COMPETITION LAW

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PRACTICE AREA DEFINITION

The practice of Competition Law in Canada falls into two broad but distinct categories: solicitor (advisory) work (which includes merger analysis); and litigation.

Solicitor (Advisory) Work: Providing advice on Competition Law issues is an increasingly important part of advising business clients. Competition lawyers are called upon to advise clients on the competition law implications of a variety of business activities. By identifying and helping clients to address these issues, competition lawyers assist clients in managing and minimizing competition law risk. Competition lawyers provide advice with respect to corporate and commercial matters and day to day business practices. They are also advocates for clients in discussions with Competition Bureau officials. Principal areas of advice and representation include: mergers and acquisitions; strategic alliances and joint ventures; marketing and distribution activities; relations with customers, competitors and suppliers; and, increasingly, the interface between competition law and intellectual property law.

Competition Litigation: Competition litigation in Canada has traditionally involved representing clients before the courts on criminal matters and before the Competition Tribunal on civil proceedings initiated by the Commissioner of Competition. While there was limited private competition litigation in Canada in the years immediately following the enactment of the Competition Act in 1986, this type of proceeding has become more common with the advent of competition law class actions. Recent amendments permitting limited private access to the Competition Tribunal, and proposals to expand private access, are likely to lead to further private competition litigation in Canada.

RECENT DEVELOPMENTS OF IMPORTANCE

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TACKLING THE CHALLENGES OF INCREASING UNCERTAINTY IN FOREIGN INVESTMENT REVIEWS OF MERGERS AND ACQUISITIONS

I. Introduction

The interim denial by the Canadian government of BHP Billiton's (**BHP**) 2010 hostile bid for Potash Corporation of Saskatchewan (**Potash**) caught many M&A advisors off-guard. What was unprecedented about that decision was the degree of national protectionism encompassed within the application of the net benefit test under the *Investment Canada Act* (the ***ICA***). That refusal did not turn out to be an isolated incident, however. Since that time, there has been a steady increase in the breadth of national security considerations reflected in negative foreign investment reviews of both proposed and completed transactions in Canada. While the overwhelming majority of reviews are still successful, contentious reviews have accentuated the uncertainty around deal-making in an era marked by an increasingly insecure geopolitical world order, greater fears over electronic monitoring and related security issues, as well as accelerating global investment from state-owned enterprises and sovereign wealth funds.

Canada is not alone in this regard. The French government's exceptional degree of concern over losing French control of Alstom SA (**Alstom**) to General Electric Co. (**GE**), led to unprecedented intervention in that transaction. In the US, reviews of proposed take-overs by the Committee on Foreign Investment in the United States (**CFIUS**) have extended to such diverse businesses as a pork producer [Smithfield Pork], a wind farm [Ralls Corp.] and the Waldorf Astoria hotel in New York City.

In many cases, these foreign investment reviews of transborder transactions have occurred in the context of transactions also requiring competition (antitrust) reviews. These latter reviews have traditionally proceeded on relatively predictable timelines, applying well-established rules for merger control and increasingly involving international coordination between competition authorities in different jurisdictions. However, concurrent foreign investment reviews have sometimes affected the success and timing of these multinational transactions. A better understanding of the workings of the *ICA*, as well as the global factors driving its application, will assist M&A advisors in addressing these new challenges.

II. Foreign Investment Reviews In Canada

Introduced in 1985, the *ICA* applies both to acquisitions of existing Canadian businesses by non-Canadians and cases where non-Canadians establish new Canadian businesses. The Minister of Innovation, Science and Economic Development ("**Minister**") is responsible for administering the *ICA* save for investments concerning "cultural" businesses, such as those involved in the sale of books, film or audio and video products, which fall under the responsibility of the Minister of Canadian Heritage.

There are two types of possible reviews under the *ICA* — reviews to determine whether a proposed investment is of net benefit to Canada, and reviews to determine whether an investment is injurious to Canada's national security.

i. Net Benefit

Transactions subject to the net benefit provisions of the *ICA* are either "reviewable" or "notifiable." Investments that are reviewable cannot be completed until the non-Canadian investor has filed an application with the Director of Investments (the **Director**) of the Investment Review Division (the **IRD**), and the Minister has reviewed the investment and has satisfied himself it will likely be of net benefit to Canada. Investments are reviewable if a non-Canadian investor acquires control of a "Canadian business" and the proposed investment exceeds the relevant monetary threshold. Investments not meeting the threshold are considered notifiable because the non-Canadian investor need only file a notice with the Director, which can be done anytime up to 30 days following closing.

