

Intelligence MEMOS



From: Joshua Krane, Stephen Wortley and Connor Campbell

To: François-Philippe Champagne, Minister of Innovation, Science and Industry

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Re: **THE IMPACT OF NATIONAL SECURITY REVIEWS ON FOREIGN DIRECT INVESTMENT IN CANADA**

Foreign investment in Canadian companies has long been subject to government review.

In recent years, the government has moved away from examining the economic impacts of foreign direct investment to focusing on national security implications. From fiscal 2009/10 to fiscal 2018/19, there were 22 orders for a national security review. In the two years following, there were a further 18 national security review orders – nearly doubling the total in just two years.

The issue at hand is not that these reviews are happening. It is important that the government review investments that could compromise critical infrastructure, disrupt the supply of important goods and services to government, or involve sensitive technology.

Our concern, outlined in a recent [C.D. Howe Institute paper](#), is that investors and their advisors often have little information available as to why the reviews are occurring or how decisions were made. This lack of information exposes the process to criticism from investors, vendors and the public. Investors often receive few if any reasons for a national security review, and this lack of clarity is challenging for both the investors and the Canadian companies and innovators who count on foreign investment.

A recent example highlights this point: the national security review of China Mobile's Canadian operation prompted the company to challenge the resulting divestiture order in court. There are real implications to this opacity: it could chill investment in Canada, dampen economic growth and hinder relations with Canada's trading partners.

To both ensure national security is maintained without dampening investment, we propose the government create a national security amicus to allow investors and their advisors the opportunity to test the government's evidence and conclusions on national security matters.

The amicus process would offer clarity and fairness.

Under our proposal, the investor could request the appointment of an amicus following an order for a national security review. 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. These amici would be pre-cleared by the government to receive classified national security information during an investment review. An amicus would be able to provide counsel to the investor, while being bound by certain conditions designed to protect the confidentiality of any sensitive security information.

We also propose that any costs associated with the amicus would be borne by the investor.

The introduction of an amicus would have benefits for Canada too and should not impact the current review timelines. An amicus would also give the government a further avenue to persuade investors to withdraw certain investments if the prospects of an approval are low.

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