DAVIES

Investment Canada Act

Guide for Foreign Investors in Canada

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Introduction

Foreign investments in Canada are subject to the federal *Investment Canada Act*.

The purpose of the *Investment Canada Act* (ICA)[1] is to encourage foreign investment in Canada while at the same time ensuring that foreign investment contributes to economic growth and employment opportunities. In addition, the ICA has the further purpose of protecting national security by providing for the review of foreign investments in Canada that could be injurious to national security.

The principal responsibility for enforcing the ICA belongs to the federal Minister of Innovation, Science and Economic Development Canada (ISEDC)[2]; investments in "cultural businesses" are the responsibility of the federal Minister of Canadian Heritage. (Collectively, these ministers are referred to here as the "Responsible Minister.")[3]

Foreign investors whose acquisitions are subject to review under the ICA must satisfy the Responsible Minister that the acquisition is likely to be of "net benefit to Canada."[4] Acquisitions are rarely refused approval under the net benefit test — the only two rejections of proposed acquisitions in non-cultural sectors being one in 2008 and the other in 2010.[5] However, the ICA review process can introduce delay into the transaction timetable.[6] In addition, foreign investors are usually obliged to provide binding undertakings to the Responsible Minister in order to obtain approval. These can involve commitments to undertake capital expenditures, maintain certain employment levels and ensure Canadian participation in the management of the business, among other things.[7] As a result of concerns about the impact on the Canadian economy of investments by state-owned-enterprises (SOEs), the prior federal government adopted specific provisions and guidelines governing investments in Canada by foreign SOEs.[8] The current government initially appeared to be more lenient with respect to investments by SOEs, as evidenced by its decision in 2017 to conduct a fresh review of an investment that was rejected by the previous government, and ultimately to approve that investment. (In particular, the government approved the purchase of ITF Technologies, a Montréal-based high-tech firm, by O-Net, a Chinese developer of optical networking components that was reported to be effectively controlled by the Chinese government.) However, as noted later in this guide, the current government subsequently blocked a proposed acquisition by a Chinese SOE in the construction sector on national security grounds.

In addition to this general net-benefit-to-Canada review process, the Responsible Minister, and ultimately the federal Cabinet, has broad discretion to review investments on grounds that they could be injurious to national security. If an investment (whether completed or proposed) is found to be injurious to national security, the federal Cabinet has authority to block the investment in whole or in part (including ordering divestiture when the investment is already completed) or impose conditions on the investment.

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1 RSC 1985, c 28 (1st Supp.). There are also sector-specific rules governing foreign investments in certain key industries, such as telecommunications, broadcasting, airlines and banking. These rules are beyond the scope of this guide.

2 The Investment Review Division (IRD) is the specific part of ISEDC charged with administering the ICA.

3 The definition of "cultural business" is provided in Thresholds for Review, later in this guide. The Cultural Sector Investment Review division is the counterpart of the IRD in Heritage Canada.

4 The "net benefit" test is discussed in more detail under Net Benefit Test, later in this guide.

5 In 2008, the Minister of Industry (predecessor to the Minister of ISEDC) denied approval of the proposed $1.325-billion acquisition by Alliant Techsystems Inc. of the space division of MacDonald, Dettwiler and Associates Ltd. In 2010, the Minister of Industry announced that BHP Billiton's proposed $38-billion acquisition of Potash Corporation of Saskatchewan Inc. was not likely to be of net benefit to Canada. (BHP Billiton subsequently abandoned the transaction during the 30-day "appeal" period during which BHP Billiton could submit additional representations and undertakings.) These are the only two non-cultural acquisitions to be turned down since the ICA came into force in 1985.

6 The timing of the ICA review process is discussed in more detail under The Review Process - Net Benefit, later in this guide.

7 Undertakings are discussed in more detail under Undertakings, later in this guide.

8 The SOE guidelines are discussed in more detail under State-Owned Enterprises, later in this guide.

1. Application of the *Investment Canada Act*

The ICA applies whenever a "non-Canadian" (i) establishes a new "Canadian business" or (ii) acquires "control" of an existing Canadian business. Furthermore, as discussed below under National Security Review, there is scope to review an investment under the ICA on national security grounds even when there has been no acquisition of control of a Canadian business.

NON-CANADIAN

A "non-Canadian" is defined under the ICA as an individual, entity, government or government agency that is not "Canadian."

