Canada

JUSTIN G. PERSAUD, WENDY WAGNER, JOHN W. BOSCARIOL, MARTIN G. MASSE, MONICA PODGORNY, AND SERGIO R. KARAS*

This article reviews significant legal developments in Canada during 2012.[1]

I. Investment Treaty Update: Canada Defends Its Decision to Enter More Agreements (and Numerous NAFTA Claims)

In 2012, the Government of Canada delivered on its promise to enter bilateral investment treaties, also known as Foreign Investment Promotion and Protection Agreements (FIPAs), which will "provide a more transparent and predictable climate for Canadian investors abroad."[2]

Agreements with the Czech Republic and Slovakia came into force, bringing the total number of Canadian FIPAs to twenty-four.[3] A great deal of attention was given to the conclusion of negotiations for an agreement with China, which brought the number of FIPAs negotiated (but not yet in force) to eight.[4] Negotiations with another fifteen countries are underway.[5]

Canada's free trade agreements with the United States and Mexico (NAFTA), Columbia, Peru, and Chile contain investor-state dispute settlement provisions similar to FIPAs.[6] The Canada-EU free trade agreement (CETA) currently being negotiated is expected to include protections for investors. China has served as this year's lightening rod for critics of the Government's FIPA strategy. Nonetheless, based on the NAFTA experience, and

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* Edited by Justin G. Persaud, Esq., LL.M. Candidate at Osgoode Hall, admitted to New York, District of Columbia, and New Jersey. Individual authors will subsequently be identified by section.

1. For developments during 2011, see Cliff Sosnow et al., *Canada*, 46 INT'L LAW. 487 (2012). For developments during 2010, see Sandra Walker et al., *Canada*, 45 INT'L LAW. 471 (2011).

2. *Canada's Foreign Investment Promotion and Protection Agreements (FIPAs)*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d (last modified Nov. 9, 2012); *see Negotiations and Agreements*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en&view=d (last modified Feb. 20, 2013) [hereinafter *Negotiations*]. The abbreviation of FIPA is also used by many sources to describe these acts.

3. *Negotiations*, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.* (see list of "FTAs in Force" for text of the agreements).

at least in the short term, any increase in claims against Canada as a result of new agreements is likely to emanate from European versus Chinese investors, should the CETA reach a successful conclusion.

A. Canada-China FIPA

The Canada-China FIPA negotiations concluded in February 2012, and the agreement was signed on September 9, 2012.[7] Ratification is imminent.[8] There is nothing remarkable about the Canada-China FIPA. The obligations are narrower in some respects than those contained in Canada's existing FIPAs and likely narrower than what can be expected within CETA, should the agreement come to fruition.[9] The Canada-China FIPA is circumscribed with respect to the right to establish an investment. Unlike NAFTA, under which the Parties must accord national treatment to the establishment and acquisition of an investment, the obligation in the Canada-China FIPA extends only to activities after the establishment of an investment.[10] Similar to NAFTA, the agreement carves out Investment Canada Act review, pursuant to which Canada may deny approval of foreign investments that are of an asset value exceeding certain thresholds and block other acquisitions on national security grounds.[11] In a leaked memorandum, the European Commission has stated that the exclusion of the Investment Canada Act from investor-state provisions within CETA is "not acceptable," particularly because exempting EU investors from Investment Canada Act review is seen as a "primary target" within the negotiations.[12]

The Canada-China FIPA includes standard obligations to provide investors of another party: a minimum standard of treatment;[13] prompt, adequate, and effective compensation for direct and indirect expropriation;[14] the ability to freely transfer capital and other monies;[15] and prohibitions against imposing domestic performance requirements.[16]

7. *Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng&view=d (last modified Nov. 30, 2012).

8. The Canada-China FIPA was tabled in Parliament on September 9, 2012. *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, FOREIGN AFF. & INT'L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d (last modified Sept. 26, 2012) [hereinafter *Canada-China FIPA*]. The ratification process requires tabling in Parliament for a period of twenty-one sitting days, after which the agreement can become law through a cabinet Order in Council. *Id.*

9. *See* Memorandum from European Comm'n to Trade Policy Comm., Can., on the EU Canada Comprehensive Economic & Trade Agreement – Landing Zones, at 1 (Nov. 6, 2012), *available at* http://www.lapresse.ca/html/1633/Document_UE_2.pdf [hereinafter EU Canada Memorandum]. The memorandum indicates that although Canada is *demandeur* for investment protection, "[p]rotection for the large amount of EU FDI stock in Canada is also very important for the EU." *Id.* at 8. The memorandum was leaked by La Presse. *See* Hugo De Grandpré & Paul Journet, *Négos Canada-Europe: Trop de Choses Restent sur la Table, Selon la CAQ* [*Canada-Europe Trades: Too Many Things Remain on the Table, According to the CAQ*], LA PRESSE (Nov. 24, 2012, 5:00 AM), http://affaires.lapresse.ca/economie/canada/201211/23/01-4597184-negos-canada-europe-trop-de-choses-restent-sur-la-table-selon-la-caq.php.

