The Foreign Investment Regulation Review

Second Edition

Editor
Brian A Facey

Law Business Research

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This article was first published in The Foreign Investment Regulation Review - Edition 2
(published in August 2014 – editor Brian A Facey).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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ISBN 978-1-909830-19-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD

AMARCHAND & MANGALDAS & SURESH A SHROFF & CO

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EDITOR'S PREFACE

I am pleased to present the second edition of *The Foreign Investment Regulation Review*. Building on the inaugural publication of last year, this edition provides insight into the national regulatory framework for foreign investment review in major jurisdictions around the world, as well as an overview of current trends and developments in this field.

Over the past few years, foreign investment has grown to match levels that were attained during the pre-economic crisis era of the mid-2000s. As national economies continue to recover from the global financial crisis, foreign investment often constitutes a source of capital that is key to promoting and sustaining domestic economic growth. From the perspective of investors, it can represent an important opportunity to expand into new markets or to implement efficiency enhancing improvements to a supply chain. Within this environment, legislators and regulators frequently face the challenge of attracting sufficient capital to develop the local economy while at the same time protecting national interests, including national security.

The diversity among foreign investment regimes reflects the fact that each nation has a unique set of goals and priorities to consider. Some countries, such as China, have recently introduced reforms aimed at attracting greater foreign investment. At the same time, the experience of jurisdictions such as Canada highlights that foreign investment review remains a balancing act between attracting foreign capital and protecting domestic interests in certain sectors of the economy. One common theme across jurisdictions is that foreign investment reviews continue to present complex issues for businesses, regulatory authorities and legal counsel alike.

Both legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. We hope that it allows investors and businesses being acquired to better evaluate and manage risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

This edition contains contributions from leading experts practicing in 23 jurisdictions around the world. I would like to express my gratitude to each author and law firm involved in this project for their commitment of both their expertise and time.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Brian A Facey
Blake, Cassels & Graydon LLP
Toronto
August 2014

Chapter 3

CANADA

Jason Gudofsky, Navin Joneja, Julie Soloway and Cassandra Brown[1]

I INTRODUCTION

As trade and investment policies become more liberalised around the world, and as global demand for resources continues to grow, Canada increasingly competes with other jurisdictions for foreign investment to fuel economic growth and development. At the same time, certain types of foreign investment have recently generated increased attention and concern among Canadians regarding the potential benefits to Canada of foreign investment. This increasing scrutiny is arising particularly in relation to acquisitions by state-owned enterprises (SOEs) and especially in respect of more sensitive sectors of the economy. Following two recent major acquisitions by SOEs – namely, China National Offshore Oil Company's (CNOOC) acquisition of Nexen Inc and Petroliam Nasional Berhad's (PETRONAS) acquisition of Progress Energy Resources Corp[2] – the Prime

1 Jason Gudofsky, Navin Joneja and Julie Soloway are partners and Cassandra Brown is an associate at Blake, Cassels & Graydon LLP. The authors would like to thank Mark Adkins, Chris Christopher, Jamie Koumanakos, Aaron Libbey and Peter Flynn for their valuable contributions to this chapter.

2 Both transactions were cleared by the government on 7 December 2012: Industry Canada, 'CNOOC Limited's Acquisition of Nexen Inc.': http://news.gc.ca/web/article-eng.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=711499&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2012&crtr.kw=&crtr.dyStrtVl=6&crtr.aud1D=&crtr.mnthStrtVl=12&crtr.page=2&crtr.yrndVl=2012&crtr.dyndVl=8; Industry Canada, 'Petronas' Acquisition of Progress': http://news.gc.ca/web/article-eng.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=711509&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2012&crtr.kw=&crtr.dyStrtVl=6&crtr.aud1D=&crtr.mnthStrtVl=12&crtr.page=1&crtr.yrndVl=2012&crtr.dyndVl=8. CNOOC/Nexen closed on 25 February 2013

Minister himself spoke of the specific principles to be applied in relation to future SOE investments.[3]

The principles and process used to ensure that investment into Canada benefits the Canadian economy are encompassed in specific foreign investment review legislation, which has existed in Canada in some form since 1973.[4] The Investment Canada Act (ICA),[5] enacted in 1985, is the federal statute of broad application that regulates the establishment and acquisition of Canadian businesses by non-Canadians. The stated purpose of the legislation is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada, and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.[6]

II FOREIGN INVESTMENT REGIME

An investment subject to the ICA is either 'reviewable', in which case it is subject to both a pre-closing approval process and reporting obligation, or 'notifiable', in which case it is subject only to a one-time post-closing notice. In addition, all direct or indirect investments made by non-Canadian investors in entities that carry on operations in Canada, whether reviewable, notifiable or neither, may possibly be subject to a national security review.

In general, a reviewable transaction may not be completed unless and until the responsible Minister[7] is satisfied that the investment is likely to be 'of net benefit to Canada'. The non-Canadian investor must make an application to the Investment Review Division of Industry Canada (IRD) (or in certain cases, the Cultural Sector Investment Review Division of the Department of Canadian Heritage (CSIRD)) setting out, *inter alia*, the particulars of the proposed transaction and its plans for the Canadian business post-transaction. The responsible Minister then determines whether the proposed investment is likely to be of net benefit to Canada, based on factors enumerated under the ICA and related guidelines and policies.

The ICA provides that the Minister shall take into account any 'information, undertakings and representations'[8] when determining whether a proposed investment is likely to be of net benefit to Canada. While undertakings are not mandatory under

and PETRONAS/Progress closed on 12 December 2012. Blakes represented Nexen in its acquisition by CNOOC, including with respect to the ICA review.

3 Statement by the Prime Minister of Canada on foreign investment, 7 December 2012: www.pm.gc.ca/eng/media.asp?id=5195.

4 Foreign Investment Review Act, SC 1973-74, c 46.

5 Investment Canada Act, RSC 1985, c 28 (1st supp).

6 ICA, Section 2.

7 As explained below, the responsible Minister is typically the Minister of Industry, except where the Canadian business being acquired is a cultural business, in which case the minister responsible for administering the ICA is the Minister of Canadian Heritage.

8 ICA, Section 21(1).

the ICA, in practice, the Minister requires undertakings (i.e., contractual commitments from the investor) in virtually every transaction that meets the criteria for reviewability. Undertakings regarding the acquired Canadian business typically address subjects such as:

a future employment levels;
b plans for the Canadian head office of the acquired Canadian business;
c future capital expenditures;
d production targets;
e research and development; and
f charitable contributions.

The duration of such commitments (for non-SOE investors) is typically approximately three to five years post-closing. Compliance with undertakings is actively monitored by IRD, and investors are usually expected to report on progress and compliance with undertakings at least at the 18-month point post-transaction.

Special rules apply to investments by SOEs, acquisitions of Canadian cultural businesses and investments that raise national security issues. These are summarised briefly immediately below, and examined in more detail in Section IV, *infra*.

i SOEs

The Minister has issued specific guidelines that apply to reviewable investments made by SOEs. These investments are analysed within the general 'net benefit' framework outlined above, but are subject to certain additional considerations, such as the extent to which the SOE operates similarly to a non-SOE commercial investor in terms of its accountability, governance and commercial orientation. An SOE investor typically will need to provide a more robust set of undertakings, and those of its undertakings that pertain to its SOE status may have a longer duration than the undertakings that typically apply to non-SOE investors. In addition, special restrictions are placed on reviewable investments by SOEs that constitute an acquisition of control of a Canadian oil sands business.[9] For more detail, see Section IV.vii, *infra*.

ii Cultural businesses

Transactions involving business activities relating to Canada's cultural heritage or national identity (e.g., publishing, film, video, music and broadcasting) fall within the jurisdiction of CSIRD, under the direction of the Minister of Canadian Heritage. Acquisitions of control of Canadian cultural businesses are subject to a lower financial threshold for review, and even those that fall below the lower financial threshold (including indirect acquisitions) may be reviewed at the discretion of the government. For more detail, see Section IV.vii, *infra*.

iii National security

All transactions by non-Canadians involving entities that carry on operations in Canada are potentially subject to a national security review, even where control will not be

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9 Industry Canada, Statement Regarding Investment by Foreign State-Owned Enterprises, 7 December 2012: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html.

acquired by the investor. Where the Minister has reasonable grounds to believe that an investment by a non-Canadian to acquire all or part of an entity (or to establish an entity) carrying on business in Canada could be injurious to national security, he or she may notify the non-Canadian that the investment may be reviewed for potential national security concerns,[10] in which case the investor may not complete its investment until it receives the required notice from the Minister or from the Governor in Council (i.e., the federal Cabinet).[11] The term 'national security' is not defined under the ICA. For more detail, see Section IV.vii, *infra*.

