Creative deal-making navigates Canadian national security review in the critical minerals sector

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A recent transaction has illustrated how creative deal-making, in the right circumstances, can address Canadian governmental concerns with respect to foreign investment in the critical minerals sector.

Canada's federal government announced in 2022 that under its new "Critical Minerals Policy" (Policy), investors considered to be owned or influenced by "non-likeminded foreign governments" (including investors "who could be compelled to comply with extrajudicial direction" from such governments) would in most circumstances face difficulty in gaining approval for investments that involve critical minerals under the *Investment Canada Act* (ICA).

Since that announcement, Chinese investors (and particularly Chinese state-owned enterprises) have been strongly discouraged from acquiring critical mineral assets – even those outside of Canada - owned, directly or indirectly, by Canadian businesses. While jurisdictional challenges have been raised, the government has asserted that shares of foreign entities, which themselves hold no Canadian assets, but which are held by Canadian businesses, are "part" of that Canadian business. On this basis, the government asserts that the national security review provisions of the ICA, and all of the remedial powers to restrict foreign investments provided therein, can be applied where a Canadian business seeks to sell shares in a foreign entity that owns critical minerals assets. Recent amendments to the ICA that have passed but are not yet implemented purport to strengthen the government's jurisdictional hand.

However, on Nov. 5, 2024, for the first time reported publicly since 2022, the Canadian government permitted a Chinese company - Zijin Mining Group Co., Ltd (Zijin) - to acquire what the government considers to be a critical minerals asset from a Canadian vendor, in this case Vancouver-based Pan American Silver Corp. (Pan American). The transaction closed on December 2, 2024. Pan American is a leading producer of silver and gold in the Americas, operating mines in Canada, Mexico, Peru, Brazil, Bolivia, Chile and Argentina. One of Pan American's subsidiaries, La Arena S.A., owns the La Arena gold mine in Peru, as well as the early stage La Arena II copper/gold sulphide deposit located below and adjacent to the La Arena mine.

On May 1, 2024, Pan American announced that it had agreed to sell its indirect 100 per cent interest in La Arena S.A. to a subsidiary of Zijin. Zijin was no stranger to the ICA process – having acquired Canada's Neo Lithium in 2022. The government's failure to block this acquisition proved to be politically controversial, sparking a Parliamentary Report that no doubt set the stage for the Policy.

In the La Arena deal, the government commenced a national security review of Pan American's sale of the interest to Zijin, as potentially being injurious to Canada's national security. Canada's Critical Minerals Strategy has highlighted Canada's national security concerns with respect to critical minerals, including copper, as follows: "key operations are located in only a handful of regions globally, leaving them exposed to economic disruptions and predatory actions by non-market economies. Non-market economies are taking increasingly aggressive steps to further cement their control of critical minerals markets and achieve foreign policy goals."

While Zijin continued to participate in the review process, it also contemporaneously challenged the government's jurisdiction to apply the national security regime under the ICA to the sale of a non-Canadian subsidiary in the Federal Court of Canada. Zijin's application stressed: "The targets are Peruvian entities. They do not have a place of operations in Canada or otherwise carry on operations in Canada, they do not have individuals in Canada who are employed or self-employed in connection with their operations, and they do not have assets in Canada used in carrying on their operations."

Notwithstanding the court challenge, the parties were able to secure approval from the Minister of Innovation, Science and Industry (the Minister) on behalf of the Federal government by offering a remedy, which was notable in that it involved both parties to the transaction – not just the investor.[1] Pan American and Zijin undertook to enter into an offtake agreement in respect of the La Arena II project, which would enable Pan American to secure 60 per cent of the future copper concentrate supply from the project on commercial terms following the commencement of commercial production for sale in North American markets.

The offtake agreement addressed Canada's concerns about Chinese control of copper supplies and lack of access for Canada and its allies by ensuring that a major portion of La Arena's copper production, if and when it is produced, would be directed to a Canadian buyer.

The Minister's approval may also have been influenced by sales proceeds indirectly being applied by Pan American to advance its La Colorada silver-zinc skarn project in Mexico, which upon completion would be the world's fourth largest zinc mine (zinc also being a critical mineral), and to increase the mine life and expand its Bell Creek and Timmins West gold mines in Ontario.

Though it remains the case that the Canadian government will continue to apply the Policy stringently in foreign acquisitions (especially those originating from Chinese state-owned enterprises) of Canadian critical mineral assets located in the country, the outcome in the La Arena deal suggests that it is prepared to apply a more nuanced approach where assets are located in a third country, and where measures can be undertaken to secure Canadian access to the minerals in question.

BLG advised Pan American on all aspects of the transaction, including negotiations with the Canadian government under the ICA's national security review process.

[1] These undertakings were formalized under a revised process provided by the recent amendments to the ICA that allows the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, to complete a national security review and allow an investment to proceed on the basis of undertakings offered by the investor, the target, or the vendor (s.25.3(4) and 25.3(6)(b)). Previously, only the full Cabinet could accept undertakings to resolve national security concerns, and such undertakings could only be offered by the investor.

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