In the case of a corporation, control is deemed where greater than 50 per cent of the voting shares are acquired; there is a rebuttable presumption of control where more than one-third of the voting shares are acquired and control is deemed not to be acquired where less than one-third of the voting shares are acquired.

In April 2015 the monetary threshold for direct acquisitions was raised significantly for investors from WTO member states (other than state-owned enterprises [**SOEs**]) and also changed from a threshold based on the book value of the assets being acquired to their "enterprise value". The monetary threshold for these investors' acquisition of non-cultural businesses has been set at $600 million. This threshold will increase to $800 million in 2017 and $1 billion in 2019, to be adjusted annually based on GDP thereafter. Indirect acquisitions by these investors (*i.e.*, where a non-Canadian parent company that controls a Canadian subsidiary is being acquired) are not reviewable unless the Canadian subsidiary of the target is a cultural business.

Under the Trans-Pacific Partnership (**TPP**), released publicly on November 5, 2015, the Government of Canada committed to increase the review thresholds to $1.5 billion in enterprise value for investments from TPP countries. It is expected that the threshold will be increased in 2017 if the TPP is ratified in parliament. Under the Canada-European Union Comprehensive Economic and Trade Agreement entered into in September 2014, the Government of Canada also committed to increase the review thresholds to $1.5 billion in enterprise value for investments from the participating countries.

In contrast, the threshold for direct acquisitions for investors belonging to non-WTO member states, or for direct acquisitions of Canadian "cultural businesses" (irrespective of investor nationality), is only $5 million. In the case of cultural businesses, the Minister of Canadian Heritage has broad discretionary powers to make determinations as to Canadian control and to review proposed transactions for their alignment with Canada's cultural policy objectives.

To receive approval, the investor must satisfy the Minister that the proposed investment would be of "net benefit to Canada", for which the *ICA* enumerates the following broad criteria: (a) the effect of the investment on the level and nature of economic activity in Canada; (b) the degree and significance of participation by Canadians in the business; (c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety; (d) the effect of the investment on competition within any industry or between industries in Canada; (e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and (f) the contribution of the investment to Canada's ability to compete in world markets. The broad language of the net benefit factors listed in s. 20 of the *ICA* provides the Minister with wide discretion to approve or reject proposed transactions.

A net benefit review must be completed within 45 days, but the period can be unilaterally extended by the Minister for an additional 30 days, and further on consent. In practice, consent extensions to this timeline are usual, and on average net benefit reviews take between 65 and 110 days to resolve, typically through the investor's provision of binding undertakings.

The only explicit overlap between the Minister's "net benefit" analysis and the Competition Bureau's ("Bureau") merger review analysis is the Minister's consideration of the effect of the investment on competition under criterion (d). Given the Bureau's expertise in this area, the Minister, through the Director, will consult the Bureau in respect of this criterion.

ii. National Security

The *ICA* was amended in 2009, for the first time giving the government the explicit statutory power to review proposed investments on national security grounds. Investments may be reviewed where the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, considers that "the investment *could be injurious to national security*" [emphasis added] and the Governor in Council (*i.e.*, the federal Cabinet) makes an order for review. The *ICA* does not define "national security," which gives the Minister broad discretion to review investments and contributes to the uncertainty of non-Canadians seeking to invest in Canada.

Unlike a net benefit review that is limited to acquisitions of control over certain thresholds, a national security review may be invoked in any transaction involving a non-Canadian investor, irrespective of the size of the transaction and, arguably, irrespective of the extent of the interest being acquired by the foreign investor.

This can become particularly problematic in situations where no application for review or notification is required under the net benefit provisions of the *ICA*, but a transaction may, nonetheless, raise national security concerns due to the nature of the target. In such situations, for example where a non-Canadian is investing in, but not acquiring control over, a Canadian business, the regulations permit a national security review to be ordered up to 45 days after closing. Moreover, unlike the CFIUS regime, which allows for national security pre-acquisition clearance, prior clearance cannot be obtained under the national security provisions of the *ICA*. This presents an additional challenge for deal certainty and execution.