III TYPICAL TRANSACTIONAL STRUCTURES

The structuring of the foreign acquisition of a Canadian private or public company involves a number of considerations, including timing, ease of implementation and tax.

Most foreign acquisitions of control of Canadian private businesses are effected in one of two ways: a purchase of the assets and assumption of the liabilities of the business being acquired; or a purchase of the shares of the corporation (or the purchase of the units of a non-corporate entity) that carries on the business. A share purchase transaction is generally simpler and quicker to complete than an asset acquisition, as it avoids many of the practical issues associated with the transfer of assets. A share purchase also may have tax advantages from the perspective of the vendor, as it generally permits the vendor to obtain capital gains treatment with respect to any gain on the sale of the shares, thereby reducing overall tax liability. Conversely, asset acquisitions may have distinct advantages from the perspective of the purchaser, particularly where the purchaser wishes to exclude certain parts of the business or liabilities from the transaction or to step up the tax cost of depreciable assets. The acquisition of a private company by asset or share sale in Canada is generally exempt from Canadian securities legislation.

Apart from a foreign purchaser acquiring assets of a Canadian public company (which, if constituting all or substantially all of the company's assets requires shareholder approval (generally 66 2/3 per cent) under Canadian corporate law), foreign acquisitions of control of Canadian public companies are typically structured in one of three ways: arrangement, takeover bid or amalgamation. Friendly acquisitions of Canadian public companies are most often effected by way of a plan of arrangement.[12] An arrangement

10 See the ICA, Section 25.2. The Minister is barred from providing such notice 45 days after having received an application or notification or, where the transaction is not subject to a requirement to file a notification or application, more than 45 days after the transaction has been implemented. However, the ICA provides the Minister with a five-day grace period to send a notice following the expiry of the 45-day period.

11 If the Minister is able to determine that the investment would not be injurious to national security, he or she will send a no-action notice directly to the non-Canadian. However, if the Minister believes the investment to be injurious to national security or is unable to make the determination, the investment is referred to the Governor in Council for review.

12 The 2014 Blakes Canadian Public M&A Deal Study, which focuses on the key structuring and negotiation issues in the 50 largest recent target-supported public company acquisitions

is a court-approved transaction and requires shareholder approval (generally 66 2/3 per cent) by the target's shareholders. The parties enter into an arrangement agreement setting out the basis for the combination, following which an application is made to the court for approval of the process. In addition to certain tax advantages for the purchaser, arrangements are generally preferred for a number of reasons, including:

a the acquirer's financing may be a condition to closing (unlike takeover bids);
b structuring flexibility, including the ability to offer unequal consideration to management shareholders;
c certainty that the acquirer will obtain 100 per cent of the shares of the target if shareholder approval is obtained;
d in the US context, an exemption from the registration requirements of US securities laws in respect of share consideration; and
e the court approval of the arrangement offers the board of the target comfort that an independent arbiter has considered and approved the plan as fair.

Generally, a takeover bid under Canadian securities laws is the offer to acquire 20 per cent or more of the issued voting shares or 'equity' shares (essentially non-voting common shares) of any class or series of a Canadian public company, but does not include an offer that is a step in an amalgamation, merger, reorganisation or arrangement that requires security holder approval. If a foreign acquirer proceeds by way of a takeover bid, unless a statutory exemption is available, the transaction will be subject to the detailed takeover bid procedural requirements of Canadian corporate and securities legislation, including that:

a an all-cash or part-cash offer cannot be conditional on financing;
b the offer must be made to all holders resident in Canada, and all holders must be offered identical consideration or identical choice of consideration;
c the offer must be open for at least 35 days, and no deposited securities can be taken up and paid for by the offeror during the first 35 days of the offer;
d if the offer is partial (i.e., for less than 100 per cent), deposited shares are to be taken up *pro rata*; and
e the offeror is obligated to take up and pay for the deposited securities when the conditions to the offer have been satisfied or waived.

Under most Canadian corporate legislation, an offeror that has made a takeover bid to all shareholders and acquires 90 per cent of such securities, subject to certain exceptions, may buy out the remaining shareholders at the offer price or, if not accepted by the shareholders, at a court-determined 'fair value'.

Acquisitions of Canadian public companies can also be effected by way of a shareholder-approved 'amalgamation'. An amalgamation is akin to a merger under US law; however, the amalgamated corporation is considered to be the successor to both amalgamating entities, and the amalgamated entity succeeds to the assets and liabilities

in Canada, found that 74 per cent of transactions were completed by plan of arrangement (compared with 76 per cent in 2013), 18 per cent by takeover bid (compared with 18 per cent in 2013) and 8 per cent by other shareholder-approved transactions, including amalgamations (compared with 6 per cent in 2013).

of the amalgamating entities. Amalgamations are used less often than arrangements as, while the time and documentation required are virtually identical, amalgamations do not provide the structuring flexibility afforded by an arrangement or the benefit of a court decision as to the fairness of the transaction. Similarly to arrangements, a statutory amalgamation provides certainty in an acquisition transaction that the acquirer will obtain 100 per cent of the shares of the target.

Other transaction structures among foreign entities and Canadian public and private companies include joint ventures, green field investments and various forms of non-controlling investments (e.g., acquisitions of minority interests in a corporation, partnership or unincorporated joint venture). Foreign investors will sometimes seek to structure their transaction in such a way that there is no 'acquisition of control' of a Canadian business (discussed in greater detail below); however, the ICA includes an anti-avoidance provision that provides the Minister with certain powers (e.g., the ability to demand that the investor cease contravening the ICA) in the event that he or she believes that a non-Canadian investor 'has entered into any transaction or arrangement primarily for a purpose related to' the ICA.[13]

IV REVIEW PROCEDURE

As noted in Section II, *supra*, an investment in Canada by a non-Canadian is either reviewable under a net benefit to Canada test or notifiable, generally depending on whether there is a direct acquisition of control of a Canadian business and whether the applicable financial threshold is met.

i Definitions of 'acquisition of control' and 'non-Canadian'

The rules relating to whether a foreign investment amounts to an 'acquisition of control' and whether an investor is a 'non-Canadian' are complex.

First, with respect to control, the ICA provides that the acquisition of a majority of the voting interests of an entity is deemed to be an acquisition of control.[14] A majority voting interest means a majority of the voting shares in the case of a corporation or, in the case of a non-corporate entity (partnership, joint venture, trust), a majority of the undivided ownership interests in the assets or profits of the entity upon dissolution.[15] For non-corporate entities, an acquisition of less than a majority of the voting interests is deemed not to be an acquisition of control. By contrast, for corporations, there is a rebuttable presumption that the acquisition of one-third or more but less than a majority of the voting shares is an acquisition of control of the corporation. This presumption can be rebutted by establishing that the corporation will not be controlled through its voting shares by the entity acquiring one-third or more of the voting interests. The acquisition of less than one-third of the voting interests of a corporation is deemed not to be an acquisition of control of that corporation.[16]

13 ICA, Section 39(1)(g).

14 ICA, Section 28(3)(a).

15 ICA, Section 3.

16 ICA, Section 28(3)(d).

Second, with respect to status, the ICA defines a Canadian as:

a a Canadian citizen;

b a permanent resident of Canada who has been ordinarily resident in Canada for not more than one year after the time at which he or she first became eligible to apply for Canadian citizenship;

c a Canadian government or agency thereof; or

d an entity that is Canadian controlled as determined by the rules respecting the control of entities set out in the ICA.[17]

In general, an entity will be Canadian-controlled if a majority of its voting interests are owned by one Canadian, by a voting group where a majority of the voting group members are Canadian, or by two or more Canadians where it can be established that the entity is not controlled in fact through ownership of its voting interests by one or more non-Canadians. Where less than a majority of the voting interests of an entity are owned by Canadians, the entity will be presumed to be non-Canadian unless the contrary can be established by showing that:

a the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which the majority are Canadians; or

b in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and two-thirds of the members of its board of directors or, in the case of a limited partnership, two-thirds of its general partners, are Canadians.[18]

