dominated by foreign ownership and low-value activities. Critics argue that foreign investors acquiring Canadian companies will shift their management and value-added activities to the investors' home jurisdictions, resulting in a decline or the "hollowing out" of corporate Canada. Many academics, business leaders, unions, and other stakeholders told the Panel "that Canadian businesses [were] being swallowed by foreign competitors in an era of global consolidation." control and influence over the economy. These concerns are elevated in Canada's oil sands. Opponents of FDI fear that raw resources will be extracted and exported for processing and final consumption in the foreign investor's home jurisdiction to the detriment of Canadian processors and consumers. As a result, critics contend that Canada requires special rules preventing foreign investors from acquiring or "lockingup" oil sand businesses.

FDI: Inadequate Regulatory Control

This concern is based on the notion that the foreign investor is "a kind of power unto itself", able to avoid the application of domestic laws to its operations within a host country "through the global diffusion of its activities." While this concern may be less of an issue in Canada, where regulatory laws and enforcement mechanisms are strong, concerns persist. Canada may have difficulty regulating foreign investor's domestic activities "where the bulk of the firm's assets and much of the information about [its] activities and decision-making is located abroad."

FDI: Foreign Economic Interference

Another major concern associated with FDI is that foreign-controlled Canadian businesses may be operated to drive the agenda of the investor's home jurisdiction, causing harmful economic distortions. Critics of FDI argue that these concerns are elevated for SOE investors

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because of their inextricable ties with foreign governments. A key concern is that statecontrolled firms may have an unwarranted competitive advantage as a result of government financial support. This may undermine healthy competition in an industry, forcing Canadian-controlled domestic firms to exit the marketplace.The unsuccessful proposal by state-owned China Communications Construction Co. Ltd. ("CCCC") to acquire control of Aecon Group Inc. ("Aecon"), a domestic construction and engineering business, is illustrative. Domestic competitors of Aecon, including; PCL Constructors Inc., Ledcor Group Ltd., and Graham Group Ltd., as well as the Canadian Construction Association, an industry group, protested the proposed transaction. They argued that if the transaction proceeded, Aecon "would easily be able to underprice domestic rivals on infrastructure projects in Canada" due to CCCC's "easy access to Chinese government money". A related concern is that foreign investment will erode Canadian sovereignty as a result of the extraterritorial application of foreign laws to foreign-controlled Canadian businesses. The actions of Canada's southern neighbor, the United States, provides an example. In the past, the United States has attempted to prevent subsidiaries of American firms operating outside of the United States, such as Walmart Canada Inc., from acquiring products from Cuba, a country embargoed by American import and export control laws. Besides offending Canada's sensitive national pride, the extraterritorial application of foreign laws in Canada may frustrate Canadian regulatory efforts.

IV. LIBERALIZING THE INVESTMENT CANADA ACT

Canada to maintain control over domestic providers of arms. Restrictions on investment are warranted, they argue, because of foreign investors' potentially close relationship with their home jurisdiction's government. Where foreign investors are government-owned, have present or past government officials serving in management, or are the recipients of government subsidies or procurement contracts, there may be a legitimate basis to fear that an investor's government will exercise influence over the investor so as to gain access to, or control over, the goods and services of the investor's Canadian business.

National security concerns have long been used to justify measures limiting foreign investment in Canada. In 2009, the ICA was amended to formalize Canada's review process for investments that may be injurious to Canada's national security. The proposed acquisition of ITF Technologies Inc. ("ITF"), a Canadian information company, by O-Net Communications Ltd. ("O-Net") provides an example of an investment rejected on these grounds. In 2015, the Harper government disallowed the transaction fearing that O-Net,

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controlled by a subsidiary of state-owned China Electronics Corporation, would pass on ITF's proprietary technology to the Chinese military.

FDI: Protecting Cultural Distinctiveness

Finally, countries may restrict FDI in order to protect their unique cultural heritage. Investment may be limited to prevent foreign investors, especially multinational businesses and the "global brand culture" which they create, from "suppress[ing]…the market [for] local creativity and difference". The cultural rationale for restricting foreign investment is particularly relevant in Canada given the country's proximity to the United States, a global leader in cultural industries, such as music, film, and television.Restricting FDI may help protect a country's cultural distinctiveness by propping up domesticallyowned cultural businesses.

