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This seventh edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS’s scrutiny. In turn, France is trying to generate support to revise the European Union’s competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and unpredictable
Preface

foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant ‘chilling’ effect on investment decisions and economic activity. Foreign investment regimes may be challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development’s Competition Committee.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 17 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

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I INTRODUCTION

Foreign investment in Canada has been regulated since the Foreign Investment Review Act was introduced in 1973. While this Act was emblematic of Canada’s protectionist stance towards foreign direct investment in the 1970s and early 1980s, its replacement by the Investment Canada Act (ICA) in 1985 made Canada a friendlier environment for foreign investment.2

Although the overwhelming majority of foreign investment reviews in Canada are still successful, the marked increase in contentious reviews in the past eight years demonstrates that Canada is not entirely immune to the parallel rising tide of economic protectionism and concern for national security that is increasing in various jurisdictions across the globe. Nonetheless, recent developments suggest that the Liberal government of Prime Minister Justin Trudeau is seeking to encourage increased foreign investment.

II FOREIGN INVESTMENT REGIME

The stated purpose of the ICA is to review ‘significant investments’ by non-Canadians with a view to encouraging investment and economic growth, as well as to review investments by non-Canadians that ‘could be injurious to national security’.3 The ICA applies when non-Canadians acquire existing Canadian businesses or establish new Canadian businesses.

The Minister of Innovation, Science and Economic Development (the Minister) is responsible for administering the majority of investments subject to the ICA, save for acquisitions or investments concerning ‘cultural’ businesses, which fall under the responsibility of the Minister of Canadian Heritage, as discussed in Section IV.iv.4

There are two separate but interdependent regimes for review under the ICA – net benefit reviews, aimed at determining whether the proposed transaction is likely to be of net benefit to Canada, and national security reviews.

1 David Rosner is a partner and Justine Johnston is an associate at Goodmans LLP.
3 Investment Canada Act, RSC 1985, c 28, Section 2 [ICA].
4 id., Section 4.
i  **Net benefit reviews**

Proposed transactions subject to the net benefit review provisions of the ICA are either notifiable or reviewable, depending on whether the applicable statutory financial threshold is met. When investments are considered notifiable, the foreign investor need only file a short notice of the transaction with the Director of Investments within 30 days of closing. In contrast, investments that are reviewable cannot be completed until the foreign investor has received, or has been deemed to receive, prior approval.

When a transaction is reviewable, the non-Canadian investor applies to the Investment Review Division (IRD) of Innovation, Science and Economic Development. The IRD is led by the Director of Investments, who is appointed by the Minister. It is the Director’s duty to assist the Minister and make recommendations as to whether a proposed investment would be of net benefit to Canada. However, the Minister is not bound by the Director’s recommendation and can approve or deny any investment. The Director and his or her officials are guided in assessing the net benefit of a transaction by a series of factors set out in the ICA, as discussed in Section IV.i. Consultations also occur with provincial governments affected by the proposed transaction, and with the Competition Bureau.

ii  **National security reviews**

All foreign investments in Canadian businesses may also be the subject of a national security review if the investment could be injurious to national security. The national security review provisions in the ICA do not specify threshold requirements based on the size of the transaction or the extent of the interest being acquired by the foreign investor. Accordingly, a national security review may be invoked in any transaction involving a non-Canadian investor in a Canadian business, even if the transaction is neither notifiable nor reviewable under the net benefit review provisions discussed above. The national security review framework is discussed further in Section IV.ii.

iii  **Special rules for state-owned enterprises and cultural businesses**

Special guidelines under the ICA also apply to investments by foreign state-owned enterprises (SOEs). These special guidelines are discussed in Section IV.vi. Similarly, transactions involving cultural businesses (e.g., those involved in the production or distribution of books, or film, audio and video products), for which the financial thresholds for review are substantially lower, are also subject to special rules, as discussed in Section IV.vi.

### III  **TYPICAL TRANSACTIONAL STRUCTURES**

When determining how to structure the acquisition of a private or public Canadian company, the question is whether to acquire the assets or the shares of the target. Share purchase transactions are usually less complex than asset purchase transactions, which benefits both the
buyer and the seller. Specifically, while a single share transfer is required in a share purchase transaction, an asset purchase transaction requires the conveyance of each individual asset and can trigger the need for third-party consents.

Setting aside the simplicity of a share acquisition, an asset acquisition is generally preferable for buyers. In an asset purchase, the buyer can choose to assume only specific assets and specific liabilities, whereas in a share purchase, the buyer acquires all the target’s assets and liabilities. An asset acquisition can also have tax benefits for purchasers, who are often able to allocate some of the purchase price to depreciable property, resulting in future tax deductions.

i  Acquisitions of public companies

The acquisition of a public company in Canada by way of an asset purchase generally requires at least 66.66 per cent shareholder approval. The acquisition of shares in a public company is usually achieved through one of three structures: plan of arrangement, amalgamation or takeover bid.

a A plan of arrangement is a statutory procedure that facilitates the acquisition of all the outstanding shares of the target company in a single step.

b An amalgamation is the combination of one or more entities resulting in a single new entity that houses the combined assets and liabilities of both pre-amalgamation entities.

c A takeover bid is an offer to acquire outstanding voting or equity securities where the securities subject to the offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the shares of the class that is subject to the offer. A takeover bid is the only method available in Canada to acquire legal control of a public company without the consent of the board of directors.

