Recent Developments in Foreign Investment
Review in Canada:

Much Fanfare, Much Furor ... Much Ado about Nothing?

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I. INTRODUCTION

The Investment Canada Act (the “ICA”) is the framework legislation that establishes Canada’s foreign investment regime – a regime that has been ranked by the OECD as one of the most restrictive among industrialized nations. According to a 2008 blue-ribbon panel appointed by the Government to review Canada’s competitiveness (often referred to as the “Wilson Panel” after its chair), this characterization of Canada’s foreign investment screening was unduly critical and merely reflected the fact that Canada’s law is more visible than other countries which have more informal barriers to investment. Despite this, the Wilson Panel recommended that the Canadian Government bring perception into line with reality by narrowing the scope of transactions subject to foreign investment review and with a nod to increasing national security concerns, the panel supported the consideration of a national security review process for foreign investment.

In March 2009, the Government responded to the Wilson Panel’s report by conducting a major overhaul of the ICA. There were two major elements to this overhaul: reducing the number of transactions subject to review and ministerial approval under the ICA and establishing a review process for investments that may be “injurious to national security”.

At the time of these amendments, foreign investors welcomed the reduction in routine reviews but expressed concern about the potential erection of investment barriers through an expansive interpretation of “national security”. A year and a half after the amendments were passed, however, surprisingly little has changed in Canada’s foreign investment regime. The increase in review thresholds set forth in

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the amended ICA has not been implemented through regulation nor has “national security” become the protectionist barrier to investment feared by some investors.

This paper is structured as follows. Part II provides a brief history of Canada’s foreign investment review regime. Part III highlight recent trends and developments, culminating in the amendments to the ICA in March 2009. Part IV offers a status report on the principal elements of Canada’s foreign investment regime while Part V concludes the paper.

II. A BRIEF HISTORY OF CANADA’S FOREIGN INVESTMENT REVIEW REGIME

In the 1970s, the Foreign Investment Review Act (or “FIRA”) was legislated on the premise that Canadians needed to control their economy as a matter of national concern and that foreign investment was fundamentally suspect. The test for approval under this statute was “significant benefit to Canada”.

The ICA replaced FIRA in 1985. As its title suggests, the ICA was meant to be more welcoming of foreign investment than the protectionist FIRA. The new test for review was “net benefit to Canada”. The thresholds for review were raised and no reviews were required for establishing new businesses outside of the cultural realm.

The ICA applies to any acquisition of control of a Canadian business by a non-Canadian. Proposed investments may require pre-closing approval by the Minister of Industry (or the Minister of Canadian Heritage if the target is engaged in a cultural business) if they meet certain review thresholds. Generally speaking, to satisfy the relevant Minister that an acquisition of control that exceeds the review thresholds is of “net benefit to Canada,” the foreign investor must make various binding commitments (or “undertakings”).

Whether or not an acquisition is subject to review will depend on the economic sector in which the target is engaged, the structure of the transaction, the
nationality of the foreign investor and the value of the target business. In addition, there are a limited number of exempt transactions, including those involving banks, the temporary acquisition of a business in connection with the facilitation of financing arrangements, and corporate reorganizations where the ultimate direct or indirect control of the target remains unchanged.

In making the determination of whether an investment will be of “net benefit to Canada,” the Minister will consider the following factors, among others:

- The effect of the investment on employment, capital expenditures and the location of the head office;
- The degree and significance of participation by Canadians in senior management of the Canadian business;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation, product variety in Canada and the level of Canadian exports;
- The effect of the investment on competition within any industry in Canada; and
- The compatibility of the investment with national industrial, economic and cultural policies.

Note that the purchase price paid for the Canadian business (i.e., the benefit to existing shareholders) is not a factor that is considered.