Notwithstanding these rules and presumptions, the ICA provides the Minister with additional flexibility to make fact-specific (i.e., *de facto*) determinations regarding 'acquisitions of control' and Canadian status in the following situations, each of which is explained in greater detail below: where a non-Canadian investor is an SOE;[19] the acquisition of control of a Canadian cultural business;[20] and investments that may raise national security concerns.[21]

ii Relevant financial thresholds

A direct acquisition of control of a Canadian business by a non-Canadian is reviewable under the ICA where the prescribed financial threshold is met.[22] With respect to a

17 ICA, Section 3. Rules regarding the control of entities are set out under Section 26 of the ICA.

18 ICA, Section 26.

19 ICA, Section 28(6.1).

20 ICA, Section 28(4).

21 ICA, Section 28(4.1).

22 A 'direct acquisition' for the purpose of the ICA is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets, or a majority (or, in some cases, one-third or more) of the shares of the entity carrying on the business in Canada. An 'indirect acquisition' for the purpose of the ICA is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Where a Canadian business is

direct acquisition by a 'WTO investor',[23] the current threshold for triggering a review requirement is C$354 million.[24] This threshold is based on the book value of the acquired assets according to the target's financial statements. The ICA was amended to change the threshold for non-SOE WTO investors from the current C$354 million in book value of assets to C$600 million in 'enterprise value' for two years, then to C$800 million in enterprise value for two years, then to C$1 billion in enterprise value for two years, after which the threshold will be indexed to changes in Canada's GDP.[25] However, the new threshold will not come into effect until promulgated by Cabinet, which is expected to occur concurrently with the publication of new regulations describing how enterprise value is to be calculated. While the regulations are expected before the end of 2014, the amendments were introduced in 2009 and, given past practice, it is possible that the new threshold will not come into effect until after that time. Indirect acquisitions of Canadian businesses through their non-Canadian parent corporations (other than in the cultural sector) by WTO investors are not subject to a net benefit review, but are subject to a notification requirement, and are potentially reviewable under the ICA's national security provisions.[26]

According to the government, the basis for the new financial threshold applicable to direct acquisitions – enterprise value – will better reflect the value of a business as a going concern, particularly with respect to service and knowledge-based industries.[27] Depending on how enterprise value will be calculated under the soon-to-be-adopted regulations, certain classes of transactions that would not have been reviewable under the old, numerically lower financial threshold may be reviewable under the new, numerically higher threshold. For example, IT and service firms (which tend to have lower asset

acquired indirectly through the acquisition of a non-Canadian partnership, joint venture or trust, such transaction is treated as if it were a 'direct acquisition' for the purpose of determining whether it will be reviewable.

23 A 'WTO investor' is an investor controlled by a person who is a resident or national of a WTO member country or, if not controlled by a person, where two-thirds or more of a corporation's board of directors or two-thirds or more of the general partners of a limited partnership comprises residents or nationals of WTO member countries. The WTO investor threshold also applies where the Canadian business being acquired is owned by a non-Canadian WTO investor.

24 In the case of an equity transaction, the assets consist of the assets of the target and its subsidiaries, wherever located, while in an asset transaction, the threshold is based on the assets being acquired. As noted, the financial threshold is lower where the Canadian target business is a cultural business or where the investor is not a WTO investor.

25 Bill C-60, An Act to implement certain provisions of the budget tabled in Parliament on 21 March 2013 and other measures, 1st Sess, 41st Parl, 2013 (assented to on 26 June 2013).

26 However, as noted above, indirect acquisitions of Canadian businesses through non-Canadian partnerships, joint ventures or trusts are treated as 'direct acquisitions' for the purpose of determining whether they are reviewable.

27 Industry Canada, Backgrounder: Proposed Amendments to the Investment Canada Regulations, 25 May 2012: http://news.gc.ca/web/article-eng.do?nid=676779.

values but higher enterprise values) may more easily trigger the monetary threshold based on enterprise value than under a threshold based on asset value.

The current asset-based financial thresholds will still apply for investments in cultural businesses, investments that do not qualify for the WTO investor status rules and investments by SOEs.

Table 1
Financial thresholds for direct acquisitions

		Cultural	*Non-cultural*	*National security*
WTO	SOE	C$5 million	C$354 million book value of assets (annual adjustment)	No threshold
	Non-SOE	C$5 million	C$354 million book value of assets (annual adjustment) Will change to C$600 million in enterprise value, increasing to $1 billion over four years	No threshold
Non-WTO	SOE	C$5 million	C$5 million	No threshold
	Non-SOE	C$5 million	C$5 million	No threshold

Table 2
Financial thresholds for indirect acquisitions through non-Canadian corporations[28]

	Cultural	*Non-cultural*	*National security*
WTO	C$5 million or C$50 million depending on proportion of Canadian assets	Not reviewable	No threshold
Non-WTO	C$5 million or C$50 million depending on proportion of Canadian assets	C$5 million or C$50 million depending on proportion of Canadian assets*	No threshold

* See Brian A Facey and Joshua A Krane, *Investment Canada Act: Commentary and Annotation*, 2014 edition (Toronto: LexisNexis Canada, 2013): 'Where the indirect acquisition occurs directly or indirectly through the acquisition of voting shares of a non-Canadian corporation (i.e., control of any non-Canadian corporation is acquired), the investment is reviewable where: (a) the book value of all of the Canadian assets acquired in the transaction is (i) greater than 50 per cent of the book value of all of the assets and (ii) is equal to or exceeds $5 million, or (b) is (i) less than or equal to 50 per cent of the book value of all of the assets and (ii) is equal to or exceeds $50 million or more.'

iii Review periods for net benefit review and notification

Subject to certain limited exceptions, a reviewable transaction may not be completed until the investor has filed an application for review and the responsible Minister is satisfied (or is deemed to be satisfied) that the investment is likely to be of 'net benefit to Canada'. Thus, the review process begins when the investor files an application for review with the Director of Investments setting out, *inter alia*, the particulars of the proposed

28 For indirect acquisitions through non-Canadian partnerships, joint ventures or trusts, see Table 1.

transaction and its plans for the Canadian business. There is an initial review period of up to 45 calendar days, with a possible further extension of the review period by the Minister of 30 calendar days. After this time, the waiting period can be extended only with the agreement of both the Minister and the investor.[29] In practice, reviews can take the full 75 days, or longer, depending on the circumstances.[30] In general, the investor may close a direct acquisition only after the Minister has approved, or is deemed to have approved, the investment. Failure to comply with these rules exposes the investor to enforcement proceedings that can ultimately result in certain remedies, including fines of up to C$10,000 per day and a possible divestiture order.[31]

With respect to investments that are subject only to a notification requirement, the completed notification form must be filed with the Director of Investments either before or within 30 days after the implementation of the investment (i.e., closing).[32] There is no net benefit or other approval requirement with respect to these investments.

iv Legislative or regulatory guidance

The ICA enumerates a number of factors that must be considered by the Minister in conducting a net benefit test:

a the effect of the investment on the level and nature of economic activity in Canada;

b the degree and significance of participation by Canadians in the business;

c the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

d the effect of the investment on competition within any industry or industries in Canada;

e the compatibility of the investment with national industrial, economic and cultural policies; and

f the contribution of the investment to Canada's ability to compete in world markets.[33]

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29 If, at the end of the Minister's review, he or she is not satisfied that the investment is likely to be of net benefit to Canada, he or she must send a notice to that effect to the investor. The investor then has an additional 30 days (or any other period of time agreed to between the Minister and the investor) to make representations or submit undertakings to the Minister in an attempt to establish for the Minister that the investment meets the statutory net benefit to Canada test (ICA, Section 23(1)).

30 Examples of transactions where the ICA review took the full 75 days or longer include CNOOC/Nexen (100 days), PETRONAS/Progress Energy (148–162 days), Glencore International/Viterra Inc (103 days), KGHM Polska Miedź SA/Quadra FNX Mining Ltd (83 days), Walter Energy Inc/Western Coal Corp (91 days) (based on public information). See Brian A Facey and Joshua A Krane, *Investment Canada Act: Commentary and Annotation*, 2014 edition (Toronto: LexisNexis Canada, 2013).

