Goodmans LLP Update

Foreign Investment Review and *Investment Canada Act* Update

July 2, 2015

Significant Developments in National Security Reviews under the ICA

Two recent developments highlight the significance and rapidly changing nature of national security considerations in reviews under the *Investment Canada Act* (the **ICA**):

- In mid-June Industry Canada was reported to have blocked a Chinese state-owned enterprise (**SOE**), Beida Jade Bird, from building a $30 million fire alarm manufacturing facility in Saint-Bruno de Montarville, Quebec on national security grounds, due to the proximity of the proposed facility to a site operated by the Canadian Space Agency.

- Later in June Paladin Energy Ltd. (**Paladin**) of Australia obtained approval under the Non-Resident Ownership Policy of 1987 (**NROP**), as enforced under the ICA, to allow it to acquire a majority foreign ownership interest in the Michelin uranium mine in Labrador.

Proposed SOE Investment in Proximity to Sensitive Facilities

Beida Jade Bird, through its division in Quebec, Solutions D'alarme Incendie Maple Armor Canada Inc., sought to invest in a new factory manufacturing fire alarms. This investment reportedly stood to create 70 new full-time positions, and was supported through a land grant from the municipality and $4 million in subsidies and interest-free loans from the Québec provincial government.

The Chinese investor was reported to be an SOE within the meaning of the ICA. In 2012, the Government of Canada updated guidelines under the ICA and stated that it would take a more restrictive approach to reviewing proposed Canadian investments by SOEs.

Under the guidelines, the definition of SOEs have been broadened to include not only entities controlled by states but also any entity controlled or influenced, directly or indirectly, by a foreign government. Moreover, the Minister of Industry has the authority to make a factual determination of the extent of control proposed by a SOE as well as to determine if the SOE adheres to Canadian standards of corporate governance and to free market principles, all of which may be subject to undertakings by the SOE. Such undertakings may include public listing of SOE investment shares, participation of independent directors, auditing and annual reporting, and commitment to complying with Canadian law and practices.

(Please see our May 3, 2013 update entitled "*New ICA Developments – Tougher Measures for SOE Investments*" for a description of the revised approach for reviewing proposed Canadian investments by SOEs).

This rejection of the proposed investment is the first reported case where a foreign investment was rejected due to the proximity of the planned Canadian business to a sensitive government facility. Such proximity is sometimes referred to as a "co-location" concern, and is similar to the concerns in the United States that led to the very public refusal, by executive order, of a Chinese company's proposal to build a wind farm next to a U.S. naval base in 2012. It is notable too that the rejected investment reportedly had financial support from the Québec government.

Proposed Investment by an Australian Public Company in a Uranium Mine

The proposed acquisition by Paladin, an Australian public company, of the Michelin mine was reviewed under the NROP. The NROP, which is administered by the Minister of Natural Resources but enforced through the ICA, prohibits foreign entities from owning more than 49% of a producing uranium mine unless, as was the case with the proposed Paladin investment, a Canadian partner cannot be found.

The Paladin transaction was subject to review (and was reviewed) under both the NROP and the ICA's national security provisions.

The approval obtained is notable, given Canada's historical resistance to foreign investments in Canadian uranium mines and the national security concerns such an investment may raise. For example, on August 29, 2009, the proposed acquisition of Forsys Metals Corporation ("**Forsys**") by George Forrest International Afrique S.P.R.L. ("**GFI**") was terminated subsequent to intervention by the Canadian Minister of Industry under national security provisions introduced that year. Forsys is a mineral exploration company incorporated in Canada and has projects located internationally, including a uranium deposit in Namibia, Africa. In that instance concerns were raised by Canada that GFI may have obtained funding from a variety of sources, including the government of Iran, which raised security concerns.

Implications

The recent developments described illustrate the highly fact-specific nature of the government's review process and the broad set of circumstances that may be considered. The differing outcomes reflect the significant continuing uncertainties concerning the review of transactions with potential national security implications.

The rejection of the proposed Chinese SOE investment demonstrates the regulatory risks of transactions involving SOEs, and the broadening of national security considerations (in this case to include the proximity of proposed investments to sensitive government facilities). Conversely, the approval given to the proposed acquisition by Paladin of a uranium mine in Labrador provides some encouragement to foreign investors in Canada, particularly in the uranium mining industry, which has been in a downturn in recent years.

Potential investors would be well advised to carefully consider their proposed transactions with respect to any potential consequences on national security in Canada.

For further information regarding Investment Canada reviews of investments, contact any member of our Competition, Antitrust and Foreign Investment Group.