The ICA rules governing who/what is a "Canadian" (and therefore who/what is a "non-Canadian") can be complex. Briefly, however, an individual is a Canadian for the purposes of the ICA if he or she is a Canadian citizen or a permanent resident of Canada who has been ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship. (Permanent residents may apply for Canadian citizenship after four years in Canada.)

A corporation is Canadian if the ultimate controlling shareholders are Canadian. In the case of widely held companies, it may be practically impossible to determine whether shareholders are Canadian. Accordingly, the test for widely held companies is based on the citizenship or permanent resident status of the members of the company's board of directors. If at least two-thirds of the board are Canadian individuals, and the company is not controlled in fact through the ownership of its shares, the corporation will be considered Canadian; if not, the corporation is non-Canadian. (There are similar status rules for partnerships and trusts.)

CANADIAN BUSINESS

The term "Canadian business" is defined in the ICA to mean a business carried on in Canada that has (i) a place of business in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the business; and (iii) assets in Canada used in carrying on the business. Note that a Canadian business need not be controlled by Canadians – the acquisition of a foreign-controlled business operating in Canada is also subject to the ICA. In addition, a business need not be carried on entirely in Canada to qualify as Canadian.

"Business" is defined to include any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit. Thus, for example, an enterprise that is carried on for a charitable or other non-profit objective is not a business for these purposes.

An entity that is in a "pre-operational state" because of the lack of an essential asset or the source of supply or manpower is also not considered a business for these purposes. Consequently, an oil and gas property that is only at the exploration stage is not considered a business under the ICA. However, an oil and gas property that contains recoverable reserves and is

The ICA applies whenever a "non-Canadian" establishes a new "Canadian business" or acquires "control" of an existing Canadian business.

capable of production (or is already in production) will be treated as a business. Similarly, mineral properties that are only at the exploration stage are not considered to be businesses. However, a producing mine is considered to be a business, as is a property on which development of a mine has been commenced for the purpose of production.

ACQUISITION OF CONTROL

The ICA contains detailed provisions defining the concept of an "acquisition of control." In summary, these provisions state that control can be acquired only through the acquisition of (i) voting shares of a corporation; (ii) "voting interests" of a non-corporate entity (which for partnerships and trusts means an ownership interest in the assets thereof that entitles the owner to receive a share of the profits and to share in the assets on dissolution); or (iii) all or substantially all of the assets of a Canadian business. Note that the acquisition of shares of a non-Canadian company with a Canadian division, but no Canadian subsidiaries, is not an acquisition of control of a Canadian business within the meaning of the ICA.

For the purposes of determining whether an investor has acquired "control" of a corporation, the following general presumptions apply:

- The acquisition of a majority of voting shares is deemed to be an acquisition of control.
- The acquisition of one-third or more but less than a majority of voting shares is presumed to be an acquisition of control unless it can be shown that the acquired shares do not give the investor "control-in-fact" over the corporation.
- The acquisition of less than one-third of the voting shares is deemed not to be an acquisition of control.

Similarly, for the purposes of determining whether an investor has acquired control of a non-corporate entity, the following general presumptions apply:

- The acquisition of a majority of voting interests is deemed to be an acquisition of control.
- The acquisition of less than a majority of voting interests is deemed not to be an acquisition of control.

Because of the unique sensitivities attached to "cultural businesses" in Canada, the Responsible Minister may deem there to have been an acquisition of control of a Canadian cultural business even if the general criteria for establishing control are not met.

EXEMPTIONS

The ICA contains several exemptions that preclude its application. For example, the ICA does not apply to corporate reorganizations in which the foreign party that ultimately controls the Canadian business in fact does not change. The ICA also does not govern certain transactions to which the federal *Bank Act* applies.

2. Thresholds for Review

Acquisitions are subject to net benefit review under the ICA if they exceed certain prescribed financial thresholds. If the relevant thresholds are not exceeded, the only requirement on the foreign investor is to submit a relatively straightforward notification within 30 days following closing. (However, even when the net benefit review thresholds are not exceeded, an ICA review may take place on national security grounds. See National Security Review, below.) Investments to establish a new Canadian business (other than a cultural business) are not subject to net benefit review — the only requirement is to submit a notification.