Following a national security review, the Minister can allow the investment to proceed or refer the investment to the Governor in Council, which can then block the investment, require undertakings or stipulate terms and conditions and order a divestiture. The uncertainty inherent in the process is exacerbated by a lengthy approval timeline, recently revised to permit a total of up to 200 days (including the initial 45-day waiting period) and longer on consent.

iii. Special Guidelines for SOEs

As part of the Minister's "net benefit" assessment, investments by SOEs must meet specific guidelines, which were revised significantly in December 2012 following high-profile acquisitions of Canadian oil and gas producers by Asian SOEs. As well, the book value-based monetary threshold (set at $375 million for 2016) has been specifically retained for SOEs from WTO member states.

The definition of an SOE under the *ICA* is broad. SOEs include entities "controlled or *influenced* directly or indirectly" [emphasis added] by a foreign government. The *ICA* also allows the Minister to make "control in fact" determinations about SOEs; in practice, this means the Minister can declare that a Canadian-controlled investor is "controlled in fact" by an SOE, possibly subjecting the investment to review under the *ICA*.

The guidelines clarify that the Minister now considers the governance and commercial orientation of SOEs in order to determine whether an acquisition is of net benefit to Canada. The Minister's aim is to ensure that foreign SOEs acquiring Canadian businesses will operate in a transparent and commercially oriented manner that mirrors private-sector enterprises and also to prevent state-owners from using Canadian acquisitions to effect their own undesirable objectives. In particular, this means that SOEs seeking to complete investments subject to the *ICA* must satisfy the Minister that they are free from political influence and will adhere to Canadian laws, implement standards and practices that promote sound corporate governance and transparency, adopt free market principles, and make positive contributions to the productivity and industrial efficiency of the Canadian business.

The government has also announced heightened scrutiny over SOE investments, as discussed in Part III (c) below.

III. Factors Driving the Increase in Contentious Reviews

Contentious foreign investment reviews have been driven by parallel rising tides of economic protectionism and concerns for national security and SOEs.

a. Economic Protectionism

In Canada, an unprecedented degree of national protectionism was encompassed within the application of the *ICA* in the interim rejection, on November 3, 2010, of BHP's $40 billion all-cash hostile bid to acquire Potash. Potash, the source of many jobs and significant tax revenue for the province of Saskatchewan and formerly a Crown (state-owned) corporation, was a provincial "champion", while BHP was a world-class diversified natural resources company based out of Australia. The Minister's interim rejection of BHP's offer was accompanied by advice that BHP had 30 days to revise its offer by making further representations and undertakings to the government.[1] A few weeks later, BHP decided to withdraw its bid but simultaneously publicly released extensive proposed undertakings that were largely unprecedented in scope and potential contribution to Saskatchewan and Canada. This represented only the second time in the history of Canadian foreign investment review legislation that a foreign investment made outside of the cultural sector was rejected.

While official reasons for the rejection of BHP's bid were not provided, it appears that the decision was largely motivated by domestic political considerations having regard to upcoming elections at both the federal and provincial levels. The Premier of the province of Saskatchewan, Brad Wall, vehemently opposed the transaction. He repeatedly warned of the risks to provincial employment levels and tax revenues if "this valuable resource [Potash] that belongs to the people of Saskatchewan" were to be placed under foreign control.[2] The protectionist concerns articulated by Premier Wall appear to have been a significant influence on the federal government.

b. National Security Concerns

National security concerns have fuelled a series of delays or denials of transactions in the foreign investment review process, with an evolution and broadening of scrutiny over transactions implicating electronic and other economic security concerns. The significant amounts of capital sought to be deployed in Western economies by SOEs — from China, in particular — has only added to this burgeoning list of economic security considerations and environment of increased scrutiny.