While any of these three structures can be used for a ‘friendly’ transaction, most parties prefer a plan of arrangement for several reasons. First, plans of arrangement are subject to court approval while amalgamations and takeover bids are not. The board of directors will often take comfort from judicial approval, which effectively limits the potential liability of the directors in respect of the transaction. Second, plans of arrangement offer significant flexibility by accommodating transaction mechanics that may be difficult or impossible to implement through a takeover bid or amalgamation. For example, a plan of arrangement will permit the precise ordering of transaction steps needed to accommodate tax planning objectives. It will also more easily accommodate the restructuring or acquisition of the target’s options and other convertible securities. In contrast to takeover bids alone, plans of arrangement offer even more benefits, including:

a Complexity: a plan of arrangement facilitates the acquisition of 100 per cent of the target in a single step, whereas a takeover bid inevitably requires a second step to acquire 100 per cent of the shares.

b Timing: depending on the circumstances, a plan of arrangement may be completed more quickly than a takeover bid, particularly if extensions to the bid are required or fewer than 90 per cent of the target shares are ultimately tendered to the bid.

c Procedural requirements: very few technical rules apply to a plan of arrangement, as compared to a takeover bid, which is subject to comprehensive procedural requirements.
Collateral benefits: collateral benefits are permitted in plans of arrangement (subject to minority shareholder approval in most cases). In contrast, a shareholder is not able to receive greater consideration in a takeover bid, in the absence of a statutory exemption or discretionary relief.

IV  REVIEW PROCEDURE

As set out in Section II, there are two separate interdependent regimes for review under the ICA – the net benefit review and the national security review.

i  Net benefit reviews

When a non-Canadian acquires control of an existing Canadian business, the investment is subject to a net benefit review if it exceeds certain prescribed financial thresholds; otherwise, a notification of the transaction must be filed with the Director of Investments within 30 days of closing.

Key terms: non-Canadian, acquires control and Canadian business

The ICA provides a framework for determining whether an investor is non-Canadian, whether an investment is an acquisition of control by the non-Canadian, and whether the investment relates to a Canadian business.

Non-Canadian

The ICA defines ‘non-Canadian’ as an individual, a government or an agency thereof, or an entity that is not Canadian.11

An individual is a Canadian under the ICA if she or he is a Canadian citizen or a permanent resident ‘who has been ordinarily resident in Canada for not more than one year after the time at which she or he first became eligible to apply for Canadian citizenship’.12

An entity is Canadian if it is Canada-controlled. The determination of whether an entity is Canada-controlled is more complex and is determined by applying Part V of the ICA. Subject to additional rules applicable to SOEs, cultural businesses and investments that may be injurious to national security (discussed below), an entity is Canada-controlled if:

a  one Canadian owns a majority of the voting interests of the entity;

b  two or more members of a voting group who are Canadians own a majority of the voting interests of the entity; or

c  a majority of the voting interests of an entity are owned by Canadians and it can be established that the entity is not controlled in fact through the ownership of its voting interests by non-Canadians.13

10  id., Section 14.
11  id., Section 3.
12  ibid.
13  id., Section 26(1)(a) to (c).
An entity is also Canada-controlled when less than a majority of the voting interests of the entity are owned by Canadians, but it can be established that:

\[a\] the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which the Canadian members own a majority of those voting interests of the entity owned by the voting group; or

\[b\] in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and two-thirds of the members of its board of directors (or, in the case of a limited partnership, two-thirds of its general partners) are Canadians.\(^{14}\)

**Acquires control**

The manner of acquiring control varies under the ICA depending on the target entity. Generally, an acquisition of control occurs upon the acquisition of a majority of the voting shares or voting interests of an entity, either directly or indirectly, carrying on a Canadian business, or upon the acquisition of all or substantially all the assets used to carry on a Canadian business.

In the case of a corporation specifically:

\[a\] where fewer than one-third of voting shares of the target corporation are acquired, control of the corporation is deemed not to be acquired;\(^{15}\)

\[b\] where more than one-third but less than 50 per cent of voting shares of the target corporation are acquired, there is a rebuttable presumption that control has been acquired;\(^{16}\) and

\[c\] where more than 50 per cent of the voting shares of the target corporation are acquired, control of the corporation is deemed to be acquired.\(^{17}\)

In the case of a non-corporate entity, such as a trust, partnership or joint venture, the acquisition of less than 50 per cent of the voting interests of the entity is deemed not to be an acquisition of control.\(^{18}\)

When the foreign investor is an SOE,\(^{19}\) the acquisition is in respect of a cultural business\(^{20}\) or where a transaction may be injurious to national security,\(^{21}\) the Minister is given the flexibility to make a fact-specific determination as to whether an acquisition of control has occurred.