31 ICA, Section 40(2).

32 ICA, Section 12.

33 ICA, Section 20.

In practical terms, the wide scope of these factors provides the Minister with considerable discretion to decide whether an investment is likely to be of net benefit to Canada. In addition to this statutory guidance, IRD has issued guidelines to assist foreign investors in understanding the application of the net benefit test in a number of contexts. For example, guidelines have been issued with respect to how an investor's plans and undertakings, and any representations received by the government from third parties, are factored into the net benefit analysis, as well as how the net benefit assessment is conducted in the context of proposed investments by SOEs.[34]

In assessing the net benefit factors in a given transaction, the Minister may consider representations made by, *inter alia*, federal departments and agencies, provinces that are likely to be significantly affected by the investment, third parties as well as the investor's plans for the Canadian business and proposed undertakings.[35] As noted above, plans and undertakings regarding the acquired Canadian business typically address, *inter alia*, future employment levels; plans for the Canadian head office of the acquired Canadian business; future capital expenditures; production targets; research and development; and charitable contributions. The duration of such commitments (for non-SOE investors) is typically around three to five years post-closing. An investor's proposed commitments need to be tailored to the specific facts and context of a particular investment and are subject to negotiation.

v Powers of enforcement

The Minister has a wide range of powers to enforce the ICA where he or she believes that a non-Canadian has failed to comply with the ICA. The Minister can, for example, apply for a court order directing the non-Canadian to divest itself of control of the Canadian business, directing the non-Canadian to comply with an undertaking previously given to the government in relation to the investment and imposing a penalty on the non-Canadian of up to C$10,000 for each day the non-Canadian is in contravention of the ICA.[36] If the Minister believes that a non-Canadian has failed to comply with an undertaking relating to an investment that has been reviewed and approved, he or she may, after the investment has been implemented, accept a new undertaking from the non-Canadian.[37] For example, in 2009, the government sued US Steel for failing to live up to the undertakings it provided to the Minister of Industry with respect to production and employment in connection with its acquisition of Stelco Inc in 2007. The government subsequently settled the case by agreeing to new undertakings from US Steel.[38]

34 See Industry Canada, Guidelines – Administrative Procedures and Guidelines – Investment by state-owned enterprises – Net benefit assessment: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html.

35 ICA, Section 19.

36 ICA, Section 40(2).

37 ICA, Section 39.1.

38 Investment Canada, Annual Report 2009–2010, 25 May 2012: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81132.html; PR Newswire, 'United States Steel Corporation Completes Acquisition

vi Parallel reviews under the ICA and the Competition Act

Investments by non-Canadians that are subject to review under the ICA are often (although not always) also subject to notification under Part IX of the Competition Act, although the threshold tests under the ICA and the Competition Act are different. In such circumstances, reviews are undertaken concurrently by IRD under the ICA and by the Competition Bureau under the Competition Act. As the effect of a proposed investment on competition is among the 'net benefit' factors under the ICA, IRD can be expected to solicit and receive the Competition Bureau's views on the expected competitive effects of a proposed transaction (and IRD can consult with the Competition Bureau even when a transaction is not subject to notification under the Competition Act). More generally, IRD can share information with and consider the views of provinces that are affected by a proposed investment in connection with the enforcement and administration of the ICA, including, *inter alia*, with respect to the implications of a proposed investment on competition.[39]

In addition, as the importance of the ICA process has expanded, the interface between competition law review of mergers (and other types of conduct) and parallel review of such by sectoral authorities has been brought into sharper focus, which raises additional issues related to timing and coordination. The interface issues are even more challenging when there are not only concurrent reviews in Canada, but also in the United States by the Antitrust Division of the Department of Justice, the Federal Trade Commission, the Committee on Foreign Investment in the United States and the Federal Communications Commission and other sector regulators (e.g., in the financial, energy, transportation and securities sectors, where parallel reviews, especially in merger cases, may take place). These interface issues are anticipated to become even more prevalent as foreign multinationals, including SOEs, move forward with proposed acquisitions in the energy and communications sectors.

vii Special rules and exemptions

SOEs

The Canadian government has published a number of guidelines and policies setting out its approach to reviewing investments by SOEs.[40] Reviewable investments made by

of Stelco Inc', 31 October 2007: www.prnewswire.com/news-releases/united-states-steel-corporation-completes-acquisition-of-stelco-inc-58980807.html. The case is notable for, *inter alia*, confirming that commitments made by an investor in the course of obtaining ICA approval are binding and enforceable. See *United States Steel Corporation v. Canada (Attorney General)*, [2010] FCJ No. 716, 213 CRR (2d) 8 (FC), aff'd [2011] FCJ No. 726, 236 CRR (2d) 1 (FCA). See also Blakes, 'Foreign Investment in Canada: Lessons from the U.S. Steel Case', 15 December 2011: www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1598.

39 ICA, Sections 19(d) and 36(3)(b).

40 Industry Canada, Guidelines – Administrative Procedures and Guidelines – Investment by state-owned enterprises – Net benefit assessment: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html; Industry Canada, 'Government of Canada Releases Policy Statement and Revised Guidelines

SOEs are analysed within the general 'net benefit' framework outlined above, but are subject to certain additional considerations. Specifically, IRD will consider, *inter alia*, the governance and commercial orientation of SOEs in determining whether reviewable acquisitions of control in Canada by the SOE are of net benefit to Canada.

From a governance perspective, the assessment will include whether the SOE adheres to Canadian standards of corporate governance and may include such things as the SOE's willingness to provide commitments related to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders. In addition, IRD will evaluate whether the SOE will commit to adhere to Canadian laws and practices, as well as whether and to what extent the non-Canadian is owned or controlled by a state. Regarding commercial orientation, the Minister will assess, *inter alia*, whether the Canadian business to be acquired will continue to have the ability to operate on a commercial basis with respect to:

a where to export;
b where to process;
c the participation of Canadians in its operations in Canada and elsewhere;
d support of ongoing innovation, research and development; and
e the appropriate level of capital expenditures to maintain the Canadian business in a position of global competitiveness.

Over and above the undertakings that are typically required of non-SOE investors (discussed above), SOEs may be subject to additional undertakings or obligations designed to ensure that their governance is in line with Canadian standards, and that the Canadian business that they acquire maintains a commercial orientation. Specific examples of undertakings that may be required of SOE investors include:

a the appointment of Canadians as independent directors on the board of directors;
b the employment of Canadians in senior management positions;
c the incorporation of the business in Canada; and
d the listing of shares of the acquiring company or the Canadian business being acquired on a Canadian stock exchange.[41]

In contrast to undertakings typically requested of non-SOE investors, which usually last for approximately three to five years, certain SOE-specific undertakings that are required for a deal to be approved can last as long as the investor is an SOE.

The government's recent particular focus on SOEs indicates that SOE investors should expect closer scrutiny of their investments. Further, the government has placed a special restriction on acquisitions of control by SOEs of Canadian oil sands businesses.

for Investments by State-Owned Enterprises', 7 December 2012: http://news.gc.ca/web/article-eng.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=711489&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2012&crtr.kw=&crtr.dyStrtVl=6&crtr.aud1D=&crtr.mnthStrtVl=12&crtr.page=2&crtr.yrndVl=2012&crtr.dyndVl=8.

41 See Industry Canada, Guidelines – Administrative Procedures and Guidelines – Investment by state-owned enterprises – Net benefit assessment: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html.

In particular, in December 2012, immediately after the government cleared CNOOC's acquisition of Nexen Inc and PETRONAS's acquisition of Progress Energy Resources Corp, the Prime Minister stated that 'foreign state control of oil sands development has reached the point at which further such foreign state control would not be of net benefit to Canada', and that going forward, acquisitions of control of Canadian oil sands businesses by SOEs will satisfy the 'net benefit' test only under 'exceptional circumstances'.[42] The government did not provide any detail as to what might constitute an 'exceptional circumstance', thus leaving open the possibility of an SOE acquisition of a Canadian oil sands business, although this clearly would be the exception.[43]

Given the application of a different monetary threshold test and additional scrutiny faced by SOE investors, a key initial step for an investor will be to assess whether it would constitute an 'SOE' for the purposes of the ICA. Consistent with its 2012 policy statement, recent amendments to the ICA broaden the definition of an SOE. In addition to capturing foreign governments and their agencies, the broadened definition of an SOE also captures any entity that is controlled or influenced, directly or indirectly, by such a government or agency.[44] The definition also captures 'an individual who is acting under the direction of' or 'who is acting under the influence of' such a government or agency.[45] Unlike the concept of 'control', which is defined under the ICA, the concepts of 'influence' and 'direction' are potentially quite broad, and no guidance is provided to illuminate these concepts.