Even before it amended the *ICA* in 2009 to explicitly target national security concerns, the Canadian government rejected Alliant Techsystems Inc.'s (**ATK**) 2008 proposal to acquire control of Macdonald Dettwiler and Associates Ltd. (**MDA**) due to Canadian sovereignty concerns raised by the proposed transfer of satellite technology. The Minister's rejection of the proposed transaction was the first signal that national security concerns could directly affect foreign investment review in Canada. Canada has since followed the lead of the United States in invoking an increasingly broad range of national security considerations when scrutinizing proposed mergers.[3]

Electronic and technology security have become particularly acute areas of focus for national security reviews. Canada is reacting to the same concerns some commentators have expressed about the prevalence of technology from Huawei Technologies Co. Ltd. (**Huawei**) in telecommunications networks in the US and elsewhere.[4] Data leaked by Edward Snowden revealed telling details of electronic surveillance being conducted by the US government both domestically and internationally, with a particular focus on China.[5] Leaked reports indicate that the US National Security Agency (**NSA**) has spent years monitoring China, particularly leading Chinese technology companies including Huawei, due to its purported links to the Chinese military.[6] In May 2014, the US Justice Department indicted five members of the Chinese military, accusing them of cyber espionage against several US corporations, as well as a labour organization.[7] The alleged victims of the hackers are companies in the nuclear power, metals and solar products industries and include industry giants, such as US Steel and Alcoa.

The Canadian government reportedly intervened in Lenovo Group Ltd.'s talks in late 2013 to buy BlackBerry Ltd. (**Blackberry**), the Canadian company that produces mobile phones and operates a secure messaging network. Citing national security concerns, the government reportedly informed Blackberry that it "would not approve a Chinese company buying a company deeply tied into Canada's telecom infrastructure,"[8] effectively thwarting any such potential acquisition.

The government's focus on national security has continued to grow, as evidenced by several high-profile rejections in the technology area. These include the failed bid in 2013 by VimpelCom Limited (**VimpelCom**), a Russian-controlled company, to gain full control of Wind Mobile, a Canadian wireless carrier, as well as the government's 2013 rejection of the proposed sale of Manitoba Telecom Services' (**MTS**) Allstream business unit, which operates a national fiber-optic network, to Egyptian investment group Accelero Capital Holdings (**Accelero**).

In 2013, in response to VimpelCom's attempt to solidify its control of Wind, the government reportedly indicated it was hesitant to permit the deal because of national security concerns. VimpelCom is based in the Netherlands but is controlled by Russian energy and telecommunications magnate Mikhail Fridman. The government was reportedly wary about handing over control of Wind Mobile's core network infrastructure, which incidentally was built by Huawei, to a Russian-controlled entity. Notwithstanding assurances reportedly provided by VimpelCom and Wind, government delays in approving the transaction forced VimpelCom to eventually withdraw its offer to acquire full control of the company.

Similarly, after undergoing a full national security review under the *ICA*, MTS was blocked from selling its Allstream business unit to Accelero, an Egyptian investment group, due to unspecified national security concerns. Parties to the transaction claimed they had been assured by Industry Canada that the transaction would pass regulatory scrutiny and were surprised at its rejection.[9] Although the Minister did not give precise reasons for rejecting the deal, he noted that Allstream operates a national fiber-optic network that provides "critical telecommunications services to businesses and governments, including the Government of Canada."[10] The headline in *The Globe and Mail* following the refusal of the Allstream deal read "Security reviews mean deal makers are flying blind," pointing out that the security review process is so secretive that likely many foreign suitors had walked away from potential transactions in Canada rather than having their bids publicly rejected. [11] However, the government in early 2016 approved a US-based purchaser for Allstream.

In the fall of 2014, the Government of Canada reportedly established a secret security committee of senior officials, including the heads of Canada's two spy agencies as well as the Prime Minister's National Security Advisor, to review foreign investment for risks to national security.[12]

A 2015 case concerning a divestiture order issued by the Canadian government confirms that communications technology continues to be at the forefront of national security considerations, particularly where it may be supplied to the military. O-Net Communications, a Chinese firm, had acquired ITF Technologies, a firm specializing in fiber components and modules located in St. Laurent, Québec. It appears that transaction had not triggered either a review or notification obligation pursuant to the net benefit provisions of the *ICA*. Subsequently, the Minister initiated a review under the *ICA*'s national security provisions, ultimately resulting in an order that O-Net divest itself of its investment in ITF. As is typical in similar national security cases, the government has not articulated its reasons for reversing the sale. This decision is currently subject to judicial review in the Federal Court.

