National Policies Toward Foreign Investment and the Economic Crisis: Another Excuse for Protectionism?

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Introduction

• The purpose of the *Investment Canada Act* ("ICA") is to review significant investments in Canada by non-Canadians and ensure that it benefits the Canadian economy.

• Until recently, the blocking and enforcement powers under the ICA have rarely been used, and then, only in the case of cultural industries where Canada maintains strict rules and prohibitions on foreign participation.

• Recent events have demonstrated a simultaneous commitment to greater liberalization (e.g., proposed increase in the financial threshold for review) and stricter review and/or enforcement in specific instances (e.g., new national security provisions and recent enforcement actions).

• Some recent enforcement appears to have been linked to employment losses in difficult economic circumstances. However, it remains to be seen whether the administration of the ICA will become influenced by protectionist motivations.
The Net Benefit Standard

- An investment cannot be implemented until the Minister of Industry is satisfied that the investment will be of “net benefit” to Canada.
- A “net benefit” analysis will take into consideration:
  - effect on level of economic activity in Canada
  - degree of significance of participation of Canadians
  - effect of investment on competition within any industry in Canada
  - compatibility of investment without national industrial, economic and cultural policies
  - contribution of investment to Canada’s ability to compete in world markets
Why was the *ICA* amended?

- In 2007, the federal government established a blue-chip Review Panel to make recommendations as to how Canada could be more competitive

- In 2008, the Panel issued a report that found:
  - Canada to be an attractive destination for foreign direct investment
  - Canada’s economy significantly benefits from openness to the world and by attracting greater foreign investment
  - There had been no policy review of the *ICA* in more than 20 years and that it was time to update Canada’s foreign investment policies

- The Panel made several recommendations that are the foundation of the recent amendments to the *ICA*
What are the amendments?

• Three major amendment made to the ICA:
  1. Increase to the ICA’s minimum review threshold.
     • Current threshold at $299 million (WTO investors)
     • The new amendments increase the thresholds to $1 billion over a 5 year period
     • After 2013, thresholds will be adjusted annually according to GDP

  2. Elimination of lower thresholds ($5 million) for “sensitive sectors”:
     • Sensitive sectors include: transportation, financial services and uranium production
     • Lower review thresholds continue to apply in “cultural business”

  3. Introduction of a national security review process.
Recent Enforcement Activity

**Vale Inco (2006-2009)**

- In 2006, Brazilian Companhia Vale do Rio Doce acquired Canadian mining company Inco.
- It agreed not to layoff employees for a period of three years.
- In April 2009, it announced that it would be idling operations in Sudbury (Ont.) and temporarily laying off employees.
- Minister of Industry demanded that the 2006 commitments be respected otherwise he would consider all options to remedy the situation.
- In June 2009, the Minister of Industry stated that he was satisfied that after further review, the company had lived up to its commitments.
Recent Enforcement Activity (cont’d)

US Steel (2007-2010)

- In 2007, US Steel acquired Canadian steel manufacturer Stelco
- US Steel undertook to increase steel production and maintain employment for a period of three years
- In 2008 and 2009, US Steel cut production its Hamilton (Ont) plant and laid off employees
- In May 2009, the Minister of Industry demanded that US Steel respect its undertakings which US Steel failed to do
- The Minister of Industry brought a suit against US Steel in the Federal Court of Canada and is seeking fines of $10,000/day of non-compliance and possible forced divestiture
- Decision by the Federal Court is pending
Recent Enforcement Activity (cont’d)

MacDonald, Dettwiler & Associates (2008)

• In April 2008, US-based Alliant Techsystems attempted to acquire Canadian MDA’s Information Systems and Geospatial Service Operations division for $1.3 billion
• The bid was rejected on the basis that the transaction was not likely to be of net benefit to Canada
• First time that an investment outside the cultural sphere was blocked
• Commenting on the decision, the Minister of Industry stated:

  When it comes to decisions on whether foreign purchases represent a net benefit to Canada, my bottom line is this: Canada must retain jurisdiction and control of technologies that are vital to the future of our industry and the pursuit of our public policy objectives. We will not accept loss of jurisdictional control to another party. We must retain the jurisdiction over Canadian assets in space.”
Recent Enforcement Activity (cont’d)

Forsys Metals Corp. (2008-2009)

• In 2008, George Forrest International (GFI) made a bid to acquire Canadian Forsys Metals, a company with uranium mining interests in Africa
• The book value of Forsys’ assets was below the $312 million review threshold
• GFI received an unsolicited letter from Industry Canada advising GFI that it was prohibited from implementing the transaction
• It is likely the transaction was blocked on the basis of national security concerns
Lessons to be drawn

- Canada further liberalized its foreign investment law in 2009
- In its March 2010 Speech from the Throne, the Canadian government stated that it will “open Canada’s doors further to venture capital and to foreign investment in key sectors”

**HOWEVER**

- In practice, the Canadian government has shown increasing willingness to invoke the enforcement powers under the *ICA* and even to use its blocking power.