The amendments also create new powers for the Minister of Industry to make 'control in fact' determinations in respect of SOEs,[46] notwithstanding the bright line control rules set out in the ICA as previously described. Specifically, following the amendments, the Minister can assess whether an investor that would otherwise qualify as a Canadian-controlled entity is 'controlled in fact' by one or more SOEs – the implication being that such an investment potentially could be reviewable under the ICA on the grounds that the investor would be non-Canadian (and in such case, also an SOE). Similarly, the amendments allow the Minister to determine that an SOE investor has 'acquired control' in fact of a Canadian business. This means that, even in the case of a minority investment by an SOE that would not otherwise constitute an acquisition of

42 See footnote 3.

43 The government's December 2012 policy statement also indicated that other sectors of the economy may, in the future, be subject to similar restrictions with respect to acquisition of control by SOEs. In particular, the government indicated that '[w]here due to a high concentration of ownership a small number of acquisitions of control by SOEs could undermine the private sector orientation of an industry, and consequently subject an industrial sector to an inordinate amount of foreign state influence, the Government will act to safeguard Canadian interests'. See Industry Canada, Statement Regarding Investment by Foreign State-Owned Enterprises, 7 December 2012: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html.

44 See footnote 25.

45 Ibid.

46 Separate and apart from the amendments, this power to make control in fact determinations already exists with respect to investments involving cultural businesses and investments that could raise national security concerns.

control under the ICA (e.g., an acquisition of less than one-third of a target corporation's voting shares), the Minister may determine, notwithstanding the applicable control rules set out under the ICA, that the investment constitutes an acquisition of control, thereby bringing the transaction within the purview of an ICA review. Prior to the amendments, such determinations of control by a foreign investor were made pursuant to more precise and predictable legal tests that are specified in the statute.

Cultural businesses

As noted above, investments involving business activities relating to Canada's cultural heritage or national identity, such as publishing, film, video, music and broadcasting, fall within the responsibility of the Minister of Canadian Heritage, and reviews are administered by CSIRD.[47] Acquisitions of control of Canadian cultural businesses are subject to a lower financial threshold for review, with the current financial threshold being C$5 million in assets of the Canadian business for direct acquisitions, and either C$5 million or C$50 million in assets for indirect acquisitions, depending on the proportion of Canadian assets (see Table 2, above). In addition, an investment that would be otherwise notifiable would be reviewable if, in the opinion of the Governor in Council, it is related to Canada's cultural heritage or national identity; and within 21 days following receipt of a complete notification the Cabinet issues an order for the review of the investment and the Director of Investments sends the non-Canadian investor a notice for review.[48] Unlike the general case where a direct acquisition would be subject to mandatory net benefit review prior to implementation, indirect acquisitions of cultural businesses and investments where the Governor in Council determines that the investment is related to Canada's cultural heritage and issues a notice to that effect within 21 days following receipt of a complete notification can be reviewed post-implementation.[49]

When assessing whether the acquisition of control of a Canadian cultural business is of net benefit to Canada, the Minister of Canadian Heritage will consider a number of factors specific to cultural businesses, including the extent to which the investment protects Canadian content, commits to nurturing Canadian talent and contributes to Canadian civic life.[50] While the term 'cultural business' is defined under the ICA,

47 Section 14.1(2)) of the ICA defines 'cultural business' to mean:

> *[...] a Canadian business that carries on any of the following activities, namely, (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers, (b) the production, distribution, sale or exhibition of film or video recordings, (c) the production, distribution, sale or exhibition of audio or video music recordings, (d) the publication, distribution or sale of music in print or machine readable form, or (e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.*

48 ICA, Section 15.

49 ICA, Section 16(2).

50 Canadian Heritage, Cultural Sector Investment Review Division, Net Benefit Undertakings and Canadian Cultural Policy: www.pch.gc.ca/invest/net-eng.cfm.

the Governor in Council has the authority to order a cultural review of an otherwise notifiable investment where it is 'in the public interest'.[51]

National security

As of 2009, the ICA includes a national security review regime, permitting the Minister of Industry to initiate a review of any acquisition by a foreign investor of an entity, in whole or in part, that has operations in Canada that 'could be injurious to national security', regardless of the size of the investment.[52] If the Minister believes that the investment could be injurious to national security, he or she may refer the transaction to the Governor in Council, who, following a review, may take any action considered advisable to protect national security, including blocking the transaction, ordering a divestiture of assets or control (i.e., where the non-Canadian investor has completed its investment) or authorising the investment on the basis of written undertakings.[53] The ICA does not define the term 'national security'.[54]

51 ICA, Sections 14.1(6), 15. Note that CSIRD provides additional guidance through its guidelines, including Revised Foreign Investment Policy in Book Publishing and Distribution: www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/bkp-eng.cfm; Canadian Content in Magazines: A Policy on Investment in the Periodical Publishing Sector: www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/prd-eng.cfm; and Investment Canada: Investment Canada Policy on Foreign Investment in the Canadian Film Distribution Sector: www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/film-eng.cfm.

52 ICA, Sections 25.1-25.2.

53 ICA, Sections 25.3-25.4. The ICA sets out the government agencies with which the Minister may consult in relation to an investment that may raise national security concerns. These agencies include the Department of Industry; the Department of Canadian Heritage; the Department of Public Safety and Emergency Preparedness; the Canadian Security Intelligence Service; the Royal Canadian Mounted Police; the Canada Border Services Agency; the Communications Security Establishment, Department of National Defence; the Department of National Defence; the Department of Foreign Affairs and International Trade; the Department of Justice; the Department of Natural Resources; the Department of Transport; the Canada Revenue Agency; the Privy Council Office; the Department of Public Works and Government Services; the Public Health Agency of Canada; the Department of Health; the Department of Citizenship and Immigration; the Department of Finance; and all provincial, regional and municipal police forces. See National Security Review of Investments Regulations, SOR/2009-271, Section 7.

54 The introduction of the ICA's national security provisions followed the government's decision in May 2008 to block US-based Alliant Techsystems Inc's proposed acquisition of the information systems and geospatial services business of MacDonald, Dettwiler and Associates Ltd (MDA) on net benefit to Canada grounds. At that time, although the national security provisions had not yet been enacted, it was widely suspected that national security played an important part in the responsible Minister's determination. MDA built, owned and operated Radarsat-2, a remote sensing satellite. There have been only a small number of national security reviews since the enactment of the national security provisions in 2009. One early example is George Forrest International Afrique SPRL's (GFI) proposed acquisition of Forsys Metals Corp (Forsys). In November 2008, GFI made an offer to acquire Forsys, an Ontario-based company whose operations were in Namibia, including its flagship Valencia uranium project, which produced

The Minister has 45 calendar days[55] after receiving notice of the investment (or after implementation of the investment, if an application for review or notification is not required or, in the case of a notification, filed in advance) to initiate a national security review,[56] and the Minister has five days thereafter to provide notice of his or her decision to order a review. Although the ICA does not provide for a pre-closing clearance process for a national security review, where either an application for review or notification is required, the non-Canadian investor can protect itself by including the following in its purchase agreement: a covenant allowing the investor to file a notification more than 50 days before closing (to allow the period for a possible commencement of a national security review to expire); and a closing condition providing that a national security review shall not have been initiated or, if any such review is initiated, that it shall have been concluded on terms and conditions satisfactory to the purchaser.[57]

The recent amendments extend the time period during which the Minister must make a net benefit determination in connection with an investment undergoing a national security review by 25 days, and introduce additional flexibility for the Minister and an investor to agree to an even longer timeline for concurrent reviews. According to the government's policy announcement in December 2012, the government will only use the new flexibility under the national security review timelines on 'an exceptional basis'.[58]

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low-grade uranium. On 18 August 2009, the Minister issued a notice to GFI pursuant to Section 25.2(1) of the ICA that its proposed acquisition of Forsys could be injurious to national security, and that an order for a national security review could be made under Section 25.3(1). The effect of the notice was to prohibit the completion of the investment unless and until the Minister issued a further notice indicating that no further action would be taken. This is believed to be the first notice issued under the national security provisions of the ICA. While the nature of the Minister's concerns have not been publicly disclosed, media reports suggest that the concerns related to the business in question (uranium production) and the source of funding for the investment, which may have been linked to Iran. Ultimately, the Minister's review of the investment was never completed, as Forsys terminated the investment in August 2009 following GFI's failure to transfer funds in accordance with the transaction agreement. See Brian A Facey and Joshua A Krane, *Investment Canada Act: Commentary and Annotation*, 2014 edition (Toronto: LexisNexis Canada, 2013). More recently, on 7 October 2013, the federal executive branch of the Canadian government (Cabinet) issued the first order prohibiting a proposed foreign investment in the telecommunications sector on the basis of the ICA national security provisions, as further described in Section VII, *infra*.