10. *Canada-China FIPA*, *supra* note 8, art. 6.

11. *Id.* Annex D.34.

12. EU Canada Memorandum, *supra* note 9, at 3, 10.

13. *Canada-China FIPA*, *supra* note 8, art. 4.

14. *Id.* art. 10.

15. *Id.* art. 12.

The minimum standard of treatment obligation takes a conservative approach by defining the standard by reference to the "international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law," a standard which the European Commission has stated would be unacceptable for CETA in that it would "reduce the level of protection for investment."[17] An annex to the expropriation provision attempts to narrow the concept of indirect expropriation by excluding non-discriminatory measures "designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment."[18] In the CETA context, the European Commission has again described such a narrowing of investment protections as unacceptable and out of line with existing arbitral practice.[19]

The Canada-China FIPA contains several general exceptions, including those applying to investments in cultural industries, the protection of "human, animal or plant life or health," and "the conservation of living or non-living exhaustible natural resources."[20] In addition, existing non-conforming laws, regulations, and policies are not subject to the obligations regarding national treatment, most-favored-nation treatment, and senior management, boards of directors, and entry of personnel.[21]

B. Arbitral Claims Against Canada

The year 2012 was a significant year not only for investment treaty negotiations by Canada, but also for investor state claims against Canada. Four new notices of intent to file claims were submitted by Eli Lilly and Company, Lone Pine Resources Inc., Windstream Energy LLC, and Mercer International Inc., with Mercer filing its request for arbitration on April 30, 2012.[22] Four claims are ongoing, brought by investors Clayton/Bilcon, Detroit International Bridge Company, Mesa Power Group LLC, and St. Marys VCNA, LLC.[23] A decision on the merits was rendered against Canada in *Mobil Investments Canada Inc. v. Canada*, with damages still to be determined.[24] All of the claims involve U.S. investors pursuant to NAFTA.

Lone Pine Resources Inc.'s complaint alleges "arbitrary, capricious, and illegal revocation" of its enterprise's "valuable right to mine for oil and gas under the St. Lawrence River by the Government of Quebec without due process, without compensation, and with no cognizable public purpose."[25] The measure alleged to violate NAFTA Articles

16. *Id.* art. 9.
17. *Id.* art. 4; EU Canada Memorandum, *supra* note 9, at 9.
18. *Canada-China FIPA*, *supra* note 8, at Annex B.10.
19. EU Canada Memorandum, *supra* note 9, at 9.
20. *Canada-China FIPA*, *supra* note 8, art. 33.
21. *Id.* art. 8(2).
22. *NAFTA – Chapter 11 – Investment: Cases Filed Against the Government of Canada*, Foreign Affs. & Int'l Trade Can., http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en&view=d (last modified Dec. 5, 2012) [hereinafter *Cases Filed*]; *NAFTA – Chapter 11 – Investment: Mercer International v. Government of Canada*, Foreign Affs. & Int'l Trade Can., http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/mercer.aspx?view=d (last modified June 29, 2012).
23. *Cases Filed*, *supra* note 22.
24. *Id.*
25. Lone Pine Res. Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitrate, ¶ 2 (Nov. 8, 2012), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/lone-1.pdf.

1110 and 1105 is a Quebec law that suspended oil and gas exploration in response to public demands for an environmental assessment.[26] Windstream Energy LLC's claim also involves an environmental moratorium, imposed by the Government of Ontario on off-shore wind projects. The environmental measure at issue resulted in the frustration of a twenty-year contract for the development of wind energy entered into between the investor and the Ontario Power Authority under Ontario's Green Energy Act Feed-in-Tariff Program.[27] The claim brought by Mercer International Inc. is also energy related but is based primarily on a discrimination argument that centers on an alleged denial of access to favorable hydroelectric energy rates enjoyed by competing pulp mills.[28]