As noted earlier, it is common for the Minister to require investors to provide undertaking as a condition to receiving approval. These undertakings, which vary from transaction to transaction in light of the particular facts, often include commitments to maintain employment levels in Canada, to retain head office functions in Canada, to have a certain percentage of Canadians in senior management positions, and, if applicable, to make minimum capital expenditures and other types of expenditures (e.g., R&D) in Canada. There has only been one
instance where a deal has been rejected by the Minister of Industry – Alliant Techsystem’s proposed acquisition of the geospatial business of MacDonald, Dettwiler and Associates⁴.

III. RECENT TRENDS AND DEVELOPMENTS

Over the past decade, there has been a resurgence of popular interest in, and scrutiny of, foreign investment in Canada. This national preoccupation arose as a result of three main developments. First, Canadians have witnessed a rapid series of takeovers of Canadian icons over the past five years, including: Alcan, Inco, Falconbridge, Hudson’s Bay Company and Dofasco. These takeovers led to renewed concerns about the “hollowing out” of corporate Canada – the loss of jobs, head offices and related professional services such as lawyers and accountants. Second, “national security” became a focus of public policy makers with the rise of international terrorism (9/11 and the 2005 London bombing by way of examples). Third, the origin and type of foreign investors in Canada have changed. No longer are the investors from close neighbours with similar cultural and political backgrounds such as the U.S.; rather, they are often from far-flung countries with whom Canada has not had a historically close relationships and with whom an alignment of political/business interests has not always been clear. In addition, state-owned investors, including state-owned enterprises (“SOEs”) and sovereign wealth funds (“SWF”s) (referred to collectively as “SOEs” in this paper), have gained greater prominence with their considerable economic muscle.

The Government has responded to these developments by:

- addressing concerns about SOEs through the release of guidelines describing how it will review investments by such entities (the “SOE Guidelines”) in December 2007;

⁴ Note that the Department of Canadian Heritage, which is responsible for the review of cultural sector acquisitions over certain monetary thresholds, has a number of draconian policies that prohibit takeovers of Canadian-owned companies in a number of sectors such as book publishing.
• establishing a panel of business and legal experts, the Competition Policy Review Panel (the Wilson Panel) to review, among other things, the ICA as well as certain sectoral regimes (telecom, airlines, uranium and financial services); and

• amending the ICA to introduce a national security screening mechanism and to reduce reviews of routine foreign investments.

A. SOE Guidelines – 2007

Foreign state-owned investors came to the forefront of Canadian political consciousness in 2004 with a potential takeover of Canadian mining company, Noranda, by a Chinese SOE, China Minmetals Corp (which did not ultimately occur). The possibility of this deal unleashed a hue and cry among the public, including some Parliamentarians, uncomfortable with the prospect of losing Noranda to a foreign SOE.

The Government of the day proceeded to introduce legislation in 2005 that would have amended the ICA to give the federal Cabinet the ability to review and prohibit a proposed foreign investment on the basis that it would be injurious to “national security.” This key term was not defined in the bill, an omission that generated considerable criticism. Nor did the bill address the government status of the foreign buyer.

In December 2007 and following a change of government, the Government released its SOE Guidelines. These guidelines identify the “governance and commercial orientation of SOEs” as central considerations in reviewing whether SOE investments in Canada should be approved. To assess governance, the SOE Guidelines state that adherence to Canadian standards of corporate governance, such as commitments to transparency and disclosure, independent directors, audit committees and equitable treatment of shareholders will be examined as will compliance with Canadian laws and practices. In addition, the Government will consider how and the extent to which the investor is owned or controlled by a state.
The SOE Guidelines also focus on the commercial orientation of the SOE investor as it relates to the operation of the target business, in particular, regarding: “where to export; where to process; the participation of Canadians in its operations in Canada and elsewhere; the support of on-going innovation, research and development; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position”.

Finally, the SOE Guidelines outline the types of binding commitments or undertakings that may be required to ensure that SOE investments result in a net benefit to Canada. These include commitments to appoint Canadians as independent directors, the employment of Canadians in senior management, the incorporation of the target business in Canada and the listing of shares of the acquiring company or the target Canadian business on a Canadian stock exchange.