**Canadian business**

A Canadian business is defined as ‘a business carried on in Canada that has (1) a place of business in Canada, (2) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (3) assets in Canada used in carrying on the business’.\(^{22}\) The ICA also contains provisions relating to businesses that are carried on only partially in Canada.

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\(^{14}\) id., Section 26(1)(d).
\(^{15}\) id., Section 28(3)(d).
\(^{16}\) id., Section 28(3)(b).
\(^{17}\) id., Section 28(3)(a).
\(^{18}\) id., Section 28(3)(b).
\(^{19}\) id., Section 28(6.1).
\(^{20}\) id., Section 28(4).
\(^{21}\) id., Section 28(4.1).
\(^{22}\) id., Section 3.
Threshold requirements

Foreign investments are reviewable by the IRD (or the Cultural Sector Investment Review Division of the Department of Heritage Canada when the target engages in cultural business activities) if a foreign investor acquires control of a Canadian business and the value of the business exceeds certain statutory thresholds.23

Threshold factors

The applicable statutory threshold depends on a number of factors:

a whether the investor, or investors, is a World Trade Organization (WTO) investor or trade agreement investor, or the target Canadian business is controlled by such an investor. A ‘WTO investor’ generally refers to an individual who is a national of a WTO Member State, the government of a WTO Member State and a WTO-controlled entity. A ‘trade agreement investor’ refers to the subset of WTO Member States with which Canada executes a trade agreement, such as the North American Free Trade Agreement (NAFTA) or the Comprehensive Economic and Trade Agreement (CETA);24

b whether the investor is an SOE;

c whether the target entity carries on a cultural business;

d whether the acquisition is direct or indirect. Pursuant to the ICA, an indirect acquisition is a transaction involving the acquisition of the shares of a company incorporated outside Canada, which owns subsidiaries in Canada; and

e whether the investment raises national security concerns.

Statutory financial thresholds

In determining whether an applicable financial threshold has been met, either the book value or the enterprise value of the transaction must be determined, depending on the type of transaction. The book value is determined by the value of the assets acquired as reflected in the business’s most recent annual audited financial statements.25 The calculation of enterprise value depends on the structure of the transaction:

a In the case of an acquisition of shares of a public entity, enterprise value is equal to the market capitalisation of the entity plus its liabilities (excluding operating liabilities), minus its cash and cash equivalents.26

b In the case of an acquisition of shares of an entity that is not publicly traded, enterprise value is equal to the acquisition value plus the entity’s total liabilities (excluding operating liabilities), minus cash and cash equivalents.27

c In the case of an acquisition of assets, enterprise value is equal to acquisition value plus liabilities assumed by the investor (excluding operating liabilities), minus cash and cash equivalents.28

The 2019 reviewable threshold for direct private sector investments involving WTO investors either as purchaser or seller is C$1.045 billion in enterprise value. This threshold has more
than doubled since 2013. Additionally, since 1 January 2019, this reviewable threshold is adjusted annually to reflect the change in Canada’s nominal gross domestic product. The 2019 equivalent reviewable threshold for private sector investments involving trade agreement investors is C$1.568 billion in enterprise value. This threshold is also adjusted annually based on changes in nominal gross domestic product.

The reviewable threshold for direct acquisitions by investors not belonging to a WTO Member State, or for direct acquisitions of Canadian cultural businesses (irrespective of investor nationality), is only C$5 million.\(^{29}\) For direct acquisitions by SOEs from WTO Member States, the 2019 reviewable threshold is C$416 million (book value of assets).

Indirect acquisitions (in which a non-Canadian parent company that controls a Canadian subsidiary is being acquired) by investors from WTO Member States are not reviewable, unless the Canadian subsidiary of the target is a cultural business.\(^{30}\) Indirect acquisitions of cultural businesses are reviewable if the book value of the assets involved exceeds C$50 million, but this threshold is reduced to C$5 million if the asset value of the target exceeds 50 per cent of the asset value of the international transaction.

**Applicable time frames**

When a transaction is reviewable, the investor must submit an application to the IRD to aid the Minister in determining whether the proposed transaction is likely to be of net benefit to Canada. The Minister has 45 days from the date of receiving a sufficient application to complete the net benefit review and issue an opinion.\(^{31}\) The Minister can (and typically does) unilaterally extend the review period by an additional 30 days.\(^{32}\) In practice, investors should therefore allow at least 75 days for the process. The review period cannot be unilaterally extended by the Minister beyond 75 days without the consent of the investor.