Despite the tension over electronic security, deal flow from China still increased in recent years, and China has topped the list of countries whose acquisitions are subject to scrutiny on national security grounds by US authorities.[13] In the last two years, however, there appears to be less vigorous activity from China-based investors, perhaps due to the overall economic downturn in China.

c. Economic Security: The Rise of SOEs

On the rise, too, are concerns for control over key or economically sensitive sectors of a nation's economy, also referred to as "strategic assets" — in Canada, natural resources, and the oil and gas sector more specifically. This followed several high-profile investments by Chinese SOEs in the Canadian oil sands, particularly the acquisition of Nexen Inc. (**Nexen**) by China National Offshore Oil Corporation (**CNOOC**), and the acquisition of Progress Energy Resources Corp. (**Progress**) by Malaysian government-controlled Petroliam Nasional Bhd (**Petronas**).

The Government of Canada approved these contentious deals in December 2012. At the same time, the government indicated these transactions would be the last of their kind and announced the new, tighter guidelines for SOE investments. The then Prime Minister of Canada, Stephen Harper, indicated that under these amendments further SOE control of Canadian oil-sands business would only be permitted in an "exceptional circumstance," stating:

"… foreign state control of oil sands development has reached the point at which *further such foreign state control would not be of net benefit to Canada*. Therefore, going forward, the Minister will find the acquisition of control of a Canadian oil-sands business by a foreign state-owned enterprise to be of *net benefit, only in an exceptional circumstance*."[14] [emphasis added]

In effect, the government indicated that SOE investment in the oil sands had reached a point whereby there was reason to be concerned about undue foreign government influence on an industry that is so vital to Canada's economic success.[15] Furthermore, Prime Minister Harper made clear that the government's scrutiny of SOEs was not limited to foreign investment in the oil sands, stating, "outside the oil sands, our Government will strengthen scrutiny under the Act of proposals by foreign state-owned enterprises to acquire Canadian businesses."

Investments by SOEs continue to be an area of concern. In mid-June 2015, Industry Canada was reported to have blocked a Chinese SOE, Beida Jade Bird, from constructing a $30-million fire alarm manufacturing facility in Saint-Bruno de Montarville, Québec, even though the rejected investment reportedly had received financial support from the Québec government. The rejection was based on national security grounds, including the proximity of the facility to a site operated by the Canadian Space Agency. This rejection 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 — referred to as a "co-location" concern. This type of co-location concern has led in the US to the very public refusal, by executive order, of a proposal by a Chinese company, Ralls Corp., to build a wind farm next to a US naval base in 2012.[16]

IV. Lessons for Managing Foreign Investment Reviews

M&A advisors are called upon to manage the interface between competition law and foreign investment reviews, as well as risks to deal certainty and timing.

The first consideration when advising on the timing and execution of any complex transborder transaction must be how many reviews it will have to undergo. Assuming the transaction is in an industry that does not raise national security considerations, a Canada-US cross-border transaction above the monetary thresholds will involve at least three reviews: by the Bureau and Minister in Canada (under the net benefit provisions of the *ICA*), and by the FTC or DOJ in the US.

Depending on the specific industry, target and identity of the proposed purchaser involved, review by CFIUS in the US and a review under the national security provisions of the *ICA* may also be required.[17] As described above, in the US it is a common practice to "pre-clear" a transaction with CFIUS even, or specifically where, the proposed transaction is not anticipated to raise national security issues. In Canada, this same opportunity does not arise: until now the IRD has not been prepared to commit the Minister to not reviewing a transaction under the national security provisions. Therefore, parties may be forced to grapple at an early stage with an assessment of whether the transaction is likely to undergo a national security review in Canada at all, quite independently of the question of whether it will be reviewed under the *ICA*'s "net benefit" test.

In assessing the likelihood of a national security review, advisors will have to take into consideration the trend towards the broadening of national security considerations. There are no clear limitations on the scope or breadth of review, particularly where an SOE or former SOE is involved in the transaction. It is no longer good enough to eliminate the "usual suspects" — the defence, technology and telecommunications industries. National security issues can extend to new sectors. Moreover, increasing threats to cyber security have recently generated concerns about the co-location of acquisition targets next to sensitive installations — such as that by Ralls Corp. in the US and Beida Jade Bird in Canada — that would not have been considered only a few years prior.

An accurate assessment of the potential for national security concerns and management of concurrent reviews will often require parties to retain experts beyond the economists typically involved in competition reviews. Such experts will often include individuals with government relations backgrounds, geopolitical advisory capabilities and those with considerable national security experience. It will be important to engage experts early in the process to assist in the fashioning of remedies to address anticipated domestic regulatory roadblocks.

