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E-BRIEF

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A Friend in High Places: A Proposal to Add a National Security Amicus to Canada's Investment Review Regime

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- Investors facing a national security review under the *Investment Canada Act* receive little in the way of information during the process. The absence of information exposes the process to criticism from investors, vendors and the public.
- For investments that require a full national security review, the Canadian government should introduce a national security amicus to allow investors the opportunity to test the government's evidence and conclusions on national security matters.
- This would enhance trust and transparency in the process, and position Canada well to attract inbound investment, while ensuring that sensitive information remains in the custody of pre-approved, trusted individuals.
- Having additional oversight built into the process would force investors and the government to move forward more quickly than under the current state of affairs, which sees the process extended repeatedly beyond the statutory timeline.

As an open-market economy, particularly an economy that requires very significant capital investment but does not have huge reserves of domestic capital, maintaining Canada's growth and increases in productivity will depend on being able to attract inbound foreign direct investment (Advisory Council on Economic Growth 2016, 2). Canadian law allows the federal government to review all inbound investments where a non-Canadian either establishes a new Canadian business or acquires an interest in an existing one (*Investment Canada Act* (ICA), s. 11 and s. 25.1). Historically, the focus of foreign investment review was based on a "net benefit" analysis focused on

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economic grounds; namely, whether the investment would enhance employment for Canadians, ensure a role for Canadians in managing the business, drive investment in capital expenditures or research and development, or allow for the sharing of technology or best practices across global firms. As Canada has raised the threshold for review of transactions significantly, in part due to an increasing number of free trade agreements, its use of the economic review power has waned.

The government, however, has reviewed and either blocked or restructured a growing number of investments (both new businesses and acquisitions) on national security grounds over the last five years (ISED 2022, 20).[1] This review process has been the subject of significant criticism both from investors and their advisors because it lacks transparency (Neiman 2020, 32-39, Bergevin and Schwanen 2011, 11, 13). The government does not typically give investors much information about why it decides to block or impose conditions on an investment on national security grounds. It is also contrary to the aim of affording protection to investors under various treaties that Canada has signed to that effect.[2]

This lack of clarity is challenging for both potential investors and potential vendors (as well, inadvertently, for the advisors). The recent national security review of China Mobile's Canadian operations exemplifies these problems. Faced with little information about the content of the national security concerns raised against it, China Mobile has pursued a very public court challenge of the divestiture order it received in August 2021 (Krane 2021; Chad 2022), the outcome of which could result in significant political tension or embarrassment.

Insofar as this opacity could chill investment in Canada, it has implications for the overall economy and Canada's relations with its trading partners. While the ICA is statutorily agnostic to country of origin for national security reviews, in practice, most of these national security reviews have involved investments from Chinese firms.[3] The absence of a mechanism to deter certain types of investment informally without raising political ire, or to explain clearly why other investments have been permitted (such as Zijin's 2021 proposed acquisition of

1 From fiscal 2009-2010 to fiscal 2018-2019, there were 22 Orders for a national security review. In the two years following, there were a further 18 national security reviews – almost eclipsing the total number of reviews for the previous decade. Many of these national security reviews led to orders blocking, requiring divestiture of, or imposing conditions on the investments. Since the fiscal year 2009-2010, five transactions were blocked, 12 transactions required divestiture, and four transactions had conditions imposed on them. Furthermore, 11 transactions were withdrawn after a s. 25.3 order for review was issued (ISED 2019, 16; ISED 2020, 17; ISED 2022, 20).

2 These treaties include the Foreign Investment Promotion and Protection Agreement (FIPA) between Canada and China, the Comprehensive Economic and Trade Agreement (CETA) between Canada and Europe and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Canada and six countries in the Asia-Pacific region. Each of these agreements provides additional protections and benefits for investors. FIPA provides for fair and equitable treatment of foreign investments, compensation for investors due to direct or indirect expropriation, due process before courts and tribunals, protections against discriminatory or protectionist conduct, transparent and impartial application of applicable laws, and repatriation of profits and the transfer of capital (Wisner 2014, 1). CETA sets a higher threshold for net benefit reviews of European investments into Canada (Musgrove and Chad 2017). CETA also provides investors with greater certainty, stability and protection for their investments in Canada, along with access to an independent dispute resolution mechanism (Global Affairs Canada, Sept. 2020). The CPTPP provides investors with enhanced protections, fewer restrictions, non-discriminatory treatment and access to an investor-state dispute settlement mechanism (Global Affairs Canada, Dec. 2020).

3 Of the 40 transactions that have been the subject of a national security review Order since fiscal 2009-2010, 24 expressly involved a Chinese investor entity, one involved a Taiwanese entity, and of the remaining, while not confirmed, Chinese investor involvement may also have been present, in some of these instances. (ISED 2019, 17-18; ISED 2022, 21).