Analysis

While the SOE Guidelines offer some insight into the Government’s concerns about SOEs, their level of generality raised many questions. For example, the SOE Guidelines do not indicate what degree of state ownership or control is required to be an SOE, thus creating uncertainty about whether an acquisition vehicle would be caught.

Another concern voiced about SOEs is that they will invest in strategic economic sectors to pursue agendas at odds with Canadian national interests. The SOE Guidelines do not propose a direct assessment of the motives behind an investment but rather list factors that might reveal a deviation from commercial principles. For example, the SOE Guidelines indicate that the Government will consider the destination of exports; this may reflect a concern that the SOE will buy up resources to fuel the “home” economy rather than supply Canadian customers.
The SOE Guidelines address governance concerns by measuring the SOE’s governance against Canadian standards. For example, the requirement for independent directors appears to be directed towards ensuring that the Canadian business is governed by an entity with directors that are not all from the SOE’s home state government.

Of particular interest is the possible requirement that the target business be listed on a Canadian exchange. This could be interpreted as indicating that the Government might require a minority Canadian shareholding in certain instances. Such a step would be one means by which the Government could ensure that the SOE meets Canadian securities laws with their disclosure requirements, while at the same time giving Canadians the opportunity to become part owners of the target Canadian business.

The SOE Guidelines’ impact is limited to investments that are already reviewable under the ICA. Investments that do not constitute acquisitions of control (e.g., small shareholdings), or are below the review thresholds are not subject to the guidelines.


The Wilson Panel was appointed in July 2007 to address Canada’s competition and foreign investment policies amid a public outcry following the high profile takeovers of a number of Canadian stalwarts. On June 26, 2008, the panel issued its report, *Compete to Win*, to the federal Industry Minister on how to raise Canada’s standard of living through greater competition and productivity.5

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5 The report is wide-ranging, canvassing issues from education, immigration, taxation, securities regulation to specific proposals to amend Canada’s competition and foreign investment review laws. In particular, the Panel’s recommendations aimed to eliminate legal, regulatory and policy impediments to competition and enhance conditions necessary to enable Canadian companies to compete more effectively internationally.
The Wilson’s Panel’s recommendations on foreign investment review generally favoured a more streamlined and narrower review process, although there were some notable exceptions. Significantly, the panel did not subscribe to the ideology of completely unfettered investment liberalization: the panel did not support the wholesale elimination of the federal Government’s power to review foreign investment in any sector under the ICA. And it conditioned further liberalization in ownership in certain sectors on the offer of reciprocal liberalization by other countries.

As noted above, the Wilson Panel rejected the OECD’s assessment that Canada has the most restrictive barriers to foreign direct investment among industrialized countries, suggesting instead that Canada’s foreign investment review process was simply more explicit and formal than in most countries which have informal means of discouraging foreign investment. Nevertheless, the panel proposed significant amendments to the ICA to rectify the perception that Canada does not fully welcome foreign investment.

*Raising the ICA Review Threshold*

The Wilson Panel advocated raising the threshold for review from (the 2008 level of) $295 million in book value of assets of the Canadian target to $1 billion in the enterprise value of the business, except for cultural businesses. “Enterprise value” is a term used to represent the economic value of a company and is defined by the panel as being equal to the purchase price plus assumed liabilities minus cash

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6 The Wilson Panel did not expressly state why it wished to retain a review process, although it may have wished to retain some bargaining leverage against other countries’ restrictions on investments. Moreover, the panel noted that under NAFTA and other international treaties, Canada may only narrow the application of the ICA, not broaden it (without significant negotiations with its trading partners), and arguably this constraint would make it very difficult for Canada to reinstate foreign investment restrictions in the future should this be judged desirable.

7 Wilson Report at 29.
assets\(^8\) (which can be used to pay the debt)\(^9\). In addition, the panel noted that the magnitude of the increase in the review threshold would depend upon the nature of the business being acquired. For example, in knowledge-based businesses much of the value of an enterprise may not be recorded on its balance sheet because it is intangible.