Mobil Investment Inc.'s claim asserted that the 2004 guidelines promulgated by Newfoundland that required the investor to contribute millions of dollars annually to research, development, education, and training in the province constituted an impermissible performance requirement (Article 1106) and violated the Article 1105 minimum standard of treatment.[29] The arbitral tribunal adopted a narrow interpretation of Article 1105, rejecting the claim on the basis that "[t]his applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change."[30] The investor nonetheless prevailed in its Article 1106 claim. The tribunal concluded that the expenditures constituted "services" encompassed within the Article 1106 disciplines,[31] and, while falling broadly within the scope of a non-conforming measure reserved by Canada, went beyond the threshold that would allow the measures to be considered consistent with that non-conforming measure.[32]

As for claims by Canadian investors, more claims have been brought under NAFTA than all FIPAs combined, which is likely reflective of the large stock of outbound foreign direct investment (FDI) in the United States. For 2011, with Europe accounting for approximately one-quarter of Canada's stock of outbound FDI and one-quarter of its inbound stock,[33] there can be no doubt that the CETA negotiations are Canada's investor-state play to watch.

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26. *Id.* ¶¶ 3, 5.

27. Windstream Energy LLC v. Canada, Notice of Intent to Submit a Claim to Arbitrate, ¶¶ 8, 26 (Oct. 17, 2012), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/windstream-1.pdf.

28. Mercer International Inc. v. Canada, ICSID No. ARB(AF)/12/3, Decision on Liability and on Principles of Quantum, ¶¶ 5-6 (Jan. 6, 2012), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/mercer-01.pdf.

29. *Mobil Invs*, ARB(AF)/07/4, ¶¶ 1, 99.

30. *Id.* ¶ 153.

31. *Id.* ¶ 246.

32. *Id.* ¶¶ 409-13.

33. *Foreign Direct Investment Statistics: Data on Canadian Direct Investment Abroad and Foreign Direct Investment to Canada by Country and Sector*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/economist-economiste/statistics-statistiques/investments-investissements.aspx?lang=eng&view=d (last modified Jan. 21, 2013).

II. Canadian Economic Sanctions and Export Control Developments in 2012

The year 2012 was another busy year for legal developments in the area of Canadian economic sanctions and export controls.[34] The most significant changes were in respect of the Export Control List, expanding sanction measures against Syria, relaxing sanctions against Burma, changes in nuclear controls, and further liberalization of controls over information security exports and technology transfers.

A. Significant Changes to the Export Control List

Although they were not officially published until January 2012, on December 19, 2011 the Foreign Affairs and International Trade's Export Controls Division (ECD) announced a number of changes to the Export Control List (ECL) that became effective on December 16, 2011.[35] This caused significant concern among a number of exporters. The latest list of controlled goods and technology are now set out in a new *Guide to Canada's Export Controls* (2010).[36] Accordingly, the *Guide to Canada's Export Controls* (2007) is no longer in force. These changes were made to update Canada's controls in accordance with its commitments as of 2010 under various multilateral export control regimes, including the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.[37]

The amendments to the ECL include the addition of numerous goods and technology that now require an export permit for their transfer from Canada. The amendments also include the removal of various items from control as well as clarifications regarding existing controlled items. Goods and technology that are affected by these changes include items in ECL Group 1 (dual-use items), Group 2 (munitions list), Group 5 (miscellaneous items), Group 6 (missile technology), and Group 7 (chemical and biological weapons items).[38]

Because of concerns expressed with the timing of the publication and coming into force of these changes, ECD has indicated that the next set of changes (to bring the ECL up to date with more recent changes under the Wassenaar Arrangement) will not come into force until thirty days after they are announced. This is currently anticipated to occur in early 2013.

B. Encryption Export and Technology Transfer Controls

Included in the above-noted changes to the ECL was the long-awaited implementation of the "ancillary crypto" decontrol note. Note 4 to ECL Group 1, Category 5 – Part 2:

34. For additional developments in this area, *see* John Boscariol et al., *Export Controls and Economic Sanctions*, 1 ABA/SIL YIR (n.s.) ____ (2013).

35. *A Guide to Canada's Export Controls*, Foreign Affs. & Int'l Trade Can., http://www.international.gc.ca/controls-controles/about-a_propos/expor/guide-2010.aspx?lang=eng&view=d (last modified Jan. 16, 2012); Order Amending Export Control List, SOR/2011-320 (Can.).

36. *A Guide to Canada's Export Controls*, *supra* note 35.