The thresholds for net benefit review vary depending upon several considerations, including the following:

- Is the foreign investor, or the Canadian business being acquired, ultimately controlled by trade agreement investors?
- Is the foreign investor, or the Canadian business being acquired, ultimately controlled by WTO investors?
- Is the acquisition of control direct or indirect?
- Is the foreign investor an SOE?
- Is the Canadian business a cultural business?

TRADE AGREEMENT INVESTORS

Under the ICA, generally an individual will be a trade agreement investor if he or she is a "national" of a country (other than Canada) that is a "trade agreement country" — that is, a country that has a trade agreement with Canada. Currently, the list of trade agreement countries includes Australia, Japan, New Zealand, Singapore, Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea, the United States and the European Union and its member states. (The list of trade agreement countries may change as the Canadian government enters or exits trade agreements in the future.) Further, a corporation or other entity will be a trade agreement investor if it is ultimately controlled by one or more trade agreement investors. A widely held public company will generally be a trade agreement investor for the purposes of the ICA (i) if a majority of the voting shares of the public company are owned by trade agreement investors; or (ii) if no person or voting group controls the company, at least two-thirds of the members of the company's board of directors are any combination of trade agreement investors and Canadians.

WTO INVESTORS

In general, an individual will be a World Trade Organization (WTO) investor if he or she is a "national" of a country (other than Canada) that is a member of the WTO or has a right of permanent residence in a WTO member country.[9] Similar to the definition of a trade agreement investor, a corporation or other entity will be a WTO investor if it, in turn, is ultimately controlled by one or more WTO investors. A widely held public company will generally be a WTO investor for the purposes of the ICA (i) if a majority of the voting shares of the public company are owned by WTO investors; or (ii) if no person or voting group controls the company, at least two-thirds of the members of the company's board of directors are any combination of WTO investors and Canadians.

[9] A list of WTO member countries as of the date of writing is attached hereto as an appendix.

The acquisition of a Canadian business that is a cultural business is subject to lower review thresholds under the ICA because of the perceived sensitivity of the cultural sector.

INDIRECT ACQUISITION

Generally speaking, an "indirect acquisition" for the purposes of the ICA occurs if an investor is acquiring control of a corporation that is incorporated outside Canada and that controls an entity in Canada carrying on a Canadian business.

STATE-OWNED ENTERPRISE

An SOE is broadly defined to include a foreign government or government agency, or an entity that is controlled or influenced, directly or indirectly, by a foreign government or government agency. The ICA does not define the term "influenced," but it is clear that it would include something less than legal control or control-in-fact.

CULTURAL BUSINESS

The acquisition of a Canadian business that is a cultural business is subject to lower review thresholds under the ICA because of the perceived sensitivity of the cultural sector. A "cultural business" includes a business that carries on any of the following activities: (i) 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; (ii) production, distribution, sale or exhibition of film or video recordings; (iii) production, distribution, sale or exhibition of audio or video music recordings; (iv) publication, distribution or sale of music in print or machine-readable form; or, for some purposes, (v) any 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.

APPLICABLE REVIEW THRESHOLDS

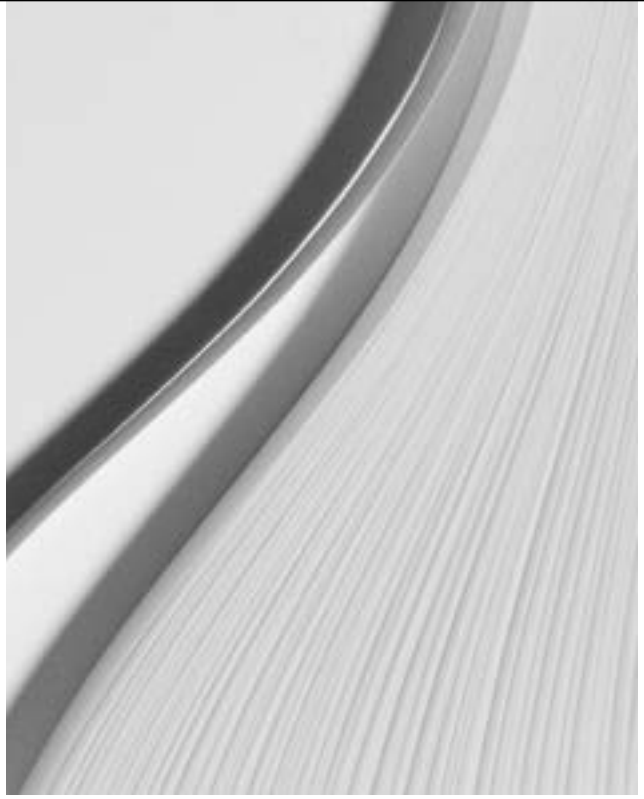
Summarized briefly, an acquisition of a Canadian business that exceeds the following thresholds will be subject to review under the ICA:

