

CHINA BUSINESS 商 LAW JOURNAL 法

November 2012 | Volume 3, Issue 10

2012年11月 | 第3辑第10期

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Canada's PETRONAS rejection: miscommunication or new reality?

加拿大政府 10 月 19 日通知马来西亚国有企业 PETRONAS，称该公司未能表明其收购 Progress Energy 可为加拿大带来“净利益”。“净利益”是《加拿大投资法》(ICA) 规定外资项目获得联邦政府批准必须符合的标准。鉴于加拿大近期批准了一系列涉及国有企业的投资项目以及该国鼓励外商投资的多项声明和举措，此通知令许多观察人士颇感意外。

影响

PETRONAS 收购 Progress 一案是 2008 年以来第三宗未获批准的交易，也是首宗遭否决的国有企业能源行业投资项目。如果加拿大的这项决定维持不变，并预示着政府政策的新导向，可能会打压投资者（尤其是国企）收购加国企业的投资热情。PETRONAS 仍未放弃投标收购 Progress，并正就该初步决定提起上诉。从目前来看，该项决定似乎只是沟通不畅所致，而并非政策的转变。

加拿大政府正在制订新的 ICA 框架，以进一步细化针对国企的“净利益”标准。政府可能还将在 12 月中旬之前宣布对 PETRONAS 收购案和中海油收购 Nexen 的最终决定。尽管有 ICA 存在，但加拿大对外资持非常开放的姿态，比如最近与中国签订了一项投资协定。此类举措将有助于能源业吸纳外资，并扩大该国的出口市场。

投资程序

根据 ICA，对于账面资产价值超过 3.3 亿加元（合 3.302 亿美元）的加拿大企业，外国投资者若直接收购企业控制权须事先获得加拿大工业部的批准。为取得 ICA 项下的批准，投资项目必须能为加拿大带来净利益，对此的评判要综合衡量就业、资源加工、出口、加拿大的参与度和生产率等因素。如为国有企业，还须向工业部表明其商业目标符合特定指导方针。

观察人士批评说，净利益标准概念模糊，并受政治因素左右，不能为投资者提供足够指引。ICA 审核程序也不透明。不举行公开听证，也不公布具体理由，而只是发布最终的反对决定。初步审核期为 45 天，工业部可酌情延长 30 天。如需进一步延长审核期，须由投资人与工业部协商。工业部会在审核期（或商定的延长期限）结束之前就项目是否符合净利益标准作出决定。

ICA 框架将就审核程序和现行法律与政策（特别是适用于国企的准则）的适用提供进一步指导，但不会出台新规。我们预计加拿大政府对 PETRONAS 和中海油收购案的决定也将按现行法律和政策作出。

On Friday 19 October, the Canadian government advised Malaysian state-owned PETRONAS that it had not demonstrated that its acquisition of Progress Energy would be of “net benefit” to Canada. “Net benefit” is the standard that must be met under the Investment Canada Act (ICA) in order to receive federal government approval. This announcement caught many observers by surprise. It appears to be inconsistent with a recent series of approvals of investments involving state-owned enterprises (SOEs), as well as statements and actions by the Canadian government encouraging foreign investment.

The implications

Although the PETRONAS/Progress deal is the third disapproval since 2008, it was the first disapproval involving an SOE and the energy sector. If the decision stands, and reflects government policy, it could have a chilling effect on investors (especially SOEs) in Canada. PETRONAS is continuing its bid for Progress and is appealing the government's initial decision. For now, the rejection seems to reflect an unfortunate miscommunication, rather than a change in policy.

The Canadian government is working on a new ICA framework expected to include further details on how SOEs may satisfy the “net benefit” test. The government is also expected to announce final decisions in the PETRONAS and CNOOC/Nexen transactions at about the same time. This could occur by mid-December. Despite the existence of the ICA, Canada is very open to foreign investment, reflected in the recent signing of an investment treaty with China. Such initiatives will assist the resource sector in accessing the capital it requires, as well as expanding Canadian export markets.

Investment process

Under the ICA, a foreign investor must obtain approval from the Minister of Industry before directly acquiring control of a Canadian business with more than C\$330 million (US\$330.2 million) book value of assets. To secure approval under the ICA, investments must be of net benefit to Canada, considering factors including employment, resource processing, exports, Canadian participation and productivity. SOEs must also satisfy the minister that their commercial orientation is compatible with special guidelines.