The Wilson Panel’s stated rationale for increasing the review threshold was two-fold: to narrow the scope for intervention and to recognize that, except in certain circumstances, foreign investment is beneficial to Canada.

*Reverse Onus of Proof*

While under the current regime, the investor must demonstrate to the Minister that the proposed investment will result in a “net benefit to Canada”, the Wilson Panel recommended “reversing the onus” so that the ICA minister would have the burden of establishing that a transaction should be disallowed as being “contrary to Canada’s national interest”. In the panel’s judgment, it would be harder for a transaction to be against the “national interest” test than to meet the “net benefit” test.

*Eliminate Sensitive Sector Thresholds*

The Wilson Panel recommended the elimination of the very low threshold ($5 million in book value of assets) currently applicable to targets in the so-called

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\(^8\) See Wilson Report, Chapter 7, footnote 12 at 111.
\(^9\) See http://www.streetauthority.com/terms/e/enterprise-value.asp which states that: 
[Enterprise value considers the fact that an acquirer must also shoulder the cost of assuming the acquired company's debt. Additionally, enterprise value incorporates the fact that the acquirer would also receive all of the acquired company's cash. This cash would effectively reduce the cost of acquiring the company. Debt and cash can have an enormous impact on a particular company's enterprise value. For this reason, two companies may have the same market capitalizations but may sport very different enterprise values. For example, a company with a $50 million market capitalization, no debt, and $10 million in cash would be cheaper to acquire than the same company with $30 million of debt and no cash.”

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sensitive sectors of uranium production, non-federally regulated financial services and transportation services, but not cultural businesses. This recommendation would significantly reduce the number of reviewable acquisitions caught either whether the target business was engaged primarily or even minimally in so-called sensitive sector activity. The panel saw no compelling reason to differentiate investments in these sectors from others given the “broad array of other industry specific regulation as well as the forthcoming national security safeguards on foreign investment”.

The Wilson Panel also advocated several changes in the review of investments in “cultural businesses” including the introduction of a *de minimis* exemption, stipulating that businesses with only incidental cultural activities (i.e., revenues from cultural activities falling under the lesser of CDN$10 million or 10% of overall revenues) are not “cultural businesses.”

*Greater Transparency*

The Wilson Panel argued for enhanced transparency in the administration of the ICA, calling for the greater use of guidelines, advisory materials, interpretations, annual reports and binding opinions to assist investors and the public in understanding how the ICA is applied. In addition, it advocated the streamlining of procedures and timelines to improve the functioning of the ICA.

C. **Amendments to the ICA -- March 2009**

On February 6, 2009, the Government introduced Bill C-10, its budget implementation bill. Tucked into the back of that bill was the Government’s

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10 The Wilson Panel notes that foreign investment involving federally regulated financial services businesses (regulated under the *Bank Act* and the *Insurance Companies Act*) is exempt from review under the ICA.

11 Wilson Report at 32.
response to the Wilson Report in the form of amendments to ICA. These became law in March 2009.

**Fewer Transactions Subject to Review**

Following the lead of the Wilson Panel, one of the key changes in the amendments was that the threshold for review of direct acquisitions of control by WTO-member based investors would increase from (the 2009\(^1\) level of) $312 million in book value of assets to C$600 million in the "enterprise value" ("EV") of the Canadian business, for the next two years after implementing regulations are in force, to C$800 million for the two years following, and to C$1 billion for another two years, to be indexed according to inflation thereafter.

The effect of this amendment will, in all likelihood, be a decrease in the number of transactions that will be subject to review. Nevertheless, the amount of the decrease and the degree to which the amendments will streamline the foreign investment review process will depend on how regulations regarding EV are drafted, and in particular, what the constituent elements of EV are for different types of transactions (private company versus public company share acquisitions versus asset acquisitions). The Government issued draft regulations in July 2009 which defined EV in relation to market capitalization (adjusted to add liabilities and to deduct cash assets). For private company share acquisitions and asset acquisitions, the draft guidelines continued the use of a book value measure.