When the Canadian business is controlled by a trade agreement investor or is being acquired by a trade agreement investor:

– Direct acquisitions will be reviewable only when the value of the entity carrying on the Canadian business and all other acquired entities in Canada (not limited to their assets in Canada) is equal to or greater than C$1.568 billion in *enterprise* value of assets[10] (for 2019; adjusted annually) unless the investor is an SOE or the Canadian business is a cultural business.

[10] In the case of an acquisition of control of a Canadian business that is publicly traded, the enterprise value of the assets of the Canadian business is the market capitalization of the entity plus the entity's total liabilities (excluding operating liabilities) and minus the assumed cash and cash equivalents. Market capitalization is determined on the basis of the average daily closing price of each class of security outstanding multiplied by the average number of that security outstanding, calculated over a prescribed period.

In the case of an acquisition of control of a Canadian business that is not publicly traded or in the case of an asset acquisition, the enterprise value of the assets of the Canadian business is the acquisition value plus total liabilities assumed (excluding operating liabilities) of the business acquired and minus the assumed cash and cash equivalents.



When the Canadian business is controlled by a WTO investor or is being acquired by a WTO investor that is not a trade agreement investor:

- Direct acquisitions will be reviewable only when the value of the entity carrying on the Canadian business and all other acquired entities in Canada (not limited to their assets in Canada) is equal to or greater than C$1 billion in *enterprise* value of assets unless the investor is an SOE or the Canadian business is a cultural business.

- When the investor is an SOE, the threshold is C$416 million in *book* value of assets (for 2019; adjusted annually).

- When the Canadian business being acquired is a cultural business, the threshold is C$5 million in *book* value of assets (whether or not the investor is an SOE).

"Indirect" acquisitions by or from a WTO investor (including an acquisition by an SOE) will not be reviewable but will be subject to notification only, unless the Canadian business is a cultural business and the *book* value of the relevant assets exceeds C$50 million, in which case a review obligation would apply.

When no WTO investor is involved as the acquiring party or vendor:

- A direct acquisition will be reviewable if the book value of the relevant assets involved exceeds C$5 million.

- An indirect acquisition will be reviewable if the book value of the relevant assets involved exceeds C$50 million (except that the C$5-million threshold applies to indirect acquisitions if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the entire transaction).

Note some additional points in this regard:

- There is no *de minimis* exception to the determination whether a business is a cultural business.

- A business will be considered a cultural business even if its cultural activities represent only a small part of its overall operations.

- The Responsible Minister may decide to review the acquisition of control over certain Canadian cultural businesses even if the acquisition does not trigger any of the foregoing thresholds.

3. Net Benefit Test

CRITERIA

Among the relevant factors that the Responsible Minister will assess in determining "net benefit" are the following:

- **Economic Activity:** The investor is required to explain the effect of the investment on the level and nature of economic activity in Canada, including the effect of the investment on employment, resource processing and the utilization of parts, components and services produced in Canada. The number of jobs to be created (or lost) in Canada will be an important consideration, as will any incremental investment over existing levels.

- **Canadian Participation:** The investor is required to describe the degree and significance of continued participation by Canadians in the Canadian business — for example, whether (and how many) Canadians will act as directors and managers of the acquired entity, or whether equity will be made available to Canadian employees through a stock option plan.

- **Competition/Productivity:** The investor is required to explain the effect of the investment on competition in Canada, as well as on factors such as (i) productivity, (ii) industrial efficiency, (iii) technological development, and (iv) product innovation and variety in Canada. As a general rule, Canada's Competition Bureau will be asked for its views in this regard.

- **National and International Impact:** The investor is required to address the compatibility of the investment with "national industrial, economic and cultural policies," which include both federal policy objectives and those of any government or legislature of a province likely to be significantly affected by the investment. The investment also will be assessed in light of its contribution to Canada's ability to compete in world markets.

SECTORS

The Responsible Minister has issued some specific policies setting out how the net benefit test will be applied to certain sectors, including book publishing and film production and distribution.