Observers criticise the net benefit test as being vague and subject to political interpretations that do not provide investors with sufficient guidance. The ICA review process is not transparent. There are no public hearings and no published reasons are required, except for a final negative determination. The initial review period is 45 days. This may be extended by the minister for 30 days. Any further extensions must be negotiated between the minister and the investor. Before the end of the review period, (or agreed extension) the minister makes a decision on whether the net benefit test has been met.



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重要因素

由于公开资料有限，很难说 PETRONAS 收购案的初步决定是否表明加国政策的转变，也无法据此认为中海油收购 Nexen 获批的前景暗淡。尽管如此，PETRONAS 收购案有几个方面值得关注：

- PETRONAS 所作的初步承诺不足以满足净利益标准，承诺性质不得而知。在公布交易时，PETRONAS 公开声明将保留 Progress 雇员。此外，PETRONAS 并未宣布就其与 Progress 现有的合资企业进一步作出承诺，也未就有关国企的透明度、治理和商业目标公开表态。这些因素在 PETRONAS 收购案审核程序中涉及与否也不得而知。（相比之下，在公布 Nexen 交易时，中海油即公开作出一系列承诺，包括：将 Calgary 作为其管理 Nexen 全球业务和中海油的北美和中美洲现有业务的国际总部之一；保留 Nexen 的管理团队和雇员；增加资本支出；将中海油股份在多伦多证券交易所上市。）
- 约 90 天的审核期相对较短，PETRONAS 难以准时获得批准。超过 90 天的审核期并不少见，尤其是对国有企业投资项目而言。但 PETRONAS 似乎无法或不愿意进一步延长审核期。
- 工业部的决定可能说明其对未上市国有企业采取更严格的审核标准。已上市的国企要满足治理和透明度标准更为容易。虽然对许多国企来说，股份上市未必可行，但在加拿大，国企全资拥有的加拿大公司进行股份上市可选择一些耗费不多的方式。根据经验，这样的上市地位可有助于满足透明度和治理标准。

结论

与即将出台的 ICA 框架一样，PETRONAS 收购案和等待审批的中海油 /Nexen 收购案的最终结果会为外国投资者取得 ICA 项下批准提供实际的指导作用。同时，投资者应了解在加拿大投资需要有实质性的经营业务，并为审核程序的完成预留充足时间。如果投资者对此未做好准备，或者不希望承担项目被否决的风险，则应考虑选择无须通过 ICA 审核程序的少数股权投资。

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The ICA framework is expected to provide additional guidance on the review process and the manner in which the existing law and policies – particularly the guidelines for SOEs – are applied, but not introduce new rules. We also expect that the PETRONAS and CNOOC cases will be determined under existing law and policies.

Factors of note in decision

Due to the limited public information available, no conclusions can yet be drawn on whether the initial PETRONAS decision represents a shift in government policy. It is also not possible to say whether the decision makes it less likely that the government will approve the CNOOC/Nexen transaction. Nevertheless, the PETRONAS case is notable in a number of respects:

- PETRONAS's initial commitments were insufficient to establish net benefit. The nature of these commitments is not known. On deal announcement, PETRONAS publicly stated it would retain Progress employees. No new commitments in relation to its existing joint ventures with Progress were announced and nothing was publicly said with respect to the SOE guidelines concerning transparency, governance and commercial orientation. Whether these factors were addressed in the review process is unknown. (In contrast, on announcement of the Nexen transaction, CNOOC publicly outlined a number of commitments, including: making Calgary an international headquarters to manage Nexen's global operations and CNOOC's operations for North and Central America; retention of Nexen's management and employees; enhancing capital expenditures; and listing CNOOC shares on the Toronto Stock Exchange.)
- PETRONAS was unable to obtain approval within a review period of about 90 days. A period in excess of 90 days is not unusual, particularly for an SOE investment. However, PETRONAS apparently was unable or unwilling to extend the period further.
- The minister's decision may reflect a higher approval hurdle for SOEs without a public listing. Meeting the governance and transparency criteria of the SOE guidelines is simpler where an SOE has securities that are publicly traded. While listing securities may not be possible for many SOEs, there are cost-effective methods of maintaining a public listing in Canada for Canadian companies that become wholly-owned by an SOE. Such a listing can assist in satisfying the transparency and governance standards.

Conclusion

Coupled with the government's promised ICA framework, the outcome of the PETRONAS case and pending CNOOC/Nexen transaction should provide guidance to foreign investors on obtaining ICA approval. In the meantime, investors should expect to commit to substantial undertakings and allow adequate time for the review process. If investors are not prepared to do so – or do not wish to assume the risk of a negative decision – then they should consider a minority investment that is not subject to ICA review.

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