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Canada continues to welcome foreign investment with fine-tuning of *Investment Canada Act*

The Canadian Government has introduced three improvements to the *Investment Canada Act* ("ICA") process for reviewing foreign investments as adjustments to its budget legislation (Bill C-38). Two relate to transparency and one relates to compliance with undertakings.

reviewable transactions

The ICA requires that direct acquisitions of large Canadian businesses (value of assets greater than $330 million of assets in 2012) be reviewed under a "net benefit to Canada" test. (Smaller and indirect acquisitions may also be subject to review in the cultural industries or where the acquirer is not from a WTO-member country.)

The rejection of BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan in 2010 prompted a media clamour that Canada might have turned hostile towards foreign investment, that decision-making could be politically influenced and that the ICA was non-transparent. However, BHP/PCS was only the third rejected transaction since the ICA was enacted in 1985. The suggestion that the Conservative Government — which was re-elected with a large Parliamentary majority in May 2011 — does not welcome investment is simply wrong: it has an extensive track record of approving ICA applications in a wide range of sectors (prior to and since BHP/PCS), and has also demonstrated proactive commitment to policies and negotiation of agreements

which will expand inbound and outbound investment and trade with numerous countries.

The complaint that ICA decisions may be politically-influenced is also peculiar. The ICA was deliberately designed to place decision-making in the hands of an elected official (the Minister of Industry or, in cultural cases, the Minister of Heritage) in order to allow the broad list of economic factors that can be considered under the "net benefit" test to be evaluated in a substantive rather than technocratic way. Investors and their advisors can address the relevant factors and the relevant decision-makers/influencers in their regulatory clearance strategies.

transparency

The issue of transparency is not clear-cut, because there is a trade-off between its benefits (chiefly information for interested stakeholders and accountability of public decision-making) and the important value of respecting the confidentiality of sensitive transactional and commercial information.

The proposed amendments are designed to fine-tune this balance by allowing the Minister to disclose transactions which have been approved and to provide reasons in the rare cases where an investment is determined not to be of net benefit. In the latter situation, the investor will receive an opportunity to make representations about confidentiality before the disclosure occurs, and will also have 30 days in which to address the reasons and seek to persuade the Minister that the net benefit test can be met (e.g. through negotiation of undertakings). These are positive changes.

compliance with undertakings

Another case which has generated fear-mongering about Canada's treatment of foreign investors is the Stelco compliance proceeding. The Canadian Government took US Steel to court and sought sizeable penalties for alleged failures to adhere to its undertakings from its 2007 acquisition of Stelco (at that time one of Canada's largest steel producers). One compliance case in a quarter-century hardly signals hostility to foreign investment; it

merely indicates that investors should assume that the Canadian Government will expect them to follow through on written undertakings provided as part of securing a "net benefit" approval. The court challenge was ultimately settled with revised future commitments by US Steel.

The proposed amendments contain one enhancement of the undertakings mechanism. The Minister may request security that can be used to provide assurance that undertakings will be honoured. In our view, security normally will not be necessary. We expect that the Government will exercise this option in a reasonable manner and that it will not become a significant barrier to investors who want to implement transactions that are intended to meet the "net benefit" test.

In summary, the proposed changes allow the foreign investment review process to operate more transparently and with stronger compliance incentives, but do not change Canada's "open for business" policy.

by A. Neil Campbell

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a cautionary note