

The Government of Canada Proposes Amendments to the Investment Canada Act Relating to State-Owned Enterprises

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Introduction

As previously reported¹, on December 7, 2012, the Government of Canada (the "Government") approved the proposed acquisition of Progress Energy Resources Corp. by PETRONAS, and the proposed acquisition of Nexen Inc. by the China National Offshore Oil Company ("CNOOC"), pursuant to the *Investment Canada Act*² ("ICA"). Both deals involved the proposed acquisition of control, by a state-owned enterprise, of a Canadian business operating in the oil and gas sector. PETRONAS is the national oil company of Malaysia and CNOOC is the third largest national oil company in the People's Republic of China.

On the same day, Industry Canada issued revised guidelines regarding how it would assess proposed acquisitions by state-owned enterprises in the future (the "Revised Guidelines").³ The Revised Guidelines did not offer any definitive guidance on the meaning of "net benefit to Canada," as some had hoped. However, they did provide some guidance on what entities would be considered state-owned enterprises and what additional factors would be considered in cases where such an entity sought to acquire control of a Canadian business.

For example, the Revised Guidelines expanded the definition of a state-owned enterprise to include an enterprise that was influenced (directly or indirectly) by a foreign government. The previous guidelines only considered an enterprise to be a state-owned enterprise if it was actually owned and controlled by a foreign government.

On April 29, 2013, the Government introduced Bill C-60,⁴ its 2013 budget implementation bill. Bill C-60 contains proposed amendments to the ICA, which will now codify the definition of a "state-owned enterprise." It will also implement increased review thresholds for World Trade Organization ("WTO") member countries, which were announced by the Minister of Industry (the "Minister") on May 25, 2012.⁵ Finally, Bill C-60 will allow the Government to extend the timeline for national security reviews.

New Definition of "State-Owned Enterprise"

Bill C-60 will now define the term "state-owned enterprise" as meaning:

- a) The government of a foreign state, whether federal, state, or local, or an agency of such a government;
- b) An entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or
- c) An individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency.

¹ <http://www.blaney.com/articles/canada-approves-proposed-oil-and-gas-acquisitions-issues-revised-guidelines>.

² R.S., 1985 (1st Supp.).

³ <http://www.ic.gc.ca/cic/site/ica-lic.nsf/eng/lk00064.html#3>.

⁴ <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6113748&File=4>.

⁵ <http://www.blaney.com/articles/canadas-minister-industry-announces-improvements-foreign-investment-review-process>.

This new definition is consistent with the Revised Guidelines but provides added clarification. For example, it clearly includes the agency of a foreign government, an individual acting under the direction or influence of a foreign government or agency, and an entity that is influenced by a foreign government or agency. However, the concepts of “direction” and “influence” are not defined, which creates added uncertainty when determining whether a particular individual or entity is considered a state-owned enterprise.

New Ministerial Powers to Make “Control in Fact” Determinations in Connection with State-Owned Enterprises

Under Bill C-60, the Minister will have the power to make a determination that:

- a) An entity is controlled in fact by a state-owned enterprise; or
- b) There has been an acquisition of control in fact by a state-owned enterprise.

The determination may be made after considering any information and evidence made available to the Minister or the Director of Investments (the “Director”).

These new powers will allow the Minister to override the status and acquisition of control rules that appear in the ICA. For example, under the ICA, the acquisition of less than one-third of the voting shares of a corporation or of an equivalent undivided ownership interest in the voting shares of the corporation is not considered an acquisition of control of that corporation. However, where a state-owned enterprise is involved, a control in fact determination may still be made by the Minister even if that entity acquires less than one third of the corporation.

If an entity or a state-owned enterprise refuses or neglects to provide, within a reasonable time, information that the Minister or the Director has requested and the Minister considers necessary in order to make a decision, the Minister may make a declaration that the entity is controlled by a state-owned enterprise or that there has been an acquisition of control of the entity by a state-owned enterprise. In other words, if the entity or the state-owned enterprise fails to respond in a timely manner, it risks an adverse declaration from the Minister.

Under the current ICA, the power to make control in fact determinations or declarations is only available to the Minister in the case of a Canadian business that is related to Canada’s cultural heritage or national identity. Under Bill C-60, this power will extend to all Canadian businesses where a state-owned enterprise is involved. Such determinations or declarations may be made retroactive to any date not earlier than April 29, 2013.

Increased Review Thresholds for Review

The 2013 threshold for review in the case of direct investment by members of the WTO is \$344 million. This current review threshold is based on the *book value* of gross assets of the Canadian business.

As previously announced by the Minister, Bill C-60 proposes to progressively raise the review threshold for direct investments by WTO members to \$1 billion in *enterprise value*.

- a) The threshold will increase to \$600 million during the year that the amendment comes into force and will continue into the subsequent year;
- b) The threshold will increase to \$800 million in the third year and continue into the fourth year; and
- c) The threshold will increase to \$1 billion in the fifth year.

Although the method of calculating “enterprise value” has not yet been prescribed by regulation, based on draft regulations first published in the *Canada Gazette* on July 11, 2009, the following will likely apply:

- a) In the case of a Canadian business that is a publicly-traded entity, the enterprise value of the assets of the Canadian business will be calculated as the market capitalization of the entity, plus its liabilities, minus the entity’s cash and cash equivalents.
- b) In the case of a Canadian business that is not a publicly-traded entity, or where there is an acquisition of all or substantially all of the assets, the enterprise value of the assets of such a business will contin-

ue to be calculated according to the current method of valuation. In other words, the enterprise value will continue to be the book value of the Canadian business' gross assets.

In the case of state-owned enterprises that are controlled by a WTO member, the current review threshold based book value will continue to apply and will be updated each year, in accordance with the ICA. This threshold is determined by calculating the growth in Nominal Gross Domestic Product at market prices as published by Statistics Canada for specified periods, multiplied by the amount determined for the previous year.

Extension of Time Periods for National Security Reviews

Under the current ICA, the Minister has the authority to review any investment (either proposed or already implemented) made by a non-Canadian if there are reasonable grounds to believe that it may be injurious to national security. Bill C-60 proposes to extend the timelines for national security reviews to allow greater flexibility, which will permit the Government to conduct more extensive national security reviews. ■