As previously noted, when a transaction is notifiable (i.e., not reviewable), the investor must file a completed notification of the transaction with the Director of Investments within 30 days of closing.\(^{33}\)

**Net benefit test**

In determining whether the proposed transaction is of net benefit to Canada, the Minister considers a set of factors enumerated in the ICA, none of which is individually determinative. These include:

\(a\) the effect of the investment on the level and nature of economic activity in Canada, including employment, resource processing, and the utilisation of parts, components and services;

\(b\) 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;


\(^{30}\) ibid.

\(^{31}\) ICA (see footnote 3), Section 21(1).

\(^{32}\) id., Section 21.

\(^{33}\) id., Section 20.
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

the contribution of the investment to Canada’s ability to compete in world markets.34

The broad language of the net benefit factors listed in the ICA (such as ‘compatibility with industrial policies’) provides the Minister with wide discretion to approve or reject proposed transactions.35 While ministerial decisions approving a proposed transaction are published (usually with a summary of the undertakings given by the acquirer unless competitively sensitive), the Minister may, but is not under a statutory obligation to, publicise his or her reasons for rejecting reviewable investments.36 Commentators have suggested that the Minister make available information concerning the net benefit determination and ‘create a ‘jurisprudence’ of decisions that could inform future investors of the commitments that are likely to be required’.37

In making an assessment under the net benefit test, the Minister will consider the investor’s plans for the Canadian business and proposed undertakings, and may also consider representations made by other federal departments and agencies, any provinces likely to be significantly affected by the investment, and the Competition Bureau.38

Although not mandatory under the ICA, in practice, the Minister requires undertakings from the investor regarding the acquired Canadian business (i.e., contractual commitments from the investor) in virtually all reviewable transactions. The undertakings, which are legally enforceable commitments to the Government of Canada, usually have a term of three years and address matters such as employment levels in Canada, Canadian participation in management and the board of directors, production targets, research and development, future capital expenditures and charitable contributions.

In the 2017–2018 fiscal year, 751 investment filings (both applications for review and notifications) were certified under the Act. These filings were categorised into five broad sectors, with 250 transactions in the business and services sector; 179 transactions in the manufacturing sector; 141 transactions in other services; 115 transactions in the wholesale and retail sector; and 66 transactions in the resources sector.39 More than 50 per cent of these filings were for companies worth C$10 million or less. Notably, only nine applications for net benefit review were approved in the 2017–2018 fiscal year. This is a significant decrease from the 22 net benefit review applications that were approved in the 2016–2017 fiscal year.40 The decrease in the number of net benefit review applications corresponds to the increase in the net benefit review financial threshold.

34 ibid.
35 Brian Facey and Joshua Krane, Investment Canada Act: Commentary and Annotation (Toronto: LexisNexis Canada, 2014) at 54.
36 The Minister must provide reasons for rejecting a proposed investment to the non-Canadian investor – ICA (see footnote 3), Section 23.1.
37 Facey and Krane (see footnote 35) at xiv.
38 ICA (see footnote 3), Section 19.
40 ibid.
National security reviews

Alongside the net benefit review regime is the national security review regime under the ICA. In 2009, the ICA was amended to give the Canadian 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’ and the Governor in Council (i.e., the federal Cabinet) makes an order for review.41

The national security review process runs on a different timeline from the net benefit review process, and can take up to 200 days under current regulations, or longer on consent. If the Minister believes that an investment could be injurious to national security, the Governor in Council, within 45 days of receipt of a notification or an application for review under the net benefit provisions, may order a formal national security review. Alternatively, the Minister may, within that same 45-day period, notify the investor that such a review may be commenced. If the transaction is not reviewable or notifiable, however (for example, because there is no acquisition of control), this same 45-day period only begins to run after the transaction closes.42 If during that 45-day period the Minister notifies the investor that the Minister is considering commencing a review, the Governor in Council has a further 45 days from the date of the notice to order the review.43

When a formal national security review is ordered, the review itself may take 45 days to complete; this period may be unilaterally extended by a further 45 days. Following the review, unless the Minister sends a notice that no further action will be taken, she or he can refer the matter to the Governor in Council, who has 20 days in which to take any measures advisable to protect Canada’s national security, including blocking the investment, allowing the transaction to close subject to undertakings by the investor or certain terms and conditions, or, in the case of a completed transaction, order a divestiture.44 The investor may be required to make legally binding undertakings to the Government of Canada to mitigate potential harm to national security. Undertakings may require the investor to (1) obtain government approval of proposed locations to avoid proximity to strategic assets; (2) service and support some or all business lines in Canada; (3) create approved corporate security protocols to protect information; (4) conduct third-party compliance audits; and (5) provide access to facilities for compliance inspection.

As noted above, unlike a net benefit review, which 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 both the size of the transaction and the extent of the interest being acquired by the foreign investor. This can be particularly problematic from a timing perspective 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; for example, because of the nature of the target. Formal pre-acquisition clearance cannot be obtained under the national security provisions of the ICA.