The draft regulations were the subject of considerable criticism by the Canadian Bar Association\(^3\) which raised concerns about the timing of the calculation of EV for public company acquisitions\(^4\). The continued use of book value

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\(^1\)The review threshold for 2010 is only $299 million due to deflation.


\(^3\)Pursuant to the draft regulations, EV might only have been calculable immediately prior to closing, thereby creating uncertainty about the reviewability of the transaction.
value as a measure for asset acquisitions also raised concerns that the structure of the transaction could be pivotal in determining reviewability and that the policy reason behind using the type of EV measure advanced by the Wilson Panel (as a better gauge of the significance of a company) was being undermined.

The March 2009 amendments to the ICA also eliminated three of the four so-called "sensitive sectors" (cultural businesses are still sensitive) to which lower review thresholds ($5 million in book value of assets of target) applied. This amendment also rectified the situation where the acquisition of a Canadian target that fell below the WTO review threshold but above the very low sensitive sector threshold ($5 million) was made subject to review even though the target’s engagement in sensitive sector activity was purely ancillary or incidental to its principal business\textsuperscript{15}.

In summary, the incremental increase in the review threshold to $1 billion in “enterprise value” over four years once the EV standard is implemented coupled with the elimination of the sensitive sectors will likely significantly reduce the number of transactions that are subject to review, although its impact on different economic sectors may well vary\textsuperscript{16}. The investment liberalization resulting from this change will, however, be contingent on how the concept of “enterprise value” is finally defined.

It should also be noted that the amendments did not liberalize the ICA to the full extent advocated by the Wilson Panel. As discussed above, the panel proposed altering the substantive test for approval under the ICA from the current test (\textit{i.e.}, that the proposed investment is of net benefit to Canada), which places an onus on

\textsuperscript{15} For example, a target business was characterized as a “transportation business” if it transported its own goods to its customers and on the return leg of the journey carried third party goods to earn some minimal revenue to offset costs.

\textsuperscript{16} Sectors dependent on intangibles such as knowledge-based industries may be the subject of more reviews given their likely higher EV relative to their book value of assets.
the foreign investor to establish benefits to Canada, to a new test - that the Minister would only be able to reject a deal that is contrary to Canada’s national interest. In addition, with respect to acquisitions of “cultural businesses,” the amendments did not contain any changes whatsoever and in particular, continue to permit the review of businesses that are primarily non-cultural if they have even a minimal cultural dimension. (For example, a drugstore with a magazine rack would be considered a cultural business). Finally, the Wilson Panel’s call for greater transparency and the streamlining of procedures and timelines was only partially heeded: public annual reports on the administration of the ICA will have to be issued pursuant to the amendments, and the mechanism for seeking opinions is somewhat improved.

National Security

The March 2009 amendments introduced a national security review process into the ICA. Under the new national security regime, the federal Cabinet may prohibit or attach conditions to a foreign investment in an existing Canadian business or the establishment of a new Canadian business if such investment would be “injurious” to Canada’s “national security”. If the investment has already been completed, Cabinet may order a divestiture.

The scope of “national security” is not defined nor are there plans to provide guidance. Without any criteria, Cabinet has wide discretion to determine the relevant risk factors. If guidance issued in respect of the US national security review process (undertaken by the Committee on Foreign Investment in the US (“CFIUS”)) were followed in Canada, targets in sectors such as critical infrastructure, critical technology and energy would merit closer scrutiny as would investments by foreign government entities.

In addition, national security review applies to a much broader scope of transactions than the general “net benefit” review process. For example, there is no
safe harbour for transactions that fall below the review threshold noted above and minority investments are subject to review whether or not they constitute an acquisition of “control”.

