Canada orders divestment of Chinese foreign investors in Canadian critical mineral companies

November 4, 2022

Decision

On 02 November 2022, the Honorable François-Philippe Champagne, Minister of Innovation, Science and Industry, confirmed the decision by the Government of Canada ordering the divestiture of investments by three Chinese foreign investors as follows:

- Sinomine (Hong Kong) Rare Metals Resources Co., Limited is required to divest itself of its investment in Power Metals Corp.
- Chengze Lithium International Limited is required to divest itself of its investment in Lithium Chile Inc.
- Zangge Mining Investment (Chengdu) Co., Ltd. is required to divest itself of its investment in Ultra Lithium Inc.

The statement by the Minister confirms that the divestiture order is in relation to investments that threaten national security and critical minerals supply chains in accordance with the Investment Canada Act.

A number of investments in Canadian companies engaged in the critical minerals sector, including lithium, are under review.

The decision was made in support of advice of critical minerals subject matter experts, Canada’s security and

intelligence community, and other government partners.

The divestiture order was made in accordance with section 25.4(1) of the Investment Canada Act which states:

"…the Governor in Council may, by order, within the prescribed period, take any measures in respect of the investment that he or she considers advisable to protect national security, including

(a) directing the non-Canadian not to implement the investment;

(b) authorizing the investment on condition that the non-Canadian

(i) give any written undertakings to Her Majesty in right of Canada relating to the investment that the Governor in Council considers necessary in the circumstances, or

(ii) implement the investment on the terms and conditions contained in the order; or

(c) requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity."

Investment protections

The Government of Canada has investment protection treaties with both the Hong Kong Special Administrative Region and the People's Republic of China.

Both treaties with Hong Kong and the PRC provide substantive, although modifications in scope and language may be seen in the different instruments. However, most of the standard principal protections available include:

- national treatment and most-favored-nation treatment whereby Canada cannot discriminate against foreign

investors in favor of domestic investors or investors from another country;

- the requirement that Canada provides the minimum standard of treatment in accordance with customary international law for foreign investments;
- fair and equitable treatment provisions, which (as guided by findings of tribunals) include requirements for full protection and security; due process and access to justice; adherence to investors' legitimate expectations; no coercion or harassment by the organs of the state; offering a stable and predictable legal framework; transparency of the legal framework; and no arbitrary or discriminatory treatment; and
- no direct or indirect expropriation that prevents Canada from taking property belonging to a foreign investor directly through mandatory transfer or physical seizure, or indirectly through regulatory measures, prevention of contractual rights, or other actions – including methods of 'creeping' expropriation where the expropriation occurs gradually.

Both treaties provision for general compensation for foreign investors in breach of the treaties.

Actions over security concerns in the Canada – Hong Kong investment treaty

The Canada – Hong Kong investment treaty provides exceptions for matters of security but is generally limited to the Government of Canada "…taking an action that it considers necessary to protect its essential security interests:

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations,

(iii) relating to the implementation of policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;”

A special annexure was made to the Canada – Hong Kong investment treaty to expand exceptions on future matters to account for social services, rights of aboriginal peoples, economically disadvantaged minorities, government securities, maritime cabotage, fishing, telecommunications services, and the services sector.

The maritime-related exceptions consider mineral resources of the continental shelf of Canada, worded within the ambit of the right to operate sea, air, or other transport services within a particular territory as follows:

“maritime cabotage, which means (a) the transportation of either goods or passengers by ship between points in the area of Canada or above the continental shelf of Canada, either directly or by way of a place outside Canada; but with respect to waters above the continental shelf of Canada, the transportation of either goods or passengers only in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada; and (b) the engaging by ship in any other marine activity of a commercial nature in the area of Canada and, with respect to waters above the continental shelf, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada…”

Actions over security concerns in the Canada – PRC investment treaty

The Canada – Hong Kong investment treaty provides exceptions

for matters of security that the Government of Canada can trigger in cases of:

"(i) any existing non-conforming measures maintained within the territory of a Contracting Party; and

(ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership or control of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;"

The schedule to the Canada – Hong Kong investment treaty applies exceptions as those applied in the Canada – Peru investment treaty, requiring specific reservations in certain sectors including telecommunications, government finance, fishing, social services, and transportation.

Recent dispute with the Government of Canada on security issues

In Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, triggered under the Canada – Egypt bilateral investment treaty, the tribunal addressed the effects of national security on foreign investment:

"Without it affecting the findings of the Tribunal set out above, [REDACTED] it is understandable that a prudent investor may well decide that it is time to put an end to the significant sums that it was compelled to pour into the investment given the cash-intensive requirements of this economic field. Harsh as it might be, such is the reality of business with its potential for windfall profit or for abysmal loss. In any event, it cannot turn into a ground to rule that Canada has breached the BIT by its conduct of the national security review of GTH's application to take control of Wind

Mobile.”

Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 618

On 28 October 2022 the Government of Canada announced its policy on foreign investment by State-owned enterprises or foreign-influenced private investors in the ‘critical minerals’ with a recommendation that “all non-Canadian investors and Canadian businesses carefully review their investment plans to identify any potential connections to [State-owned enterprises] or entities linked to or subject to influence by hostile or non-likeminded regimes or states”.

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