55 In addition to a five-day notice period (ICA, Section 21(2)).

56 The Minister may also send the investor a notice under Section 25.2(1) that the Minister has reasonable grounds to believe that the investment could be injurious to national security and request additional information before deciding whether to commence a full national security review within an initial 25-day period.

57 This is not an issue for reviewable transactions, since in such cases, investors must make an application to IRD and may not close the transaction until it has been reviewed and the Minister has given a net benefit determination.

58 See footnote 9. The amendments, as they pertain to the national security timelines, in addition to accompanying regulations, are expected to enter into force in the coming months.

Other exemptions

Section 10 of the ICA exempts a number of classes of investments from any net benefit review or notification requirement under the Act and also exempts certain classes of investments from the ICA's national security provisions. The classes of investments that are exempt from a potential net benefit review and notification requirement include:

a acquisitions by securities dealers in the ordinary course of business;

b acquisitions by venture capitalists in the ordinary course of business;

c acquisitions of control relating to the realisation of a security not for any purposes related to the ICA;

d acquisitions of control for the purpose of facilitating financing and not for any purpose related to the ICA, with the condition that the acquirer divest itself of control within two years or within a longer period as approved by the Minister;

e acquisitions of control through an amalgamation, merger, consolidation or corporate reorganisation following which ultimate control through ownership of voting interests remains unchanged;

f acquisitions of control of Crown corporations;

g acquisitions of control of corporations wholly owned by the Crown;

h transactions exempted under Part XII.01 of the Bank Act;

i involuntary acquisitions of control on the devolution of an estate or by operation of law;

j acquisitions of control by foreign insurance companies; and

k acquisitions of control of farming businesses in which real property is acquired in the same transaction.[59]

The classes of investments that are further exempted from the national security review provisions include:

a acquisitions of control relating to the realisation of a security not for any purposes related to the ICA;

b acquisitions of control through an amalgamation, merger, consolidation or corporate reorganisation following which ultimate control through ownership of voting interests remains unchanged, or acquisitions of control by foreign insurance companies, only if these acquisitions are subject to approval under another statute;[60]

c acquisitions of control of Crown corporations; and

d transactions exempted under Part XII.01 of the Bank Act.[61]

These exemptions generally relate to classes of transactions that are temporary in nature, are for the purpose of capitalising a business, do not result in a change in control, concern the sale of a Crown corporation or are exempted by the operation of other statutes.

59 ICA, Section 10(1)(a)-(k).

60 The acquisition must be approved under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act.

61 ICA, Section 10(2)(a)-(e).

Non-ICA foreign ownership restrictions

In addition to the ICA, other statutes that regulate specific industries may have their own foreign ownership restrictions and regulations. Examples of industries with specific ownership restrictions include telecommunications,[62] broadcasting,[63] airlines[64] and banking.[65] In addition, proposed transactions that involve federally regulated transportation undertakings may be subject to review under the Canada Transportation Act.[66]

V FOREIGN INVESTOR PROTECTION

Canada provides certain foreign investors with protection through a variety of regional and bilateral international investment treaties. Canada has established foreign investment promotion and protection agreements (FIPAs), which are more commonly known as 'bilateral investment treaties' outside Canada, with over two dozen countries.[67] A FIPA is a bilateral treaty between sovereign states with the purpose of increasing foreign investment flows between the party states through establishing protections for foreign investors linked to reciprocal binding obligations on the party states, including an opportunity for investors to pursue binding arbitration with the foreign country. Canadian FIPAs seek to encourage foreign investment by providing foreign investors with increased protection against discriminatory and arbitrary practices in the host state, ensuring adequate and prompt compensation in the event a foreign investor's investment is expropriated by a host state, and enhancing the predictability of regulations affecting foreign investors and their investments.[68]

i Existing agreements

Canada currently has 27 FIPAs (of varying strength) in force with various states, including Argentina, Costa Rica, the Czech Republic, Ecuador, Egypt, Jordan, Latvia, Romania, the Russian Federation, the Slovak Republic and Venezuela.[69] Over the past year, FIPA

62 Telecommunications Act, SC 1993, c 38 and Radiocommunication Act, RSC 1985, c R-2.

63 Broadcasting Act, SC 1991, c 11.

64 Canada Transportation Act, SC 1996, c 10.

65 Bank Act, SC 1991, c 46.

66 See footnote 64.

67 Foreign Affairs and International Trade Canada, Negotiations and Agreements: Foreign Investment Promotion and Protection (FIPAs) 13 June 2013: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

68 Foreign Affairs and International Trade Canada, Canada's Foreign Investment Promotion and Protection Agreements (FIPAs), 10 May 2013: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx.

69 Ibid.

agreements with Kuwait (as of 19 February 2014),[70] Tanzania (as of 9 December 2013)[71] and Benin (as of 12 May 2014)[72] have entered into force.

Note that Chapter 11 of the North American Free Trade Agreement (NAFTA) also provides rules relating to the treatment of investments and investors of other NAFTA parties.[73] NAFTA enables aggrieved foreign NAFTA investors to submit a claim for damages against the country complained of without any approval or involvement of the investor's government. Chapter 11 also enables investors to make claims that government measures have effectively expropriated their investment. These claims may recoup the value of the expropriated investment, including lost profits.

ii Agreements concluded or being negotiated

Canada is currently in negotiations to establish FIPAs with a number of countries in Africa, Asia and Europe. Of particular significance, on 18 October 2013, Prime Minister Stephen Harper announced that Canada and the European Union had reached an agreement in principle in respect of the Canada-European Comprehensive Economic and Trade Agreement (CETA). While the text of the CETA has not yet been released publicly (and the details of the agreement are still being negotiated), a technical summary published in respect of the agreement indicates that it will contain an 'investor protection' chapter, which is expected to include rights similar to those in a FIPA.[74]

Canada has also recently signed FIPA agreements with Cameroon (March 2014)[75] and Nigeria (May 2014),[76] although neither of these agreements has yet entered into

70 Foreign Affairs and International Trade, Agreement between Canada and The State of Kuwait for The Protection and Promotion of Investments, 19 February, 2014: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/kuwait-text-koweit.aspx?lang=eng.

71 Foreign Affairs and International Trade, Agreement between The Government of Canada and The Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, 9 December, 2013: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng.

72 Foreign Affairs and International Trade, Agreement between the Government of Canada and The Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 12 May 2014: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/benin-text.aspx?lang=eng.

73 North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289, c 11 (entered into force 1 January 1994).

74 Canada European-Union Comprehensive Economic and Trade Agreement (CETA), 'Canada Reaches Historic Trade Agreement with the European Union', 18 October 2013: www.actionplan.gc.ca/en/news/ceta-aecg/canada-reaches-historic-trade-agreement-european.

75 Foreign Affairs and International Trade, Agreement Between Canada and the Republic of Cameroon for the Promotion and Protection of Investments: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/cameroon-agreement-cameroun.aspx.

76 Foreign Affairs and International Trade, Canada-Nigeria Investment Promotion and Protection Agreement (FIPA) Negotiations, 6 May 2014: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/nigeria.aspx?lang=eng.

force. In addition, negotiations on a number of FIPAs[77] have concluded over the past year, although Canada has yet to formally sign these agreements. Perhaps the most important FIPA of recent years is the Canada–China FIPA, which was signed in September 2012 following negotiations that spanned almost two decades.[78] The Canada–China FIPA includes substantial investor protections and a relatively robust dispute resolution mechanism. The Canadian government tabled the Canada–China FIPA in the House of Commons on 26 September 2012. At the time of writing, the Canada–China FIPA is awaiting ratification via an Order-in-Council.[79]

iii Enforcement issues

While FIPAs provide general protections for foreign investors in Canada, certain industries and sectors are exempted from the agreements. For example, Canada's FIPAs generally do not prohibit Canada from adopting or maintaining measures, including those necessary to protect human, plant and animal life, to preserve the integrity of financial institutions and the financial system or for national security reasons. Increasingly, Canada's FIPAs also provide that a decision following a review under the ICA (or under the corresponding foreign laws) will not be subject to the FIPA's dispute settlement provisions.