Analysis of Global Regulatory Schemes on Chance-Based Microtransactions

Microtransactions are financial transactions for a digital good or service. These transactions are often seen in video game monetization models where consumers purchase a currency or credit to spend on in-game additions. Companies have found innovative ways of introducing microtransactions to monetize games through business models such as free-toplay "freemium" models or by reducing the initial cost of purchasing a game and shifting the cost onto additional features. Other companies introduced microtransactions as a method of obtaining virtual gameplay goods and services. Some products are chance-based where the obtained outcome is randomized according to a table of probabilities. These are often referred to as "gachapon" and "loot boxes." This paper seeks to examine and compare this chance-based nature, its effectiveness in video game microtransactions and their financial and psychological influences on the consumer to those of traditional gambling games. Furthermore, an analysis of Canadian and foreign legislation will be done to identify downfalls in Canadian legislation, determine necessary reformations to Canadian gaming law, and identify effective methods that will strengthen the regulatory regime.

V. Analysis Of Regulation Of Microtransactions

This is commonly seen where players have spent a significant sum of money into microtransactions for a game and continue to spend due to attributing value to an in-game account, whether emotional or financial, even if they are unable to recover any of the spent amount. Chance-based microtransactions may instill an Illusion of Control where players have an opportunity to interact with the system, usually through a decision, after investing a resource such as currency or a loot box but prior to obtaining the reward. An illusion is created where the player believes they have a choice in determining the outcome, even if the outcome was set when they invested the resource. Finally the last characteristic; Chasing is a behavior where players attempt to recoup losses by continued engagement in a particular behavior. This is often combined with the sunk cost bias, where players have invested resources and have not obtained their desired result and continue to spend in hopes of obtaining their desired result which, in their perspective, will justify the resources spent.

VI. CANADIAN GAMBLING LAWS

In Canada, federal regulation of gambling is dealt with through the Criminal Code of Canada. 14 Sections 197 to 209 deal with gambling and games of chance, though the language used within the legislation focuses on lotteries and games of chance where there is a stake or a risk of loss.15 It does not contemplate scenarios where participants purchase credits and exchange those credits to obtain prizes to which monetary value cannot be clearly attributed. In gachapon and loot boxes, there is no "stake" as there is a transaction of currency for credits, and credits for a guaranteed prize.

In Manitoba, the provincial legislature regulates gambling through The Liquor, Gaming and Cannabis Control Act. Section 77(1)(c) of the Act defines "electronic gaming device" as "an electronic device, if the device is prescribed computer and handheld devices. However, the definitions of "gaming event" and "provincial gaming"18 refer to the definition of a lottery scheme under s. 207(1) of the Criminal Code of Canada19 which does not include gachapon and loot boxes. This is echoed in Ontario's Gaming Control Act, 199220 and British Columbia's Gaming Control Act. Section 207(1) defines a lottery scheme as "a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g). Skin gambling may be a gambling activity due to the open debate of whether eSports are considered a sport. However, considering that jurisdictions such as the United States, Turkey, France, and various Asian countries have begun to recognize gaming as a sport, there is a possibility that Canada may do so as well.

Language referring to lotteries such as "lots" and "tickets", as well as to some sort of monetary value through "valuable consideration" and "money" is used throughout Section 206(1). Consequently, skin gambling escapes the scope of these provisions due to the lack of economic value that is generally attributed to the virtual goods involved. Given that Canada's legislation is lacking in regards to regulation of chance-based microtransaction and skin gambling, evaluating foreign sources will provide insight on how the subject is being addressed.

VII. Smart Contracts

A smart contract is an agreement in digital form that is self-executing and thus self-enforcing. In simpler terms smart contracts are "decentralized agreements built in computer code and stored on a blockchain." Smart contracts could take the form of a simple bet between friends which cannot be reneged, for example, or a securities trade that settles and transfers ownership instantly. Some other suggested applications for smart contracts include wills, mortgage transactions, insurance and financial services and crowd funding systems. Smart contracts and blockchains are not the same. A blockchain is a type of decentralized ledger technology ("DLT"): a shared public ledger of transactions maintained by consensus among the nodes on its network. Transactions can be automated using smart contracts "hosted and executed" on a DLT such as a blockchain.14 Once these transactions are stored immutably on a blockchain, they cannot be changed or avoided by either party – the transaction will execute by the network according to its scripted code.

VIII. Code is law or rule of law?

Blockchains are immutable, therefore smart contracts for transactions considered illegal or invalid at law will remain valid on the blockchain creating two realities: one depicted digitally on the blockchain, and one depicted by law in the physical world. The unlawful owner can still validly transfer the asset in the blockchain digital world. While they say this in the course of making valuable contributions to the development of smarter more useful smart contracts with the ability to undo or alter built on, there will still be situations where smart contracts are created without such mechanisms and thus the courts must be relied upon to provide relief. Using money substitutes for the restitution of digital assets is one solution to the issue of unlawful property transfers immutably stored on a blockchain. There has been a trend in Canadian law towards a broad approach to using money substitutes where restitution of the unlawfully transferred assets themselves is impossible.

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