41 ICA (see footnote 3), Section 25.3.
42 ICA (see footnote 3), Section 25.2(1); National Security Review of Investments Regulations, SOR/2009-271, Section 2.
43 ICA (see footnote 3), Section 25.3(1); National Security Review of Investments Regulations, note 41, Section 4.
44 ICA (see footnote 3), Section 25.4(1); National Security Review of Investments Regulations, note 41, Section 6.
Commentators have expressed concern that the ICA does not provide sufficient guidance on what may constitute a threat to national security. The ICA does not define ‘national security’, which commentators have said gives the Minister broad discretion to review investments and can lead to uncertainty for non-Canadian investors seeking to do business in Canada. In December 2016, the government issued guidelines detailing the factors that it will consider in either ordering or considering a national security review. While the guidelines do not provide a definition of national security, they list a number of factors the Minister or Governor in Council may take into account when assessing a proposed or implemented investment under the national security provisions of the ICA. The factors include:

- potential effects of the investment on Canada’s defence capabilities and interests;
- potential effects of the investment on the transfer of sensitive technology or know-how outside Canada;
- potential effects of the investment on the security of Canada’s critical infrastructure;
- potential effects of the investment on the supply of critical goods and services to Canadians or the Canadian government;
- potential for the investment to enable foreign surveillance or espionage, hinder current or future intelligence or law enforcement operations, or involve or facilitate the activities of terrorist organisations or organised crime; and
- potential effects of the investment on Canada’s international interests, including foreign relationships.

The guidelines encourage early engagement with the IRD when any of these factors may be present.

iii Enforcement

If the Minister believes that a non-Canadian has breached the ICA (for example, by implementing an investment that required prior approval without first obtaining the approval, or failing to comply with a written undertaking), the Minister may send a demand to the non-Canadian, requiring the person or entity to cease the contravention, to remedy the default, to show cause why there is no contravention or to justify non-compliance with any undertakings provided.

If a non-Canadian fails to comply with such a demand, the ICA provides for an application to be made to a superior court. The court may make any order that it determines is required in the circumstances, including an order imposing a penalty not exceeding C$10,000 for each day on which the person or entity is in contravention. The penalty is recoverable as a debt and any breach of a court order would constitute contempt of court. An appeal may be brought from any such order by the court.

46 Facey and Krane (see footnote 35) at 76.
48 ICA (see footnote 3), Section 39.
49 id., Section 40.
iv Exemptions from net benefit or national security reviews

Part II of the ICA provides a list of transactions that are exempt from the review and notification requirements contained in the ICA, and a list of transactions that are also exempt from the national security provisions of the ICA.

Transactions exempt from the review and notification requirements, but still subject to the national security review provisions, include:

- an acquisition in the ordinary course of business by a trader or dealer in securities;
- an acquisition in the ordinary course of business by a venture capitalist;
- an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance;
- an acquisition of control for the purpose of facilitating financing so long as the acquirer divests itself of control within two years;
- an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged;
- an acquisition of control of a Crown corporation;
- an acquisition of control of a non-profit corporation;
- a transaction to which Part XII.01 of the Bank Act applies;
- an involuntary acquisition of control resulting from the devolution of an estate or by operation of law;
- certain acquisitions of control by non-Canadian insurance businesses or affiliates thereof; and
- an acquisition of control of a farming business where real property is acquired.

Transactions exempt from the review and notification requirements contained in the ICA, and from the national security review provisions, include:

- an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance where the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
- an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged and the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
- an acquisition of control of a Crown corporation;
- a transaction to which Part XII.01 of the Bank Act applies; and

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50 id., Section 10(1).
51 id., Section 10(2).
52 Note, an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance that is not subject to approval under the Bank Act, SC 1991, c 46, Cooperative Credit Associations Act, SC 1991, c 48, Insurance Companies Act, SC 1991, c 47 or Trust and Loan Companies Act, SC 1991, c 45, is still exempt from the review requirements of the ICA, but not the notification or national security provisions – ICA, note 3, Section 10(1.1).
certain acquisitions of control by non-Canadian insurance businesses, or affiliates thereof, where the acquisition is subject to approval under the Bank Act, the Cooperative the Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act.

v Interplay with competition law
Investments that are subject to foreign investment review may also be subject to review under the Competition Act (CA), whereby certain proposed acquisitions and business combinations trigger advance notification requirements. Specifically, Part IX of the CA establishes a review process whereby parties to a transaction must provide the Commissioner of Competition with pre-transaction notification filings if the proposed transaction exceeds specified monetary and shareholding thresholds. These thresholds are different from those contained in the ICA. When a transaction is subject to review under Part IX of the CA, it cannot be closed until expiry of a 30-day statutory waiting period, which may be extended if the Commissioner requires more information about the proposed transaction. Many reviews under the CA take approximately four to five months to complete; some cases certainly take longer.