In some cases, the policies prohibit foreign investments regardless of the benefits offered. For example, such policies state that non-Canadians may not acquire Canadian-owned and -controlled film or book distribution businesses (although they may acquire Canadian businesses in these sectors from other non-Canadians). However, exceptions have been made to some of these policies.

NATIONAL SECURITY

In addition to the foregoing criteria for a net benefit review, the ICA provides broad discretion to review investments — whether or not subject to a net benefit review — on grounds of national security. See National Security Review, below.

4. The Review Process – Net Benefit

The ICA net benefit review process requires the submission of an application form that sets out information about the investor and the Canadian business being acquired.

APPLICATION FOR REVIEW

The ICA net benefit review process requires the submission of an application form that sets out information about the investor and the Canadian business being acquired. The most substantive portion of the application is that in which the investor sets out its plans for the Canadian business and explains why its investment is likely to be of net benefit to Canada.

The ICA does not provide any formal avenue for interested parties to intervene in this review process. However, federal Ministries with a potential interest in the transaction will be consulted, as will each province in which the Canadian business has at least 10 employees. Some provinces occasionally seek undertakings to benefit employees, suppliers and economic activity in that province. Other provinces have historically been involved more sporadically (e.g., if a key industry is at issue).[11]

TIMING

The Responsible Minister has 45 days following receipt of a completed application for net benefit review to either approve or deny the application.

If the Responsible Minister's review is not completed within that period, the Responsible Minister has the unilateral authority to extend the review period for a further 30 days (for a total of 75 days from the start of the process). If the Responsible Minister still requires more time at the end of that period, the investor's consent must be obtained for any further extension (which has no set limit).

If the Responsible Minister has advised the applicant that he or she is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings within 30 days of the date of the notice of the Responsible Minister's decision (or any longer period that may be negotiated).

[11] The province of Saskatchewan was actively involved in the review of BHP Billiton's proposed $38-billion acquisition of Potash Corporation of Saskatchewan Inc. in 2010.

On average, net benefit reviews take approximately 75 days to be completed, although there are cases involving particularly sensitive transactions when the review process took several months to complete.[12]

In the case of transactions that are also subject to a national security review, the Responsible Minister will have additional time to complete the net benefit review.

PRE- OR POST-CLOSING

A key consideration for investors in terms of timing is whether the net benefit review is to take place before or after closing. In the case of direct acquisitions, investors are generally obliged to submit their applications for review and obtain the Responsible Minister's approval before they may complete the acquisition. In contrast, the review process for indirect acquisitions (generally required only for cultural businesses) typically takes place following closing (although investors are entitled to file prior to closing should they choose to do so).

[12] For example, the CNOOC/Nexen acquisition, which was announced in July 2012, did not receive approval until December 2012.

5. Undertakings

The Responsible Minister usually requires investors to provide undertakings as a condition for approval under the ICA's net benefit review process.

Undertakings generally extend for three to five years and typically involve commitments with respect to matters such as the following:

- Capital expenditures;
- Investment in research and development;
- Minimum employment levels;
- Canadian participation in management or as directors;
- Processing resource products in Canada;
- Transferring technology to Canada;
- Location of the head office;
- Purchases from Canadian suppliers; and
- In the case of cultural businesses, various types of support (usually financial) for the "Canadian cultural community."

In some cases, the Responsible Minister has sought, or investors have offered, undertakings to continue to list the acquired Canadian business on a Canadian stock exchange.

It may be noted that guidelines issued by the Responsible Minister indicate that where inability to fulfil a commitment is clearly the result of factors beyond the control of the investor, the investor will not be held accountable.

6. State-Owned Enterprises

Acquisitions of Canadian businesses by foreign SOEs are subject to certain guidelines (SOE Guidelines) under the ICA.

The SOE Guidelines are intended to address the Canadian government's main concern about foreign SOE investments in Canada – namely, that SOEs should operate according to sound principles of corporate governance and commercial orientation. Thus, the SOE Guidelines provide that the Responsible Minister will examine the corporate governance and reporting structures of foreign SOEs as part of the net benefit assessment process under the ICA. This will involve assessing factors such as the extent and nature of state control over the SOE and whether the SOE adheres to Canadian standards of corporate governance (such as a commitment to transparency and disclosure, and to the independence of board and audit committee members).