37. *Id.*

38. For a further description of these changes in detail, *see A Guide to Canada's Export Controls*, *supra* note 35.

"Information Security" provides a decontrol for items so long as their primary function or set of functions is not any of the following: information security, a computer (including operating systems, parts and components therefor), sending, receiving, or storing information or networking.[39] Further, their "cryptographic functionality is limited to supporting their primary function or set of functions; and [w]hen necessary, details of the items are accessible and [must be] provided, upon request . . . to ascertain compliance with conditions" of the decontrol note.[40]

On July 31, 2012, General Export Permit No. 45 (Cryptography for the Development or Production of a Product) (GEP-45) was issued.[41] Provided certain conditions are satisfied, GEP-45 allows for the export of controlled cryptographic items, subject to some exceptions, that are used for the development or production of a product without having to apply for an individual export permit. The transfer must be made to a non-government entity in one of twenty-nine designated countries or non-government entities in any country (other than sanctioned or *Area Control List* countries) if the entity is controlled by a Canadian resident or a non-government affiliated entity located in one of the twenty-nine designated countries.[42] The exporter must notify ECD before the first transfer in each calendar year and then report on transfers made during the previous calendar year by January 31.[43] ECD information requests must be responded to within fifteen days.[44] In the case of physical exports, GEP-45 must be specified on the export report filed with Canada Border Security Authority (CBSA).[45]

On January 14, 2013, General Export Permit No. 46 (Cryptography for Use by Certain Consignees) (GEP-46) was issued.[46] GEP-46 allows for the transfer of finished products containing controlled cryptography to affiliates. This permits transfers to consignees that are an "affiliated company" of the exporting or transferring company and that have a parent whose head office is located in Canada, the United States, or one of the other twenty-nine designated countries.[47] It also has similar notification and reporting requirements to GEP-45.

C. Changes to Nuclear Export Controls

In May 2012, two new GEPs were issued for nuclear-related goods and technology allowing these items to be transferred without obtaining an individual export permit, provided certain conditions are satisfied.[48] These new GEPs replace GEP No. 27 – Nuclear-related Dual-Use Goods.

39. *Id.* (see section on Information Security).
40. *Id.*
41. General Export Permit No. 45 – Cryptography for the Development or Production of a Product, SOR/2012-160 (Can.).
42. *Id.*
43. *Id.* art 5(d).
44. *Id.* art 5(c).
45. *Id.* art. 5(b).
46. General Export Permit No. 46 – Cryptography for Use by Certain Consignees, SOR/2013-1 (Can.).
47. *Id.*
48. General Export Permit No. 43 – Nuclear Goods and Technologies to Certain Destinations, SOR/2012-89 (Can.); General Export Permit No. 44 = Nuclear-Related Dual-Use Goods and Technology to Certain Destinations, SOR/2012-90 (Can.).

GEP No. 43 – Nuclear Goods and Technologies to Certain Destinations "covers the export of eligible goods and technology referred to in Group 3" of the ECL,[49] and GEP No. 44 – Nuclear Related Dual-Use Goods and Technology to Certain Destinations applies to "the export of eligible goods and technology listed in [ECL] Group 4."[50] Certain Group 3 and 4 items do not qualify for these GEPs.[51]

These GEPs may only be used for transfers to one of twenty-nine eligible countries and have certain notification and record retention requirements.[52] Although touted as a liberalization of nuclear-related controls, some have noted that depending on the product and destination, these changes have resulted in controls that are more restrictive.

D. Expanded Sanctions Measures Against Syria

Effective March 5, 2012, Canada expanded its economic sanctions against Syria by imposing a financial services ban.[53] It prohibits persons in Canada and Canadians outside Canada from providing or acquiring financial or other related services to, from, for the benefit of, or on the direction or order of Syria or any person in Syria.[54] There are some exemptions, including for:

- Loan repayments to any person in Canada or any Canadians abroad in respect of loans entered into before March 5, 2012 as well as enforcement of security in respect of those loans, or payments by guarantors guaranteeing these loans;
- Financial services required to be provided or acquired [pursuant] to a contract entered into before March 5, 2012; and
- Financial services in respect of non-commercial remittances of $40,000 or less sent to or from Syria, or any person in Syria, if the person providing the financial services keeps a record of the transaction.[55]

On May 18, 2012, Canada imposed a ban on exporting, selling, supplying, or shipping to Syria or any person in Syria any luxury goods.[56] These are defined to mean "goods such as jewelry, gems, precious metals, watches, cigarettes, alcoholic beverages, perfume, designer clothing and accessories, furs, sporting goods, private aircraft, gourmet foods and ingredients, lobster, computers, televisions and other electronic devices."[57]

Sanctions were again expanded on July 6, 2012 with the implementation of a prohibition against the "export, sale, supply or shipping to Syria of a number of goods that can be

49. General Export Permit No. 43 – Nuclear Goods and Technologies to Certain Destinations, SOR/2012-89.

50. General Export Permit No. 44 – Nuclear-Related Dual-Use Goods and Technology to Certain Destinations, SOR/2012-90.

51. For further information, see Notice to Exporters No. 181: General Export Permits for Certain Nuclear and Nuclear-related Dual-use Goods and Technology to Certain Destinations (May 2012), http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/181.aspx?lang=eng&view=d.