Neo Lithium) means that the ICA process will continue to be subject to criticism from investors and Canadians alike. Instead of facilitating investment, which is a stated purpose of the ICA (ICA, s. 2), the ICA and its administrative regime will continue to be a barrier to investment and could result in significant repercussions for Canadian investments abroad if other nations treat Canadian investments in a similar manner.

In this E-Brief, we propose a solution that would allow the Canadian government to continue to screen investments on national security grounds in a manner that demonstrates a commitment to fairness and transparency. We recommend that the Canadian government adopt a national security amicus, akin to a "friend of the court"[4] to allow investors the opportunity to test the government's evidence and conclusions on national security matters, and thereby enhance the transparency and fairness of the national security review process. The proposal draws on some of the elements of the "special advocate" system used for national security assessments in the immigration context (IRPA, s. 83, 85; Power 2020, 1). While this concept has been adopted in the immigration and security certificate context in some countries, we are not aware of it being used in the investment review process.

We appreciate there are other proposals designed to improve transparency and the process overall, including shortening the duration of national security reviews,[5] and formalizing the list of concerns related to economic security or Canada's recently announced Critical Mineral List.[6] Those are better addressed in a more comprehensive review of the ICA, which is beyond the scope of this short paper. In the remainder of this E-Brief, we describe how the current process works. We then explain how an amicus process could improve the ICA national security review process. Finally, we explain the benefits of implementing this process for Canada.

Current ICA National Security Process Is Not Transparent

Under the current process, the Minister of Innovation, Science and Industry[7] (hereafter, industry minister) has 90 days from receipt of a complete filing or from implementation of an investment to commence a full national security review (ICA, s. 25.3; *National Security Review of Investments Regulations*, s. 4). Typically, when the minister orders a full review, the minister's Investment Review Division (IRD) only provides a very short summary statement of its concerns on behalf of the minister. The summary typically does not contain any of the facts underlying the concerns, which always makes it difficult for the investor to challenge the conclusions in the summary.

The ICA process does not guarantee that an investor can meet with the government officials investigating the transaction. Although the ICA provides for a right to make representations, typically that right consists of written

4 In legal terms, an amicus is an individual or body that is not a party to an action but who provides independent advice to the parties on a matter before the court.

5 The average duration of a national security review now surpasses 200 days (ISED 2020), which can dissuade a foreign investor from proceeding with a transaction or establishment of a new business.

6 The lattermost is particularly germane in light of the public debate and uncertainty around the Zijin/ Neo Lithium transaction.

7 This is one of three ministers for the department of Innovation, Science and Economic Development (ISED) Canada. The other two are: the Minister of International Trade, Export Promotion, Small Business and Economic Development; and the Minister of Tourism and Associate Minister of Finance.

submissions to the IRD (ICA, s. 25.3(2), 25.3(4)). If the IRD agrees to a meeting, it is a one-way presentation from the investor to the government officials on the issues, rather than a reciprocal discussion of the concerns.

We appreciate that a fully transparent process could have implications for Canada's national security and its relationship with its intelligence partners, particularly because Canada is a net importer of intelligence (Tunney 2020). The current process, however, provides virtually no transparency for investors. Investors are practically shooting in the dark in terms of the concerns and, while an amicus process would not provide full transparency, it would allow investors an opportunity to respond meaningfully to the allegations made in the IRD's summary and perhaps correct some of the factual underpinnings more directly.

The Difference an Amicus Would Make

We envision that an amicus would be appointed once the industry minister has ordered a national security review under s. 25.3 of the ICA. A small roster of lawyers and former government officials who have experience with the Canadian government's trade and investment portfolios would form the pool of amici. As with immigration special advocates, these individuals would be pre-cleared by the government to receive classified national security information during an investment review. The amicus would be able to provide counsel to the investor, while being bound by certain conditions designed to protect the confidentiality of sensitive information.

In the immigration context, special advocates can review copies of undisclosed information or other evidence provided to a judge. They can cross-examine government officials who testify in closed proceedings and make submissions to the judge on relevance, reliability and sufficiency of the undisclosed information and what weight the judge should give to the evidence (Waldman 2019, 1). Similarly, we envision that the amicus would receive access to the background documents that have informed the minister's assessment of the national security review. The amicus could challenge the government's decision to withhold facts from the investor that demonstrate the national security concern, either on the basis that the facts (a) are erroneous, (b) are unreliable, or (c) are insufficient to raise a national security concern.

Moreover, the government could download the costs of engaging an amicus onto investors either by having the investors pay the amicus under an engagement agreement or by levying a fee when the government commences a national security review. There are precedents for fees associated with national security reviews, such as the fee recently implemented by the Committee on Foreign Investment in the United States (CFIUS) for certain notice filings.

Since there is no apparent judicial oversight of the investment review process as it is being undertaken, the creation of an amicus process would require overcoming three main issues: (a) accessing sensitive information, (b) communicating with the investor, and (c) maintaining an effective review timeline.