FIPAs generally feature detailed rules on the standing of the investor, procedural requirements and judgment enforcement. Dispute settlement mechanisms of this sort allow aggrieved foreign investors to seek remedies against the host country (FIPAs do not provide for remedies against private parties) outside of national court systems, pursuant to the rules and procedures of one of the various international arbitration regimes, such as the International Centre for the Settlement of Investment Disputes (ICSID).[80]

VI OTHER STRATEGIC CONSIDERATIONS

While the overwhelming majority of reviewable transactions are cleared under the ICA,[81] merger scrutiny by IRD can potentially result in delay, increased cost and, in rare cases, even the divestiture of assets or dissolution of the merged entity. In light of these risks,

77 Burkina Faso (May 2014); Côte d'Ivoire (September 2013); Guinea (September 2013); Moldova (December 2013); Serbia (September 2013); and Zambia (March 2013).

78 Foreign Affairs and International Trade, Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations, 30 November 2012: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng.

79 Canada Treaty Information, Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments: www.treaty-accord.gc.ca/details.aspx?id=105363.

80 ICSID: https://icsid.worldbank.org/ICSID/Index.jsp.

81 See Investment Canada, Annual Report 2009–2010, 25 May 2012: www.ic.gc.ca/eic/site/ica-lic.nsf/vwapj/ica-report-2010-eng.pdf/$file/ica-report-2010-eng.pdf at 7; from 30 June 1985 to 31 March 2010, only one application for review was officially disallowed by the Minister of Industry.

where feasible, parties to a transaction should engage with regulatory counsel early in the deal process so that deal risk can be properly assessed.

i Deal structure and gating items

It is important for a foreign investor to understand if its proposed deal structure will be reviewable. Indirect investments, green field investments, non-controlling investments and acquisitions of control under the applicable financial threshold generally will not be subject to a net benefit review (but, as noted above, may nevertheless be subject to a national security review where national security concerns arise).

Similarly, the ICA's SOE rules will only be triggered where there is an acquisition of control by an SOE investor. As such, parties need to carefully assess the risk that, at a later date, there may be a determination that the investor falls within the broad definition of an SOE, or that a minority investment could constitute an acquisition of *de facto* control, or a risk of both. Parties also may want to consider transactional provisions that make it clear that the SOE investor would not be acquiring control in fact. In addition, in light of the government's revised SOE policy, under which SOE acquisitions of control of Canadian oil sands businesses would only satisfy the net benefit test in 'exceptional circumstances', whether an investor is an SOE and whether the SOE is acquiring control will be gating items for potential deals in the Canadian oil sands that exceed the relevant financial threshold.

ii Negotiating the deal terms

Parties can use the merger agreement to allocate ICA regulatory risk.[82] Where a transaction is expected to be subject to review under the ICA, parties should consider covenants in merger agreements to address, for example, the following:

a 'cooperation provisions' requiring parties to coordinate in the preparation and submission of filings. These provisions may also pertain to ongoing dialogue and cooperation with regulatory authorities, and delineate the measures that each side must take to secure closing and compliance with legislation;

b covenants to provide (or disallow) the vendor the opportunity to participate in any calls or meetings with IRD, and afford the other party the chance to review drafts and comment on any filings and submissions. Since the ICA applies only to an investor, a vendor does not have any standing under the ICA. For this reason, it is not uncommon for an investor to assert that the vendor should not have an automatic right to participate in all meetings with IRD. That said, each transaction is unique, and the issue of participation can be negotiated by the parties. In addition, covenants often extend the right for a party to designate some confidential or competitively sensitive information as 'external counsel only';

c efforts clauses (best efforts or commercially reasonable efforts) requiring purchasers to undertake various degrees of effort to obtain regulatory approval or comfort. In practice, the Minister requires undertakings in virtually every reviewable

82 However, parties should be cognisant of the extent to which the transaction agreement emphasises risk since merger agreements are subject to scrutiny by IRD.

transaction and parties should turn their minds to the types of undertakings that likely will be required to obtain Ministerial approval. Undertakings will, *inter alia*, typically address employment levels in Canada at the acquired Canadian business, plans for the Canadian head office of the acquired Canadian business, and future capital expenditures and research and development in Canada by the Canadian business. For SOE investments that are reviewable, the government generally will require additional undertakings compared with what would be required from non-SOE investors; for example, commitments pertaining to corporate governance, commercial operations, adherence to free market principles and industrial efficiency. As such, parties need to consider how to allocate regulatory risk, for example, through the use of covenants that specify the investor's obligations to obtain Ministerial approval;

d 'hell or high water' provisions requiring the purchaser to do all that it can to obtain a positive net benefit determination; and

e reverse break fees payable by the acquirer if the transaction does not receive regulatory approval. This provides protection for vendors if the deal does not close for regulatory reasons.

The length of ICA reviews can vary significantly depending on a number of factors, including the size and public profile of the Canadian business and the identity of the investor (including whether the investor is an SOE). In addition, given that the recent amendments do not prescribe the time period within which the Minister must determine that an investor is an SOE, there is at least some residual risk that the parties may close a transaction only to find at a later date that the Minister is considering a review of it. As such, parties will want to consider how to allocate this regulatory risk (e.g., through the inclusion of appropriate representations or indemnity provisions in the transaction agreement). Parties may also want to include a specific time frame within which they are required to respond to information requests or questions from regulatory authorities.

iii Engagement of advisers early in the process

ICA reviews take place in a politicised environment, sometimes under intense media scrutiny. Parties are well advised to engage counsel as early as possible in the planning process and, where appropriate, develop government and stakeholder relations strategies in the context of high-profile transactions that may attract significant media attention or attention from special interest groups. A thorough, well-planned government relations and public communications strategy, coordinated by counsel[83] working with the non-Canadian investor, can reduce the likelihood of an acquisition being denied for political reasons. Such strategies also work to ensure clear lines of communication with government officials reviewing the transaction.

83 The involvement of counsel is necessary to ensure a consistent message and to preserve legal privilege.

VII CURRENT DEVELOPMENTS

While the large majority of reviewable investments are approved without much fanfare, the government has stepped up enforcement in recent years. A case in point was the Minister's rejection on net benefit grounds of BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan in 2010.[84] Similarly, in 2009, the government sued US Steel for failing to live up to the undertakings it provided to the Minister of Industry with respect to production and employment in connection with its acquisition of Stelco Inc in 2007.[85]

The most recent high profile transaction reviewed under the ICA was Accelero Capital Holdings' (Accelero) proposed acquisition of the Allstream division of Manitoba Telecom Services Inc (MTS). On 7 October 2013, the federal executive branch of the government (Cabinet) issued the first order prohibiting a proposed foreign investment on the basis of the national security provisions under the ICA (previous transactions had been abandoned at the stage of the receipt of a national security review notice). The Minister of Industry and the Cabinet are believed to have undertaken a full national security review of the transaction, which led to a prohibition order approximately five months after the public announcement of the transaction. Although Accelero claimed to have made substantial commitments (i.e., undertakings) in support of its proposed investment, the federal government issued a statement rejecting Accelero's bid on national security grounds.[86] The government declined to offer any reasons for the rejection as a result of confidentiality concerns.

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84 On 3 November 2010, the Minister indicated that, at the time, he was not satisfied that the proposed investment was 'likely to be of net benefit to Canada'. BHP Billiton had the right to make additional representations and submit undertakings for 30 days after the Minister's notice; however, BHP Billiton determined that the condition of its offer relating to the receipt of a net benefit determination under the ICA could not be satisfied, and accordingly, the offer was withdrawn. See Industry Canada, 'Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation', 3 November 2010: www.ic.gc.ca/eic/site/064.nsf/eng/06031.html.

85 Investment Canada, Annual Report 2009–2010, 25 May 2012: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81132.html; PR Newswire, 'United States Steel Corporation Completes Acquisition of Stelco Inc.', 31 October 2007: www.prnewswire.com/news-releases/united-states-steel-corporation-completes-acquisition-of-stelco-inc-58980807.html. As noted above, the government subsequently settled the case by agreeing to new undertakings from US Steel.