52. General Export Permit No. 43 – Nuclear Goods and Technologies to Certain Destinations, SOR/2012-89; General Export Permit No. 44 = Nuclear-Related Dual-Use Goods and Technology to Certain Destinations, SOR/2012-90.

53. *Canadian Economic Sanctions: Syria*, Foreign Affs. & Int'l Trade Can., http://www.international.gc.ca/sanctions/syria-syrie.aspx?lang=eng&menu_id=70&view=d (last modified Dec. 27, 2012).

54. Special Economic Measures (Syria) Regulations, SOR/2011-114, s. 3.3 (Can.).

55. *Id.*

56. *Canadian Economic Sanctions: Syria*, *supra* note 53.

57. Special Economic Measures (Syria) Regulations, SOR/2011-114, s. 1.

used for internal repression" or "in the production of chemical and biological weapons."[58] In addition, throughout the year, dozens of companies, government entities, and individuals were listed as "designated persons" under Canadian sanctions measures against Syria.[59] Canadian companies and individuals are prohibited from engaging in a wide range of dealings with designated persons under Canada's sanctions regime. Canadians are also subject to reporting requirements for property owned or controlled by designated persons and for related proposed or actual transactions involving property owned or controlled by designated persons.

Financial institutions, including federally regulated banks, provincial trust and loan companies, and securities dealers, are required to monitor and determine on a continuing basis whether the financial institutions are in possession or control of property owned or controlled by or on behalf of a designated person.

E. Sanctions Against Burma

On April 24, 2012, most of Canada's economic sanctions against Burma (Myanmar) were suspended.[60] Enacted in 2007 and touted as being among the most aggressive in the world, Canada's sanctions and export controls had prohibited most activities with Burma, including: investment, exports and imports, the provision of financial services and technical data, the transiting of ships and aircraft, and dealings with designated persons.[61] These developments will raise new trade and investment opportunities for Canadian businesses; however, firms should proceed with caution as certain restrictions remain in effect. Burma had also been listed on Canada's Area Control List (ACL) since 1997.[62] With these changes, Burma has now been removed from the ACL so that exports and transfers of goods or technology from Canada to Burma are no longer prohibited.

Certain significant sanctions remain in effect. Persons in Canada and Canadians outside Canada are prohibited from dealing with designated persons as listed in the regulations. The list of designated persons currently includes 44 companies and 38 individuals.[63] Further, there is a military trade embargo against Burma. Persons in Canada and Canadians outside Canada are prohibited from supplying, transporting, or otherwise dealing in any arms or related material destined for Burma or any person in Burma. These prohibitions also apply to the transfer of technical data and provision of financial services related to military activities or dealings in arms and related materials.

F. "Red Flag" Destinations

The increasing use and enforcement of economic sanctions by Canada and its trading partners, including the United States and the European Union, is significantly raising exposure to financial, operational, and reputational risk. It is important for any company

58. *Canadian Economic Sanctions: Syria*, *supra* note 53.
59. *See* Special Economic Measures (Syria) Regulations, SOR/2011-114, paras. 1, 3, 5-6.
60. Press Release, Foreign Affs. & Int'l Trade Can., Canada Suspends Sanctions Against Burma, Helps the Country Build a Brighter Future (Apr. 24, 2012), http://www.international.gc.ca/media/aff/news-communiques/2012/04/24a.aspx?view=d.
61. *Id.*
62. *Id.*
63. Special Economic Measures (Burma) Regulations, SOR/2007-285 (Can.).

doing business internationally to have in place comprehensive internal control measures for compliance with economic sanctions and export controls.

In addition to Syria and Burma, Canada currently imposes trade controls of varying degrees on activities involving the following countries (and in many cases, individuals and entities associated with them): Belarus, Côte d'Ivoire, the Democratic Republic of the Congo, Egypt, Eritrea, Guinea-Bissau, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Sierra Leone, Somalia, Sudan, Tunisia, and Zimbabwe.[64] Any involvement with these countries or any "designated person" in proposed transactions or other activities should raise a red flag for further investigation to ensure compliance with economic sanctions.

