Canada for Sale?

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Newspapers from around the world recently headlined Canada's limits to foreign investors trying to purchase large, Canadian resource companies. Canada has, historically, had a reputation for being open for business to investors from around the world and the Canadian government would rarely use the Investment Canada Act to actually forbid an investment. Most types of foreign investment such as buying property in Canada or purchasing shares of a Canadian company have little or no restrictions.

Canada does, however, have instances where foreign investment into Canada could be blocked under the Investment Canada Act in cases where (a) the investment or the foreign investor could be injurious to national security, (b) the acquisition is of a Canadian cultural business with assets over C$5 million or (c) the acquisition is of a Canadian company with assets over C$330 million.

In November 2010, the Canadian government indicated that it was not satisfied that a proposed takeover of Potash Corporation by BHP Billiton, an Anglo-Australian company, was likely to be of net benefit to Canada. BHP Billiton eventually withdrew its application.

In late 2012, two foreign state-owned companies, PETRONAS from Malaysia and CNOOC from China, had their planned acquisitions of Progress Energy and Nexen respectively, initially rejected and then hesitantly approved. Both of these operate in the energy and natural resources sectors in Alberta. After the reluctant approval of the acquisitions, Prime Minister Stephen Harper indicated that future acquisitions similar to the CNOOC and PETRONAS ones involving a stake in Canada's energy sectors or oil sands by a foreign state-owned company would not result in a net benefit for Canadians and would be blocked unless there are exceptional circumstances. Harper stated the reason for such a restriction in relation to the energy industry is that "when we say that Canada is open for business, we do not mean that Canada is for sale to foreign governments". Going forward, does this mean Canada will prevent foreign acquisitions of Canadian companies? In similar scenarios to those stated above the answer seems likely to be yes.

The reactions to this recent decision by the government have been mixed. Some believe that allowing the acquisitions is good for the perception of Canada as a destination for capital. Others, on the other hand, believe that allowing future foreign state-owned companies to purchase large Canadian energy companies would create a situation of "nationalisation" of Canada's natural resource industry by foreign governments, which would be harmful to the Canadian economy. The dilemma of having both a foreign investment-friendly regulatory framework that allows capital to easily flow into Canada and limits to foreign-state owned entities having substantial interests in Canada's energy industry is not going to be easy for the current Canadian government and future governments to resolve. There will likely be more public attention and scrutiny on proposed foreign takeovers that involve Canada's natural resource sector. It will be interesting to see whether the Canadian government keeps its current limits to acquisitions by foreign state-owned entities or whether it will loosen those rules in certain circumstances.