Competition and foreign investment reviews in Canada cannot be ‘siloed’, as they require careful coordination, in terms of both timing and message. For example, it is of fundamental importance to ensure that information provided to each authority by the transacting parties is consistent. One of the factors considered in the net benefit test during a foreign investment review is the effect of the investment on competition within any industry or between industries in Canada. Given the Competition Bureau’s expertise in this area, the Minister, through the Director of Investments, will consult the Bureau in respect of this criterion.

Parallel reviews under the CA and the ICA can also have real-world timing implications for a proposed transaction. For example, the Minister might not issue a clearance under the ICA until the Bureau has completed its review, especially where there are significant competition issues. While not usual practice, there is also a possibility that the Competition Bureau...
Bureau may not complete its assessment until the ICA review process is concluded, especially if there are significant foreign investment issues and sufficient competition issues to give rise to a supplementary information request.

vi Special rules for SOEs and cultural businesses

Special considerations apply to investments by foreign SOEs and acquisitions of Canadian cultural businesses.

SOEs

As part of the Minister’s net benefit assessment, investments by foreign SOEs must meet specific guidelines. These guidelines were significantly revised in 2012, following high-profile acquisitions of Canadian oil and gas producers by Asian SOEs.57

Reflecting Canada’s heightened sensitivity to SOE transactions, the ICA definition of an SOE was broadened significantly in the 2012 amendments. Now, in addition to organisations that are directly owned by foreign governments, SOEs include entities ‘controlled or influenced directly or indirectly’ by a foreign government.58 The ICA also allows the Minister to make ‘control in fact’ determinations about SOEs; in practice, this means the Minister can declare that a Canada-controlled investor is controlled in fact by an SOE, possibly subjecting the investment to review under the ICA. The Minister can also determine that an SOE has acquired control of a Canada-controlled entity, subjecting even minority investments by SOEs to ICA review.59

As detailed above, the financial thresholds for review are lower for SOEs, increasing the likelihood of review of SOE transactions. The 2019 financial threshold applicable to a WTO SOE is C$416 million.60

Pursuant to the SOE guidelines, the Minister may consider the governance and commercial orientation of SOEs to determine whether an acquisition by an SOE 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 to prevent state owners from using Canadian acquisitions to effect their own undesirable objectives.61 In practice, 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.62

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58 ICA (see footnote 3), Section 3.
60 ‘Thresholds for Review’ (see footnote 29).
To ensure these principles are upheld, the Minister may require that an SOE investor provide additional undertakings, such as the appointment of Canadians as independent directors on the board of directors. Unlike undertakings required by non-SOE investors, which typically have a three-year term, undertakings required of SOEs might continue indefinitely or for as long as the investor is an SOE.

Cultural businesses

The Minister of Canadian Heritage is responsible for reviewing acquisitions of, or investments in, cultural businesses. A ‘cultural business’ is defined in the ICA and can include, for example, businesses involved in the publication or distribution of books, film, music and radio communications. Even if only a small portion of a business’s operations are cultural, it will still be considered a cultural business for the purposes of foreign investment review.

As set out in Section IV.i, the monetary thresholds for review of cultural businesses are much lower than those for non-cultural businesses, ranging from C$5 million to C$50 million. Even when an investment would be otherwise notifiable, the Minister of Canadian Heritage has considerable discretion to review a transaction involving a cultural business when certain notification requirements are met.

Transactions involving cultural businesses must also align with Canada’s cultural policy objectives, where relevant, in addition to meeting the standard ‘net benefit to Canada’ test.

Specifically, the Minister of Canadian Heritage will consider the consistency of the investment with Canada’s cultural policies in such industries as periodical and book publishing, and film production and distribution.

V FOREIGN INVESTOR PROTECTION

There are a variety of trade and investment agreements pertinent to foreign investors in Canada; namely, free trade agreements, plurilateral agreements, WTO agreements and bilateral investment treaties. In Canada, bilateral investment treaties are called foreign investment promotion and protection agreements (FIPAs), and they aim to promote and protect foreign investment through a mechanism of legally binding reciprocal rights and obligations.

Although there are a number of exclusions concerning sensitive policy areas, such as environmental protection, FIPAs generally enable foreign investors to receive the same treatment as domestic or other third-party foreign investors, referred to respectively as ‘national treatment’ and ‘most-favoured-nation treatment’. FIPAs include provisions

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63 ‘Investment Canada Act – All Guidelines’ (see footnote 59).
64 ‘Statement Regarding Investment by Foreign State-Owned Enterprises’ (see footnote 62).
65 ICA (see footnote 3), Section 4.
66 id., Section 14.1(6).
67 id., Section 15.
69 ibid.
70 ibid.
71 See, for example, Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Canada and the People’s Republic of China, Articles 5 and 6 (entered into force 1 October 2014) (Canada–China foreign investment promotion and protection agreement (FIPA)).
allowing foreign investors to repatriate their capital and returns, and precluding the Canadian government from expropriating their investments without arranging sufficient and timely compensation.

i Agreements in force and under way

Canada has 37 FIPAs in force, including with Barbados, the Czech Republic, Côte d’Ivoire, Hong Kong, Poland, Romania, the Russian Federation, Thailand and Tanzania. For example, the Canada–China FIPA entered into force on 1 October 2014. The agreement highlights the importance of promoting investment based on principles of sustainable development, and increasing economic cooperation based on equality and mutual benefit.