Accessing sensitive information

In the immigration context, once a special advocate is appointed, the immigration minister must provide the special advocate with a "copy of all of the undisclosed information and other evidence provided to the judge subject only to claims of privileged on specific grounds" (Waldman 2019, 1). In the ICA context, the security establishment could provide the amicus with undisclosed information that would inform the basis of the recommendation to the ministers of industry and public safety for a national security review. Once the amicus receives the information, the amicus could then make submissions to the ministers on why the information

would not be injurious to national security, why it should be disclosed to the investor, or why it should be given little weight in the decision-making process.

Although the investment review context lacks an independent and impartial judicial decision-maker to decide on questions of disclosure, other built-in mechanisms could help mitigate this concern. First, independent ombudsmen operate within the security establishment who could evaluate a special advocate's submissions and make a recommendation based on those submissions.[8] Second, as the China Mobile case has shown, investors have the ability to seek judicial review of administrative action that appears to be procedurally unfair. The prospect of a judicial review of a decision to deny access to information that does not impact national security, or that comes from unreliable or non-credible sources, should encourage compliance by security and intelligence agencies in Canada. This is important, because in other jurisdictions, historically, intelligence agencies have been reticent to provide special advocates with exculpatory information (Waldman 2008, 2). Today, there is no such incentive in favour of disclosure, and any new measures to promote transparency would be beneficial for investors.

Communicating information

In the immigration context, a special advocate requires judicial authorization to communicate with any person about the proceeding once that advocate has received access to the secret information. Some commentators have observed that this is a flaw in the process design because it removes any discretion from the special advocate to communicate with an impacted individual (Hudson and Alati 2018, 14, 18, 46-49; Chedrawe 2012, 34, 40-42; Rankin 2008, 928).

In the context of a national security review of a proposed investment, however, we note firstly that the presence of an amicus is an improvement over the existing situation where the investor has no ability to communicate directly with the officials who are compiling evidence against it. While the amicus would not be in a position to make the investor's case for approval, its role would be to challenge the government's propensity toward non-disclosure. Moreover, the amicus could be briefed by the investor and its counsel prior to obtaining access to the confidential information, so may in many cases be in a position to advance arguments related to the confidential information based on the advance briefing.

Second, the amicus could also provide a neutral view to the investor on the strength of the government's case. Even if an amicus cannot communicate with the investor about the contents of any of the information the amicus has reviewed, the amicus could give the investor an overall assessment of the merits of the government's position on national security, with authorization from the government, and without providing particulars. This could encourage some investors to withdraw their investments based on feedback from the government, but with some comfort that there is a legitimate concern, not merely a misunderstanding. The amicus could also encourage or propose a discussion regarding remedial measures to address concerns that arise during the review process. Both outcomes can minimize political embarrassment resulting from blocking orders or continued delays.

8 See, for example, the National Security and Intelligence Review Agency, which is "an independent and external review body" empowered by statute to investigate complaints, hold hearings, and prepare reports to parliament to ensure that national security and intelligence activities are "lawful, reasonable and necessary" (NSIRA, 2020).

Timeline

The current statutory process provides fixed milestones during the review process, but as a practical matter, complicated national security reviews often take much longer.[9] Once an amicus is involved, and in the event of a dispute over disclosure, the parties could agree to a consent extension of the review period while an assessment (either by a judge or ombudsman) is undertaken.

The amicus process would create incentives to move the national security review forward more quickly. For an acquisition transaction, investors, who are accountable to lenders and shareholders, would be motivated to tailor their requests so as not to delay the timelines. For assessments of disclosure issues involving the establishment of new businesses, which typically pose less risk because there is no acquisition of Canadian technology or infrastructure, the industry minister would be motivated to move more quickly because the investor can continue to operate in Canada until Cabinet issues an order requiring the investor to divest or wind-up the new Canadian business.

Having some oversight built into the process would force the parties to move forward more quickly rather than the current state of affairs, which sees the process extended repeatedly beyond the statutory timeline. In cases where timing is a key factor motivating the investment, or making it viable, the amicus would be able to challenge inordinate delays (similarly before a judge or ombudsman). Whether deliberate or inadvertent, such delays are a failure of due process. Delay of an investment is often no different from denial of an investment. Having an amicus would therefore promote procedural fairness for investors.

Benefits to Canada

Involving an amicus is not a perfect solution, but is arguably better than the status quo, both for investors and for the government. For investors, having a party with the ability to challenge disclosure restrictions, even if not exercised, should help to overcome concerns that the national security review process lacks elements of transparency and fairness. Such a process might also dissuade investors from expending financial and legal resources to continue engaging with the Canadian government when the special advocate can advise them of the merits of the government's position. At the end of the day, the ability to make a fully informed investment decision would help to achieve the aims of Canada's investor rights treaties, while ensuring that Canada's national security interests are protected.

9 Often, the government will seek the investor's consent to extend the process while a review is ongoing.

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