The Responsible Minister will also assess whether the acquired Canadian business will continue to operate on a commercial basis under the SOE's ownership (e.g., with respect to where the Canadian business will process and export its products). In addition, the Responsible Minister will look at factors such as the impact of the investment on Canadian participation in the business, capital expenditures and support for ongoing research and development. (These are standard criteria for review under the ICA.)

More generally, the Responsible Minister will also assess the degree of control or influence that a foreign SOE will likely exert on the industry in which the Canadian business operates. Regarding the oil sands sector in particular, the SOE Guidelines state that investments by foreign SOEs to acquire control of a Canadian oil sands business will be found to be of net benefit only on an exceptional basis.

The SOE Guidelines also encourage foreign SOEs to submit draft undertakings as part of the materials they file in support of their proposed acquisitions. Undertakings that could be appropriate in this context include (i) the appointment of Canadians as independent directors on the SOE's board of directors; (ii) the employment of Canadians in senior management positions; and (iii) the listing of securities of the acquired business on a Canadian stock exchange. (Again, it is not unusual for the Responsible Minister to seek these types of commitments even when SOEs are not involved.)

The SOE Guidelines are not designed to discourage investment by foreign SOEs in Canada.

Rather, they are meant to deal with the rare case in which closer scrutiny may be required. The SOE Guidelines thus represent a refinement to the ICA review process but are not intended to introduce a significant obstacle to the flow of investment into Canada by non-Canadians.

The SOE Guidelines also emphasize that non-controlling minority interests in Canadian businesses by foreign SOEs, including joint ventures, will continue to be welcome in the development of Canada's economy.

That said, the ICA authorizes the Responsible Minister to impose net benefit reviews on direct acquisitions of certain minority interests in Canadian businesses that would not be subject to ICA review if made by non-SOEs. The ICA also includes a very broad definition of "SOE" for ICA purposes (see Thresholds for Review, above) and authorizes the Responsible Minister to deem certain entities that otherwise would qualify as Canadian under the ICA as non-Canadian SOEs. Finally, the enterprise value thresholds for trade agreement investors and WTO investors do not apply to SOE investments, which are governed by a threshold based on book value of assets. (This book value threshold is intended to be a lower threshold for review than the enterprise value threshold.)

7. National Security Review

Irrespective of whether an investment is subject to net benefit review, the ICA provides for the review of investments that "could be injurious to national security."

Under this process, the federal Cabinet may, on the recommendation of the Responsible Minister, order a national security review. If Cabinet orders a review, the Responsible Minister is required to send a notice informing the investor that the investment will be reviewed and that the proposed transaction cannot be completed while the review is pending. If the transaction has already been completed, a review may still be ordered (and remedies, including divestiture of the Canadian business, may still be required) following implementation of the transaction.

The expression "national security" is not defined and there are no monetary thresholds that must be exceeded to trigger a national security review.

Moreover, the general net benefit review threshold requirement that there be an acquisition of control of a Canadian business has been relaxed to allow a national security review to occur if there has been an acquisition "in whole or in part" of an entity carrying on all or any part of its operations in Canada, if the entity has (i) a place of operation in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or (iii) assets in Canada used in carrying on the entity's operations.

The national security review is carried out by the Responsible Minister in consultation with the Minister of Public Safety and Emergency Preparedness. The Responsible Minister has 45 days following the filing of a notification or an application for review, or 45 days following implementation of a transaction not subject to notification or review, to issue a notice to a non-Canadian that its proposed investment may be subject to a national security review. (Alternatively, a national security review can be initiated within the same time period without such a notice first being sent.) The entire review process can last for more than 200 days.

If, following the review, the Responsible Minister is satisfied that the investment would be injurious to national security, the federal Cabinet is authorized to take any measures that it considers advisable to protect national security, including imposing conditions on the investment or the outright prohibition of a proposed investment (or divestiture in the case of a completed investment).

Since 2009, there have been at least 15 formal national security reviews commenced by the Canadian government. In only a very few instances has the government used its authority to block transactions because of national security concerns.

In December 2013, for example, the Canadian government issued its first formal rejection of a transaction under this national security review process. That transaction involved the proposed acquisition of a Canadian business in the telecom sector. The government did not provide any public reasons or explanation for this decision, although it is believed that there were concerns with the national origins and other affiliations of certain investors.

In 2015, it was reported that the Canadian government blocked a Chinese SOE from investing in a new fire alarm manufacturing facility in Québec because the site was located close to facilities operated by the Canadian Space Agency.