While there is no formal mechanism to obtain pre-clearance of these transactions on national security grounds, early submission of a filing (either an application for review or a notification) required under the general ICA provisions (i.e., not related to national security) will trigger a 45 day period during which the Minister must give notice of a national security review or possible review. The only exception is minority investments that do not represent an acquisition of control - in which case the Minister has 45 days from closing to give notice. If a national security review is invoked, investors can expect potentially significant delays, adding as much as 130 days (and possibly more) if the maximum prescribed periods are fully utilized.

**IV. STATUS REPORT AS OF SEPTEMBER 2010**

**A. Review Threshold**

Curiously, despite the closing of the public consultation in August 2009, the Government has still not promulgated final regulations with the result that the new review threshold of $600 million in EV is not yet in effect.

The reasons for the Government’s delay in promulgating regulations implementing the higher EV review threshold are not clear. It may be that the Government has second-guessed the EV definition for asset and private company sales (which was measured by book value in the draft regulations) because the Government wanted to retain the power to review the sell-off of insolvent Canadian companies through asset or private company sales (such as the sale of Nortel’s businesses). Whatever the reason, foreign investors should welcome regulations that implement a measure of EV that offers certainty and accords with the Wilson Panel’s
emphasis on the overall value of the company (considering revenue, for example, rather than just assets).

B. Treatment of SOE Investors

Given the lack of clarity and precision in the SOE Guidelines, the Government could have taken a more restrictive stance on state-owned investment than was previously the case, but this does not appear to have occurred to date (over two and a half years after the introduction of the SOE Guidelines). The warming of Canada’s relations with China in 2009 coupled with the economic recession (and the consequently higher demand for investment capital) and a softening of concerns about SOE may all be factors in explaining the Government’s reticence to restrict foreign investment by SOEs. Indeed, the Government has not prohibited any major SOE investments since the introduction of the SOE Guidelines. Over 2009 and 2010, Industry Canada reviewed and approved a number of significant transactions where the investors were state-owned. These included: the acquisition of Nova Chemicals by International Petroleum Investment Company (owned by the Abu Dhabi government); Korea National Oil Corp.’s acquisition of Harvest Energy; PetroChina’s acquisition of interests in two oil sands projects owned by Alberta Oil Sands Corp.; and Sinopec’s acquisition of a company holding a 9% interest in oil sands producer, Syncrude Canada Ltd. These Ministerial approvals confirm that the Government is not inherently hostile to state-owned acquirers. In addition, it is clear that the Government does not automatically presume that SOE investments raise national security concerns. Both of these developments should comfort SOEs wishing to invest in Canada.

17 This may be due in part to the collective efforts of organizations such as the IMF and the International Working Group of Sovereign Wealth Funds to instil greater comfort with SWFs among host states through enhanced transparency and better governance. See a discussion of the “Santiago Principles” at http://www.iwg-swf.org/pubs/gapplist.htm.
18 The minority (17%) investment by China Investment Corp. in Teck Resources in July 2009 was not subject to “net benefit” review because it did not constitute an acquisition of control.
C. National Security

The national security review process generated some anxiety among foreign investors but in fact the Government has not yet prohibited a transaction on national security grounds\(^\text{19}\). It seems likely that the current Government’s interpretation of “national security” will be more circumscribed than the broad range of industries potentially subject to review by CFIUS. Over the past year, the Government considered acquisitions in various Canadian sectors that could in theory have fallen within sensitive US categories, including the acquisition of various businesses of Canadian technology icon, Nortel, and of energy (including oil sands) companies, without apparently requiring any mitigating measures by the acquirer. Moreover, there is little evidence that prior to the establishment of the national security regime, the Government had a frustrated desire to challenge numerous transactions. For example, Dubai Ports World’s proposed acquisition of P&O’s port services business in 2006 ignited a highly political debate in the US but was quietly approved in Canada. Although national security review did not exist in 2006, the absence of specific statutory authority to block transactions on this basis did not prevent the Government from prohibiting ATK’s proposed acquisition of MacDonald, Dettwiler and Associates Ltd. in 2008 for reasons that could be characterized as “national security” (among other rationales reported in the media, the protection of Canadian sovereignty in the Arctic) under the “net benefit” test.