III. Foreign Investment

Direct foreign investment matters have seen more than their fair share of media attention this past year in Canada. As foreign investors look to the relative stability of the Canadian economy, the normally ignored Investment Canada Act (the Act)[65] has been cited repeatedly on the front page and the business sections of Canadian newspapers. Unfortunately, this increased scrutiny has not led to better transparency and predictability of outcomes. It is hoped, however, that the Government's promised "policy framework" will provide guidance as to how the investment review mechanism is applied to foreign investments.

The Act is triggered when a non-Canadian commences a new business activity in Canada or acquires control of an existing Canadian business.[66] All such transactions must either be notified to the federal Department of Industry[67] (Industry Canada) or submitted for "net benefit" review.[68] The determination of which investments are subject to review is a function of the country of origin of the investor, the type of business conducted by the target company, and the value of the transaction.[69] The monetary threshold that typically applies is the one applicable to direct non-cultural investments by investors from a World Trade Organization member country (WTO Investor). In 2012, that threshold was met if the book value of the assets of the Canadian business being acquired was more than CAD $330 million.[70]

The Act and associated guidelines also set out special rules for investments that raise specific concerns. Regarding investments that affect Canada's national security, section 25

64. *Canadian Economic Sanctions*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/sanctions/index.aspx?lang=eng&menu_id=1&view=d (last modified Dec. 14, 2012); *Guidance on Export Controls*, FOREIGN AFFS. & INT'L TRADE CAN., http://www.international.gc.ca/controls-controles/about-a_propos/expor/destination.aspx?view=d (last modified Jan. 16, 2013).

65. Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.) (Can.).

66. *Id.* ss. 10-12.

67. Investments involving Canadian cultural industries such as music, book, and magazine publishing and distribution must be notified to the Department of Heritage, either alone (if the investment is solely cultural in nature) or at the same time as the Industry Canada filing (when only part of the investment is cultural). *See Frequently Asked Questions – Investment Canada Act*, INDUSTRY CAN., http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html (last modified Nov. 9, 2011).

68. Investment Canada Act, R.S.C. 1985, c.28, s. 13.

69. *Id.* s. 14.

70. Investment Canada Act: Amount for the Year 2012, 146 C. Gaz. 331, 354 (Feb. 25, 2012).

allows the Minister to require review of any proposed investment if it could be injurious to national security.

Industry Canada has also published Guidelines for Investment by State-Owned Enterprises[71] (the SOE Guidelines).[72] According to the SOE Guidelines, it is the policy of the Government of Canada to ensure that the governance and commercial orientation of SOEs are considered in determining whether the investment is of net benefit to Canada. In addition to meeting the usual net benefit factors, SOE investors must:

- Adhere to Canadian standards of corporate governance (transparency, disclosure, independent board members, independent audit committees, and equitable treatment of shareholders);
- Adhere to Canadian laws and practices; and
- Meet an assessment by the Minister as to whether the Canadian business to be acquired by an SOE will continue to have the ability to operate on a commercial basis regarding export, processing, employment of Canadians, developing on-going innovation, and the level of capital expenditures to maintain the Canadian business in a globally competitive position.[73]

A. Past Application of the Investment Canada Act

Despite the media attention that the cases discussed below have generated, Canada remains very much open to foreign direct investment. The vast majority of investments into Canada happen without any significant government oversight. Since the Act was put in place in 1985, the Canadian government has approved approximately 18,700 transactions.[74] In 2011 alone, there were 649 direct and indirect acquisitions and investments, with 96.8 percent of these investments occurring via notifications and only 3.2 percent requiring review and approval.[75]

Only three transactions have been found not to meet the "net benefit" test: American Alliant Techsystems Inc.'s bid for geospatial business MacDonald, Dettwiler & Associates in 2008; Australian BHP Billiton Limited's bid for Potash Corporation in 2010 (Potash); and, this year, the bid of Malaysian state-owned oil company Petroliam Nasional Berhad (Petronas) for Progress Energy Resources Corporation.[76]

The first two rejections did not provide much guidance to investors, as the federal Government did not release reasons for its rejection, beyond that the transactions were un-

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71. An SOE is an enterprise that is owned or controlled directly or indirectly by a foreign government. *Guidelines — Investment by State-owned Enterprises—Net Benefit Assessment*, Industry Can., http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2 (last modified Dec. 7, 2012).