The agreements also include investor–state dispute settlement (ISDS) provisions, which allow investors to bring claims against the Canadian government for discriminatory practices, and to resolve those disputes through an arbitral tribunal.

Similar provisions, subject to a limited number of exclusions, also exist in other agreements. For example, Chapter 11 of the NAFTA pursues the principles of international reciprocity and equal treatment of investors from NAFTA states, allowing those investors to transfer their capital and returns, and precluding the Canadian government from expropriating their investments without sufficient and timely compensation. The ISDS provision in Chapter 11 allows investors from NAFTA states to submit to arbitration claims, including claims for damages, against the Canadian government. NAFTA has been renegotiated, and a new Agreement between the United States of America, the United Mexican States, and Canada (USMCA) was signed in November 2018. While USMCA ratification has yet to occur, Chapter 14 of the USMCA will remove Canada from ISDS three years after NAFTA’s termination. Once ratified, American investors already operating in Canada may use ISDS for three more years before its use is terminated in Canada. Once ratified, Canada’s exit from ISDS will greatly limit protection offered to both US and Mexican investors. Chapter 8 of the CETA, a trade agreement concluded between Canada and the European Union, also provides an ISDS mechanism whereby foreign investors may submit a claim to an arbitral tribunal. The CETA provisionally entered into force on 21 September 2017.

Lastly, following seven years of negotiations, Canada signed the Trans-Pacific Partnership (TPP) on 4 February 2016, with 11 other countries, including the United States. However, President Trump withdrew the United States from the TPP on 30 January 2017 and, without the United States, the TPP could not enter into force. The remaining countries, however, engaged in renewed negotiations, which concluded on 23 January 2018 with the creation

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72 See, for example, id., Articles 10 to 12.
74 Canada–China FIPA (see footnote 71).
75 ibid.
76 See, for example, id., Articles 19 to 32.
78 ibid.
79 Free Trade Agreement between the United States of America, the United Mexican States, and Canada, 30 November 2018, Chapter 14 (not yet in force).
80 Comprehensive Economic and Trade Agreement, Canada and the European Union, 30 October 2016, Article 8.
of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In October 2018, the Trudeau government implemented and ratified the CPTPP in Canada.\(^\text{81}\) The CPTPP entered into force (among the first six countries to ratify the agreement) on 30 December 2018. Chapter 9 of the CPTPP includes an ISDS mechanism, which allows foreign investors to submit claims to arbitration and be awarded monetary damages or restitution of property.\(^\text{82}\)

**ii Enforcement issues**

FIPAs involving Canada include exemptions for cultural industries engaged in the production and sale of books, film and music, and for environmental measures to protect human, animal or plant life or to conserve exhaustible natural resources.\(^\text{83}\) Other exceptions include measures to ensure the integrity and stability of the financial system, and to protect financial market participants and investors.\(^\text{84}\) Moreover, a decision by the Canadian government under the ICA regarding the approval of an investment after a review is generally exempted from the dispute settlement provisions.\(^\text{85}\)

Furthermore, general concerns regarding the transparency of arbitration apply but are mitigated by the emergence of mechanisms such as the Rules on Transparency in Treaty-Based Investor–State Arbitration, established by the UN Commission on International Trade Law and which came into effect on 1 April 2014.

**VI OTHER STRATEGIC CONSIDERATIONS**

With the recent rise in the financial thresholds for review applicable to direct private sector investments, increasingly only the largest transactions are subject to a net benefit review pursuant to the ICA. Such investments tend to be of a very high-profile nature, and the Minister’s discretion to address both national interest and national security considerations means that not only must legal process and substantive considerations be taken into account, but also the political and public relations aspects of a proposed acquisition. Indeed, since the 2012–2013 fiscal year, 80 per cent of the issued Section 25.3 Orders have been for Chinese and Russian investors. This reflects Canada’s fluctuating geo-political relationship with these countries, and the role of politics in foreign investment.\(^\text{86}\) Accordingly, it is prudent in the planning phase of such a transaction to fully engage not only legal experts, but also government relations experts and communications experts, to ensure there is both an accurate reading of how the particular transaction may be perceived against the political landscape and to develop the key messages that will ensure a consistent, positive public perception regarding the transaction’s benefits for Canada.

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\(^\text{82}\) Trans-Pacific Partnership Agreement, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States (withdrawn) and Vietnam, 4 February 2016, Article 9.

\(^\text{83}\) See, for example, Canada–China FIPA (see footnote 70), Article 33.

\(^\text{84}\) ibid.

\(^\text{85}\) id., Annex D.34.