That said, Canadian politicians of all political stripes have over the past few years become more aware of the potential to use the ICA to political advantage. As a result, it is conceivable that at some future time “national security” concerns could

\(^\text{19}\) It should be noted that Industry Canada intervened on national security grounds in a proposed transaction in 2009 involving the purchase by a Belgian company of a Canadian company, Forsys Metals Corp., whose only asset was a uranium project in Namibia. The parties were advised by Industry Canada not to close pending further notice. The parties ultimately abandoned the transaction and it is unclear whether a national security review was ever initiated.
be used to justify a review of a transaction that is unpopular and not otherwise reviewable under the “net benefit” approval process.

As a result, if a foreign investor’s proposed acquisition of a business with operations in Canada could potentially raise national security concerns, the foreign investor would always be well advised to consider developing and executing a pro-active government and public relations strategy to minimize the likelihood of any Government review that could prohibit or restrict the investment. Such a strategy would need to anticipate and be sensitive to changes in the Canadian political and economic climate that could alter the dynamics of how national security is perceived.20

D. Litigation for Failure to Comply with Undertakings

For the first time in the quarter century history of the ICA, the Industry Minister sued an investor to enforce undertakings given in respect of a foreign investment in July 2009. The Canadian Government applied for an order against US Steel mandating compliance with “undertakings” made in respect of US Steel’s acquisition of Stelco in 2007. The Government alleges that US Steel failed to comply with its commitments relating to employment and production at its Canadian facilities. The Canadian Government has also requested that the court impose a fine of $10,000 per day for the alleged breach of the undertakings. In response, US Steel has taken the position that it has not breached its undertakings and that its inability to meet the undertakings was a result of factors beyond its control – a type of “force

20 For instance, it is possible that the Canadian Government might at some point consider using “national security” as the justification for limiting foreign investment in certain natural resources (even water) in the event of a severe restriction on the supply of such resources. Clearly, the U.S. CFIUS process contemplates such a possibility as the illustrative list of national security factors includes long term US requirements for sources of supply of raw materials and resources. At the same time, if there were a serious shortage of a particular resource, it is likely that other policy instruments than foreign investment review would ultimately be used to ensure adequate provision of such resources for Canada.
majeure” that Industry Canada has frequently accepted in the past to excuse non-compliance with undertakings.

While a significant development, there are reasons to believe that the facts in this case are extraordinary, and that such a response by the Canadian Government will remain exceptional. Nevertheless, the US Steel case serves as a reminder to foreign investors that the Canadian Government takes ICA undertakings very seriously and monitors compliance.

V. CONCLUSION

Recent developments in Canada’s foreign investment review laws, including the 2009 amendments to the ICA as well as the SOE Guidelines, suggest that Canada is becoming generally less restrictive of routine foreign investments, yet, at the same time, more focussed on screening both investments that may harm Canadian national security and those that involve foreign state investors that may have economic and political interests at odds with those of Canadians. Ironically, 18 months after the amendments, the review thresholds have actually decreased to below the 2009 level (meaning more routine transactions are potentially subject to review than before the 2009 amendments), while the use of national security as a protectionist barrier to investment has not materialized. Nor have SOE investors faced significant restrictions to investing in Canada. The only apparent aberrations from ICA practice in the recent past have been the rejection of ATK’s proposed acquisition of MDA’s geospatial division in 2008 and the current litigation by the Government against U.S. Steel. However, both can legitimately be viewed as extraordinary events, even if potentially disquieting for foreign investors who may have viewed the ICA as toothless. In the final analysis, then, while it may be a mischaracterization to say that recent developments in Canada’s foreign investment review regime are “much ado about nothing”, they have not signalled a new resistance to foreign investment in Canada. Indeed, once regulations on the
modified review threshold are implemented, it is anticipated that Investment Canada will become a regulatory regime that, with the exception of the cultural sector and the relatively rare national security matter, will apply only to the largest foreign investments in Canada.