72. *Id.*

73. *Id.*

74. The Hon. Stockwell B. Day & Michael C. Yang, *Asian Foreign Investment in Canada: Moving Forward*, TerraLex (June 22, 2012), http://www.terralex.org/publication/pbc407bb4cf/asian-foreign-investment-in-canada-moving-forward.

75. *Canada: Investment Regulations*, EIU ViewsWire (Nov. 8, 2012), http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=229784607&region_id=440000444&page_title=Latest+analysis.

76. Jason Fekete, *Government Approves CNOOC-Nexon and Petronas-Progress Takeover Bids*, Canada.com (Dec. 7, 2012), http://www.canada.com/Government+approves+CNOOC+Nexen+Petronas+Progress+takeover+bids/7668195/story.html.

likely to be of net benefit to Canada. This is despite a promise by the Prime Minister to provide reasons after the rejection of the BHP bid.

B. The Petronas Transaction

The Petronas transaction also did not provide any particular guidance to foreign investors, mainly because it has not yet been finally decided. The transaction was not rejected outright; Industry Canada allowed Petronas to resubmit its application for net benefit review within thirty days.[77] Notably, Industry Canada had asked Petronas for an extension for the review before making a decision, but Petronas refused, effectively forcing Industry Canada to reject the deal. Petronas has taken Industry Canada up on its offer and resubmitted its application, reportedly with a new proposed governance structure.[78]

C. The CNOOC Transaction

Industry Canada's decision on the Petronas transaction came as it also grappled with another high-profile proposed acquisition by an SOE—the bid by China National Offshore Oil Co. (CNOOC) to acquire Nexen. The review of the CNOOC-Nexen transaction garnered media attention even though most of Nexen's assets are not held in Canada. Indeed, the fact that Nexen has offshore interests in the United States means that the transaction is also being scrutinized by the U.S. Committee on Foreign Investment (CFIUS).

Handicapping the results of the CNOOC/Nexen review has been difficult. The time for reviewing the transaction has been extended twice by Industry Canada.[79] Media reports suggest that the parties are busy negotiating the scope of undertakings to be given by CNOOC to ensure that net benefit to Canada is attained.[80] CNOOC has already reportedly pledged to keep Nexen's head office in Calgary, seek a listing on the Toronto Stock Exchange, and place some US $8 billion of its assets under the control of Nexen's management in Canada.[81]

On the U.S. side, it has also not been smooth sailing. On November 27, 2012, CNOOC pulled and re-filed its application with CFIUS.[82] This is widely viewed as a sign that more time is needed to conclude similar negotiations south of the border.

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77. *Progress Shares Rise on Reports Petronas Has Resubmitted Takeover Bid to Ottawa*, Calgary Herald (Nov. 16, 2012), http://www.calgaryherald.com/business/Progress+shares+rise+reports+Petronas+resubmitted+takeover+Ottawa/7560915/story.html#ixzz2DWFregx7.

78. *Id.*

79. Jason Fekete, *Federal Government's Deadline for Decision on CNOOC-Nexen Deal 'Could be Extended'*, Canada.com (Dec. 5, 2012), http://www.canada.com/Federal+government+deadline+decision+CNOOC+Nexen+deal+could+extended/7656801/story.html.

80. Shawn McCarthy, *Ottawa Pushes CNOOC on Nexen Vows*, Globe & Mail (Nov. 20, 2012, 6:30 AM), http://www.theglobeandmail.com/globe-investor/ottawa-pushes-cnooc-on-nexen-vows/article5455231/.

81. News Release, Nexen, CNOOC Limited Enters Into Definitive Agreement to Acquire Nexen Inc. (Jul. 23, 2012), http://www.nexeninc.com/en/AboutUs/MediaCentre/NewsReleases/News/Release.aspx?year=2012&release_id=130738.

82. Jeffery Jones, *Refile Update 1-CNOOC, Nexen Reapply for U.S. Deal Approval*, Reuters UK (Nov. 27, 2012, 1:47 AM), http://uk.reuters.com/article/2012/11/28/nexen-cnooc-usa-idUKL1E8MS0I320121128.

D. LACK OF CLARITY AND PREDICTABILITY

Resolution of the review of the Petronas and CNOOC deals should provide greater clarity and predictability in terms of how large-scale deals are assessed by Industry Canada, particularly when they involve SOEs. This would resolve a common complaint that the review process under the Act is not sufficiently transparent or predictable. The perception that the Investment Canada review lacks predictability is so pronounced that Germany has reportedly put forward a proposal that the Act not apply to investments from Europe as a condition of concluding the Canada-European Comprehensive Economic and Trade Agreement.