Those proposing major transactions in sensitive economic sectors, such as Canada’s oil and gas sector, or transactions of any size that might raise national security considerations, are also encouraged to arrange a meeting with the IRD at an early stage in their planning to identify any policy concerns that may be raised by a particular transaction.

VII CURRENT DEVELOPMENTS

Increased scrutiny in recent years of foreign investment internationally has been driven by the rise of both national interest considerations, such as the importance of infrastructure, and the rise in various jurisdictions of national security considerations more generally. In the 2017–2018 fiscal year, four Notices were issued to non-Canadian investors under section 25.2 of the ICA on the grounds that the investment could be injurious to Canadian national security, and two National Security Reviews were ordered under Section 25.3 of the ICA. Notwithstanding this emerging trend, the election of the Liberal government of Prime Minister Justin Trudeau in 2015 ushered in a new era for foreign investment in Canada. The Trudeau government has placed significant emphasis on attracting foreign direct investment in infrastructure projects, and holding seminars aimed at encouraging investors to deploy capital in Canada.

The Trudeau government has also specifically welcomed investment from China, putting Canada on a unique footing when compared with some of its Western allies. Whereas the former Conservative government of Prime Minister Steven Harper had blocked or ordered the divestiture of a number of transactions on national security grounds, the Trudeau government has taken a markedly different approach, particularly towards investments from Chinese SOEs. Many examples demonstrate this change in direction for Canada.

In March 2017, the Trudeau government reversed a decision of the Harper government to block the purchase of a Montreal-based technology company, ITF Technologies Inc, on national security grounds.

In 2015, O-Net Communications Group Ltd, a developer of optical networking components based in Hong Kong reported to be a subsidiary of Chinese state-owned China Electronics Corporation, acquired ITF Technologies, which specialises in fibre components and modules, for C$5 million. Following the closing, the federal cabinet exercised its powers under the national security provisions of the ICA to require the divestiture of O-Net’s investment.

O-Net brought its concerns about the secretive national security process before the Federal Court of Canada by way of an application for judicial review filed in August 2015. In its application, O-Net claimed that the government breached its right to procedural fairness by, among other ways, failing to disclose its national security concerns regarding the transaction or to provide an opportunity to respond.

In late 2016, it was announced that the new Liberal government had agreed to an order that it would undertake a new review of the ITF Technologies acquisition. At the time, the government faced public criticism for opening the door to a fresh review of a transaction. As reported in The Globe and Mail, a nationally distributed Canadian newspaper, the Canadian national security agency had warned that transfer of the target’s technology would undermine a technological edge enjoyed by Western militaries over China.

The reversal of the O-Net divestiture order followed on the heels of remarks by the newly appointed Chinese ambassador to Canada, who was reported in the 24 March 2017 edition of The Globe and Mail as stating that China would view as ‘trade protectionism any attempt
to invoke national security to block state-owned firms from buying Canadian companies or doing business with the federal government’. This comment regarding national security reviews was made in an interview dealing more broadly with Beijing’s desire for unfettered access for Chinese state-owned firms to all key sectors of the Canadian economy. The access sought would require the reversal of a policy put in place by the Harper government to block future acquisitions of control by SOEs over Canadian oil sands businesses.

In announcing its decision to reverse the divestiture order, the government made it clear that its ruling is subject to conditions. An unnamed source within the government also explained that there were no other buyers for the Canadian business, and a divestiture might have resulted in the scattering of the expertise and knowledge residing within the business.

In May 2017, the Trudeau government cleared the purchase of Norsat, a Canadian manufacturer of communications equipment with military applications, by Hytera, a Chinese SOE. Norsat makes microwave components, portable satellite systems, maritime communications equipment and radio frequency antenna products. In January 2017, it announced that it had sold portable satellite terminals to the United States Department of Defense in a deal worth C$3.3 million.

In clearing the Hytera transaction, the Canadian government did not conduct a formal national security review, which attracted criticism from opposition politicians and retired security officials within Canada, as well as US legislators. The government defended itself by making clear that a detailed review, albeit an informal one, had been conducted and had included consultation with the security apparatus in the United States.

Two national security reviews were ordered in the 2017–2018 fiscal year. In the first proposed investment, the investor withdrew its notification before a section 25.4 Order was issued. The second proposed investment was the US$1.5 billion acquisition of Aecon Canada, a Canadian construction firm, by CCCI, a Chinese SOE. Following a formal national security review, the Canadian government issued a section 25.4 Order blocking the proposed acquisition of Aecon on the basis that it would be injurious to national security. CCCI’s proposed investment was the third investment to be blocked under the national security regime, and the first transaction blocked by the Trudeau government (other foreign investments have been approved with conditions or divestitures).

Recent developments are nevertheless generally consistent with, and confirm, the widely held view that the Trudeau government is more open to foreign investment than previous governments. What remains to be seen, however, is how successfully Canada may forge its own foreign investment path in a global environment that is increasingly inward facing.
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