86 Industry Canada, 'Statement by the Honourable James Moore on the Proposed Acquisition of the Allstream Division of Manitoba Telecom Services Inc. by Accelero Capital Holdings', 7 October 2013: http://news.gc.ca/web/article-en.do?nid=778709:

The Government of Canada has concluded its review of Accelero Capital Holdings' proposed acquisition of the Allstream division of Manitoba Telecom Services Inc. (MTS) under the national security provisions of the Investment Canada Act. The result of this review is that the transaction will not proceed. MTS Allstream operates a national fibre optic network that provides critical telecommunications services to businesses and governments, including the Government of Canada.

Other high profile transactions reviewed under the ICA in recent years include CNOOC's acquisition of Nexen and PETRONAS' acquisition of Progress Energy,[87] which closed in February 2013 and December 2012, respectively.[88] While both transactions were approved under the ICA, they prompted the government to revise its SOE guidelines, place special restrictions on SOE acquisitions of control of Canadian oil sands businesses and pass amendments that give the government greater discretion in determining whether an investment should be treated as an 'SOE investment' for the purposes of the ICA, as explained above. IRD's increased enforcement activity and recent changes to the ICA highlight the importance of carefully considering the application of the ICA to a transaction where the investor has links to a foreign state.

Foreign investment is likely to remain under the spotlight in Canada in coming years. While the number of transactions subject to a net benefit review is likely to decrease as a result of the increase in the applicable financial threshold over a four-year period to C$1 billion in enterprise value, for those transactions that are reviewable, parties will continue to turn their minds to identifying and managing ICA regulatory risks. The government can be expected to continue clearing the large majority of transactions, but parties will have to consider the potential impacts of the ICA on deal timing and the undertakings that will be required of the investor to secure a positive net benefit determination. In this respect, advanced careful planning in relation to potential review issues and the thoughtful development of proposed undertakings will prove to be of significant assistance in bringing about a successful result.

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87 Both transactions were cleared by the government on 7 December 2012: Industry Canada, 'CNOOC Limited's Acquisition of Nexen Inc.': http://news.gc.ca/web/article-eng.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=711499&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2012&crtr.kw=&crtr.dyStrtVl=6&crtr.aud1D=&crtr.mnthStrtVl=12&crtr.page=2&crtr.yrndVl=2012&crtr.dyndVl=8; Industry Canada, 'Petronas' Acquisition of Progress': http://news.gc.ca/web/article-eng.do?crtr.sj1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=711509&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2012&crtr.kw=&crtr.dyStrtVl=6&crtr.aud1D=&crtr.mnthStrtVl=12&crtr.page=1&crtr.yrndVl=2012&crtr.dyndVl=8. *CNOOC/Nexen* closed on 25 February 2013 and *PETRONAS/Progress* closed on 12 December 2012.

88 Progress Energy Canada Ltd, 'Progress Announces Completion of the Acquisition by PETRONAS', 12 December 2012: www.progressenergy.com/progress-announces-completion-of-the-acquisition-by-petronas; Nexen Inc, 'Nexen Announces Completion of Acquisition by CNOOC Limited', 25 February 2013: www.nexeninc.com/en/AboutUs/MediaCentre/NewsReleases/News/Release.aspx?year=2013&release_id=135183.

Appendix 1

ABOUT THE AUTHORS

BRIAN A FACEY

Blake, Cassels & Graydon LLP

Brian Facey is the chair of Blakes competition, antitrust and foreign investment group, widely regarded as the leading competition law practice in Canada. According to Law Business Research's *Who's Who Legal: Canada 2013* (Competition), 'Brian Facey emerges as the 'most highly nominated' practitioner in our research'. For 20 years, he has advised clients in hundreds of regulatory matters, including cross-border and domestic merger transactions, criminal cartel cases, class actions, and distribution and advertising matters under the Competition Act.

Mr Facey has appeared on behalf of clients before the Competition Bureau, the Competition Tribunal, the Federal Court, the Federal Court of Appeal and various levels of Ontario courts. He also represents foreign-controlled investors under the provisions of the Investment Canada Act and the State-Owned Enterprise Guidelines, which regulate the acquisition of foreign control of Canadian businesses, and has secured approvals for foreign investors in many of Canada's key industries.

Mr Facey is recognised as one of Canada's leading competition lawyers in every major lawyer-ranking publication, including *Chambers Global: The World's Leading Lawyers for Business 2014* (Band 1); *The 2014 Lexpert Guide to the Leading U.S./Canada Cross-border Corporate Lawyers in Canada*; *The Legal 500 Canada 2014*; BTI Client Service All-Star Awards 2014 (named one of the top 15 antitrust lawyers in the world); Law Business Research's *The International Who's Who of Competition Lawyers & Economists 2014*; *The International Who's Who of Business Lawyers 2014*; *The 2014 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada;* Legal Media Group's *Guide to the World's Leading Competition and Antitrust Lawyers 2014; The Best Lawyers in Canada 2014*; *The Canadian Legal Lexpert Directory 2014* (Most Frequently Recommended); and *Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms and Attorneys* (2012 edition).

JASON GUDOFSKY

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Jason Gudofsky regularly provides strategic advice to domestic and foreign firms involved in merger and joint venture transactions, including providing risk assessments and navigating reviews through the Canadian Competition Bureau. He also provides advice in respect of strategic alliances, unilateral conduct, cartel investigations and compliance matters. He has been involved in the negotiation of complex remedies and orders with the Competition Bureau and before the Competition Tribunal in the context of both mergers and cartel investigations.

Mr Gudofsky advises foreign and Canadian vendors under the Investment Canada Act (ICA), and represents clients before the Investment Review Division of Industry Canada and the Cultural Sector Investment Review branch of Canadian Heritage. He has negotiated undertakings in a wide range of industries to secure 'net benefit to Canada' determinations, the standard necessary for reviewable investments to be completed under the ICA.

Before joining Blakes, Mr Gudofsky practised in the Brussels office of a leading international law firm.

NAVIN JONEJA

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Navin Joneja regularly advises clients engaged in mergers, joint ventures and other types of strategic alliances concerning the notification and clearance provisions of the Investment Canada Act and the Canadian Competition Act. He also counsels clients concerning potentially anti-competitive business practices, as well as international trade and business compliance matters such as foreign market access, export controls and economic sanctions. Notable matters in which he has been involved include, *inter alia*, transactions such as *Penguin/Random House*, *Maple/TMX*, *BHP Billiton/PotashCorp* and the representation of Visa in Canadian antitrust litigation.

Prior to joining Blakes in 2003, Mr Joneja practised law in Washington, DC in related areas including foreign investment reviews under the Exon-Florio statute. He is recognised in several publications, including *Chambers* and *Who's Who Legal*, and was recognised as one of the Top 40 Competition Lawyers Under 40 worldwide by *Global Competition Review*.

JULIE SOLOWAY

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Julie Soloway advises both domestic and foreign clients on all aspects of competition law, with a particular emphasis on multinational mergers and acquisitions. She also provides advice on strategic alliances, unilateral conduct cases, criminal and civil investigations, and compliance matters.

She has advised many foreign investors, including state-owned investors, on the Investment Canada Act. She has secured approvals for foreign investors in many of Canada's key industries, such as pharmaceutical, financial services and technology. As a member of the American Bar Association, Ms Soloway has served on the Section of Antitrust Law leadership for over seven years, and currently is vice-chair of the International Committee, and formerly was vice-chair of the Mergers and Acquisitions and Unilateral Conduct Committees, as well as a past editorial board member of the Antitrust Law Developments Annual Update. She is past chair of the International Competition and Trade Law Committee of the Canadian Bar Association's Competition Law Section and Foreign Investment Review Committee.

Ms Soloway is recognised as a leading competition lawyer in the following publications: *Chambers Global: The World's Leading Lawyers for Business 2013*; *Global Competition Review 2013* (Women in Antitrust Edition); Law Business Research's *The International Who's Who of Competition Lawyers and Economists 2013*; Law Business Research's *Who's Who Legal: Canada 2012*; and Legal Media Group's *Expert Guide to the Leading Women in Business Law 2012* (Competition and Antitrust).

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Cassandra Brown is an associate at Blake, Cassels & Graydon LLP in the firm's competition, antitrust and foreign investment group. She advises on foreign investment merger review under the Investment Canada Act. She also advises on all aspects of competition law, including mergers and acquisitions, distribution practices, abuse of dominance issues, criminal and civil investigations, and compliance.

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