Also in 2015, the government ordered a Chinese investor to divest a Canadian company engaged in optical networking component development that it had acquired earlier. The Chinese investor sued the government in response. As part of the settlement of those court proceedings, the Canadian government revisited the decision of the former government and approved the acquisition in March 2017 on the basis of certain (confidential) conditions.

More recently, in May 2018, the government prohibited the acquisition of a Canadian construction company by a Chinese SOE following a national security review during which there was significant public commentary and opposition to the transaction by certain stakeholders. While the government's statement announcing its decision to block the transaction did not identify specific concerns motivating the decision, the Canadian business was or had been involved in the construction of infrastructure, including, to varying degrees, telecommunications networks, transportation, electricity grids and military facilities, as well as refurbishment at nuclear power plants. The Prime Minister subsequently noted in related public statements that the decision was driven by a desire to maintain Canada's sovereignty over critical infrastructure, and that warnings had been received from the Australian government about its experience with Chinese investment in its construction industry. Broader political motivations also cannot be discounted, given the significant degree of public commentary, political debate, media interest and sensitive international trade negotiations occurring during the review.

In some other cases, transactions have been permitted to proceed subject to divestitures or the investor agreeing to meet certain conditions. In a handful of cases, transactions were apparently discontinued or never proceeded because of national security concerns, although formal proceedings were never taken.

While the discretionary nature of the national security review provisions, including the lack of definition of "national security" and the potentially long time frames for review, has introduced uncertainty into the application of the ICA for certain foreign investments in Canada, the Canadian government has attempted to provide greater transparency into the ICA's national security review process, including through its Guidelines on National Security Review of Investments (National Security Guidelines). The National Security Guidelines provide some public information on how the national security review provisions are administered and include a non-exhaustive list of factors that may give rise to a national security order in relation to an investment.

In addition, the Ministry of ISEDC has provided further information on the national security review process, as well as high-level data relating to transactions reviewed under the national security provisions, in its annual report for 2016-2017.

8. Prohibitions and Remedies

The Responsible Minister may seek to impose sanctions on non-Canadian investors in the event of non-compliance with the ICA.

Cases of non-compliance include the following: if the investor (i) fails to file a required notification or application for review; (ii) implements an investment that has not received the necessary approval or has been prohibited; (iii) does not divest as required; or (iv) does not comply with an undertaking. If there is an issue of compliance with an undertaking, the ICA provides that the Responsible Minister may accept a new or "replacement" undertaking.

Available sanctions include compulsory divestiture; revocation or suspension of voting rights; and potentially significant financial penalties (not exceeding C$10,000 for each day the non-Canadian is in breach of the ICA). Note, however, that sanctions for non-compliance have rarely been resorted to in practice. In only one case to date has the Canadian government sued an investor for alleged non-compliance with ICA undertakings. The matter was eventually settled.

Appendix: World Trade Organization Member Countries

(Verified as of January 21, 2019)

Afghanistan
Albania
Angola
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Bahrain, Kingdom of
Bangladesh
Barbados
Belgium
Belize
Benin
Bolivia, Plurinational State of
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cabo Verde
Cambodia
Cameroon
Canada
Central African Republic
Chad
Chile
China
Colombia
Congo
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
European Union (formerly European Communities)
Fiji
Finland
France
Gabon
Gambia
Georgia
Germany
Ghana
Greece
Grenada
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
Hong Kong, China
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Korea, Republic of
Kuwait, the State of
Kyrgyz Republic
Lao People's Democratic Republic
Latvia
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Macao, China
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta
Mauritania
Mauritius
Mexico
Moldova, Republic of
Mongolia
Montenegro
Morocco
Mozambique
Myanmar
Namibia
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Romania
Russian Federation
Rwanda
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Samoa
Saudi Arabia, Kingdom of
Senegal
Seychelles
Sierra Leone
Singapore
Slovak Republic
Slovenia
Solomon Islands
South Africa
Spain
Sri Lanka
Suriname
Swaziland
Sweden
Switzerland
Chinese Taipei
Tajikistan
Tanzania
Thailand
The former Yugoslav Republic of Macedonia (FYROM)
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
Uruguay
Vanuatu
Venezuela, Bolivarian Republic of
Viet Nam
Yemen
Zambia
Zimbabwe

Key Contacts

If you are interested in receiving more information, please contact us or visit our website at **www.dwpv.com.** The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.

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