The large number of potential reviews may affect the competitive position of a bidder in a competitive process; the fact that a particular bidder would have to go undergo a lengthy and potentially controversial foreign investment review, or a national security review may provide a party either an actual or perceived advantage or disadvantage in a competitive process.

Coordinating parallel reviews, both within and between jurisdictions, will increasingly be of paramount importance in these complex cases. Competition and foreign investment reviews cannot be entirely "siloed" — they require careful coordination both in terms of timing and message. For example, it is of fundamental importance to ensure that information provided to each authority by the merging parties is internally consistent.

Fortunately, cooperation in merger review between competition law authorities in the US and Canada is well established, as evidenced by many case examples over the past 25 years and the recent Cooperation Agreement. In respect of national security, too, there is a reasonable level of coordination to be anticipated between the US and Canada — both members of the alliance formed by a multilateral agreement for cooperation in signals intelligence between the United Kingdom, the United States, Canada, Australia and New Zealand, also known as "Five Eyes" and participants in other common security-clearance procedures.

This coordination regarding security risks may not rise to the level of coordinating remedies, however, so care must be taken to ensure that remedies applied in different jurisdictions do not place the purchasing party in an "operational conflict," *i.e.*, where it cannot comply with undertakings given to administrations of different countries. This challenge is particularly present in transactions involving transnational networks and information storage, where each agency may be seeking binding assurances that citizens of its country will exercise certain key access and control functions.[18]

Parallel reviews under the *Competition Act* and the *ICA* can have real-world timing implications for a proposed transaction. There have been cases where the Minister has not issued a clearance under the *ICA* until the Bureau has completed its review, especially where there are significant competition issues. While not usual practice, there also is a possibility that the Bureau may not complete its assessment until the *ICA* review process is concluded, especially where there are significant foreign investment issues and sufficient competition issues to give rise to a supplementary information request. Moreover, a competition authority may be somewhat more reluctant to move in front of a Cabinet-level parallel decision-making process, especially having seen what transpired in Australia, in the context of ADM's US$2.55-billion bid for Graincorp. In that case, the clearing of the acquisition by the competition authority was effectively reversed by the subsequent decision of the Federal Treasurer, made under Australia's foreign investment review regime, who cited competition concerns as one of the factors in his determination that the proposed transaction was not in Australia's national interest.[19]

The parallel considerations of economic protectionism and national security that have fuelled the rise in contentious foreign investment reviews dictate that M&A advisors, including counsel, undertake a thorough investigation of policy considerations — both in relation to the specific industries affected and at all levels of government — that may affect the outcome of the foreign investment review of a particular transaction. The cautionary tales of transactions that have run aground on the shoals of political considerations suggest that nothing be taken for granted in this process.■

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13. Gina Chon, "China surpasses UK in US deal scrutiny", FT (19 December 2013), http://www.ft.com/intl/cms/s/0/bf2e1c5e-68f4-11e3-996a-00144feabdc0.html#axzz3AD0mPhoU.
14. Stephen Harper, *Statement by then the Prime Minister on Foreign Investment* (7 December 2012) http://www.pm.gc.ca/eng/news/2012/12/07/statement-prime-minister-canada-foreign-investment.
15. See Avery et al. *supra* note 69 at para 76.
16. Keith Johnson and Damian Paletta, "Chinese-Owned Firm Sues Obama Over Wind-Farm Project", *Wall Street Journal* (2 October 2012) http://online.wsj.com/news/articles/SB10000872396390444004704578032083846454200.
17. A transaction in a sector that is subject to specific regulation may require additional reviews. For example, the acquisition of a wireless carrier would require a review by the FCC in the US, including a review by "Team Telecom", as well as a review by Industry Canada (under the *Radiocommunication Act* — for spectrum licence transfers).
18. In Canada, this is typically accomplished through their provision of commitments or undertakings, that are not made public. In the US, on the other hand, there is a practice of requiring the acquirer to provide publicly-available letters of assurance or enter into mitigation agreements.
19. John Hockey, *Foreign Investment Application: Archer Daniels Midland Company's Proposed Acquisition of Graincorp Limited*, Foreign Investment Review Board (29 November 2013) http://images.smh.com.au/file/2013/11/29/4965260/HockeystatementonGrainCorp.pdf?rand=1385674238966.

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