Government blocks acquisition of Canadian gold mine citing national security threat

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By Cabinet order, the Canadian government has blocked the agreed acquisition of TMAC Resources Inc. (owner of the Hope Bay gold mine in Nunavut) by Chinese state-owned Shandong Gold Mining Co. Ltd under the national security review (NSR) provisions of the *Investment Canada Act* (ICA). This is the first public action taken against a proposed foreign investment since the government announced that it would be exercising "enhanced scrutiny" under the ICA into potential "opportunistic investment behaviour" during the COVID-19 pandemic.

What you need to know

- The block in *Shandong/TMAC* follows the high profile 2018 refusal of CCCI's bid for Aecon Group and is consistent with a recent trend in heightened Canadian scrutiny of inbound state-owned or state-influenced investment, particularly from China. This is perhaps unsurprising given the deterioration of relations generally between the two countries.
- Canada's posture on such investment activity is consistent with recent actions taken by Australia, the European Union and the United States.
- Though Canada has subjected fewer inbound investments to economic "net benefit" to Canada review under the ICA, the broader and separate national security test has emerged as a key risk factor for inbound foreign acquisitions and investments, particularly those involving state owned or state influenced investors. Having said this, it remains the case that full-blown national security reviews are rare.

The transaction

The blocked transaction, by which China's Shandong Gold Mining Co. Ltd. (Shandong) was to acquire TSX-listed TMAC Resources Inc. (the owner of the Hope Bay mine) for C $230 million, was announced on May 8, 2020, relatively early in the COVID-19 pandemic. Shandong is listed on the Hong Kong and Shanghai stock exchange and is engaged in a long-term strategic partnership with Canada's Barrick Gold Corporation, which owns just over 2 per cent of Shandong. However, Shandong is majority owned and controlled by Chinese state-owned enterprises.

The national security review provisions

This is the first block of an investment under the ICA's NSR provisions since the takeover of Aecon Group Inc. by Chinese state-owned CCCC International Holding Ltd. was blocked in May 2018. However, there is no doubt that since then, and particularly since the beginning of the COVID-19 pandemic, the government has considered many other NSRs under the ICA, and has required investors to withdraw their investments as a condition of not being formally blocked.

Under the NSR provisions, the government can review virtually any investment of any value into Canada by a non-Canadian – including non-controlling investments – to determine whether they "would be injurious to national security". No monetary thresholds apply, and the process can take up to 200 days, or in some cases more, to be completed. NSRs remain relatively rare, with the process historically being commenced no more than approximately 10 times per year, although statistics are not available for the period since the COVID-19 crisis emerged.

Which investments need to be prepared for national security review

There is a clear trend toward the government applying heightened scrutiny under the NSR provisions to investments into Canada by foreign state-owned enterprises and foreign investors deemed to have close ties to foreign states, even if there is no formal state ownership or control, particularly where the ties are to China. At the same time, there is little clarity on the basis by which the government determines which investors it considers to be subject to influence by or have close ties to a foreign state, other than that it has made clear that actual or de facto control by a foreign state is not required for a concerning level of state influence to arise.

Advance consideration of the national security test is particularly essential where the investment is in any of the following:

- Canadian natural resources;
- Any defence-related industries;
- Businesses with access to sensitive data;
- Critical infrastructure or entities providing vital services for it; or
- Any businesses involved in public health or the supply of critical goods and services to Canadians (including energy, utilities, food, health, and water), as these are historically the most-sensitive industries.

If the NSR process is launched prior to an investment's completion, it cannot legally close until the process is completed. If the investment is already complete, the government can order any remedy to address what it considers to be a threat to Canada's national security, up to and including ordering divestiture or unwinding.

Par

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