The difficulty that Industry Canada faces is that the Act contains very rigid confidentiality provisions designed to encourage investors to share sensitive transactional and commercial information with appropriate officials to make the review process more efficient and effective.[83] The Act does allow the Minister to disclose information about approved transactions and provide reasons where an investment is denied, but only with the consent of the parties to whom the information pertains.[84]

There is, however, perhaps light at the end of the tunnel. Given the media scrutiny of the Petronas and CNOOC transactions, the federal government has promised that it will clarify its application of the Act via a new "policy framework." It is widely expected that the new framework will be released at the same time as the CNOOC and Petronas decisions.[85] It is hoped that it will provide sufficient detail to alleviate concerns about the opaque nature of investment review in Canada.

E. GUIDELINE REVISIONS

On December 7, 2012, Industry Canada released widely-anticipated revisions to guidelines on the review of proposed investments by foreign state-owned enterprises (SOEs) under the Investment Canada Act (ICA).[86] The 2012 SOE guidelines provide greater transparency and improved guidance on the governance and free market requirements, which will need to be met. They confirm or refine many of the factors noted in the previous SOE guidelines, such as the SOE's reporting and governance structure, commitment to transparency and to operating on a commercial basis, and willingness to proactively provide undertakings in respect of the appointment of Canadians as independent directors, employment of Canadians in senior management positions, incorporation of the business in Canada, or listing of shares on a Canadian exchange. The most notable change is that the definition of an SOE has been expanded to include enterprises that are directly or indirectly "influenced," rather than simply "controlled" by a foreign state, with an analysis of the nature and extent of control or influence that a subject SOE is expected

83. Investment Canada Act, R.S.C. 1985, c.28, s. 36.

84. *Frequently Asked Questions: An Overview of the Investment Canada Act*, INDUSTRY CAN., http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html#applytome (last modified Nov. 9, 2011).

85. Claudia Catteneo, *Ottawa's Foreign Investment Concerns Coming into Focus*, FIN. POST (Nov. 23, 2012, 7:55 PM), http://business.financialpost.com/2012/11/23/ottawas-foreign-investment-concerns-coming-into-focus.

86. News Release, Gov't of Can., Government of Canada Releases Policy Statement and Revised Guidelines for Investments by State-Owned Enterprises (Dec. 7, 2012), http://news.gc.ca/web/article-eng.do?nid=711489.

to exert over the proposed target and relevant industry post-transaction.[87] These revised guidelines were accompanied by government intentions to amend the ICA to provide the Minister of Industry with the flexibility to extend the period for national security reviews in SOE cases under "exceptional circumstances" and to increase the monetary threshold for review.[88]

In conjunction with the revised guidelines, the Minister of Industry approved two significant SOE acquisitions of Canadian businesses in the oil and gas sector, effectively under the previous SOE guidelines: the CAD $5.3 billion acquisition of Progress Energy Corp. by Malaysian state-owned oil company Petronas; and the largest foreign investment by a Chinese SOE to date, the CAD $15 billion acquisition by CNOOC of Nexen Inc.[89] The decision not to "change the rules in the middle of the game" by applying new rules to existing applications is a reflection of the government's efforts to create a favorable climate for inbound investment. Although new SOE acquisitions of controlling interests in Canadian oil sands businesses will be subject to enhanced scrutiny and will be found to be of net benefit "on an exceptional basis only," SOEs will have significant scope to participate through acquisitions of minority interests and joint ventures.[90]

87. *Id.*

88. For direct acquisitions of control by investors from WTO countries, the threshold will be increased from CAD $330 million in "asset value" to CAD $1 billion in "enterprise value" over a four-year period. Proposed investments by SOEs will continue to be subject to the existing CAD $330 million review threshold (subject to annual adjustment to reflect changes in Canada's GDP). *See* News Release, Indus. Can., Review Threshold (Dec 7, 2012), http://www.ic.gc.ca/eic/site/064.nsf/eng/07249.html.

89. Andrew Mayeda & Greg Quinn, *Canada Approves Cnooc, Petronas Bids for Nexen, Progress Energy*, BLOOMBERG (Dec. 9, 2012, 12:11 PM), http://www.bloomberg.com/news/2012-12-08/canada-approves-cnooc-petronas-bids-for-nexen-progress-energy.html.

90. News Release, Gov't of Canada, *supra* note 86.