Focus INTERNATIONAL TRADE

DNY59 / ISTOCKPHOTO.COM

Room with a review

Sale of landmark NYC hotel an example of what triggers Canadian, U.S. national security protocols

Mark Katz

New York's Waldorf Astoria hotel is renowned for many things. An icon of glamour and luxury, the Waldorf Astoria was the tallest building in the world when constructed in 1931. It's played host to numerous celebrities and is the reputed birthplace of such culinary dishes as eggs benedict, Thousand Island dressing, and of course, the Waldorf salad.

Now the Waldorf Astoria can add one more credit to its resumé — as a potential national security risk.

Odd as it may sound, when Hilton Hotels Corporation proposed to sell it to the Anbang Insurance Company of China, the transaction was reviewed first by the Committee for Foreign Investment in the United States (CFIUS), a U.S. government agency that vets proposed transactions for potential national security implications. The transaction was only given the greenlight to proceed when CFIUS signed off on it in February.

How does the proposed acquisition of a venerable luxury hotel find itself the subject of a national security review? As it turns out, the Waldorf Astoria serves as the "home away from home" of U.S. presidents visiting New York City. Every president since Herbert Hoover has stayed at the Waldorf (the Presidential Suite is on the 35th floor). There is even a special underground train that is used to transport the president from Grand Central Station to the hotel. The Waldorf Astoria also serves as the residence for the U.S. ambassador to the United Nations, and is the hotel of choice for many foreign diplomats and dignitaries when they are in New York.

Of course, the fact that Anbang is a Chinese company was also certain to catch the attention of U.S. national security officials. China is a particular focus of American national security concern, and no other country currently has more of its proposed investments in the U.S. reviewed by CFIUS than does China.

What lessons then for Canada? For one, Canadian investors in the United States should not forget that they too are subject to potential CFIUS review. Indeed, proposed Canadian acquisitions of U.S. businesses represent the third-largest source of CFIUS reviews, behind only China and the United Kingdom.

Equally important, Canada has its own CFIUS-like national security review, which can be just as amorphous and secretive as in the United States. Canada's national security review process is provided for in the *Investment Canada Act* (ICA), which authorizes the Canadian government to review and prohibit proposed foreign investments if they are potentially "injurious" to Canadian national security.

Many elements of the ICA national security review process are frustrating for investors. For example, unlike other aspects of ICA review, falling under the national security review process does not hinge upon the foreign investor acquiring control of a Canadian business, or the Canadian business exceeding a certain asset value threshold. In essence, any foreign investment, regardless of the size of the investment or the level of interest acquired, can theoretically be subject to "national security" review in Canada.

Moreover, in contrast to the CFIUS process, there is no procedure whereby investors can proactively apply for clearance. Rather, the Canadian government will determine, based on its own assessment, whether to initiate a "national security" review. The Canadian government must make this determination within 45 days of becoming aware of the transaction, which could even occur after closing. If a review is

China, Page 15

China: Investment Canada's lack of explanation is no accident

Continued from page 14

initiated, the process can take up to 130 days to complete, subject to extension.

The other bothersome aspect of the ICA process is that there are no statutory or administrative definitions indicating what areas of the economy may implicate national security concerns. This omission is part of the Canadian government's deliberate design, so that it can retain maximum discretion in any given case.

Only a handful of transactions have not proceeded because of national security issues. In one case, the Canadian government actually denied its approval to the transaction. In the other instances, the parties abandoned the proposed transaction after learning that they could be subject to review. Each of these transactions involved facially sensitive industries (such as uranium mining, computer software or telecoms) and investors with connections to sensitive jurisdictions (such as China, Iran or Russia). However, in keeping with the veil of secrecy protecting such reviews, the Canadian government has not disclosed the reasons underlying its decision-making. This lack of explanation is another tool employed by the Canadian government in order to keep all of its options open when dealing with national security reviews.

So could the proposed acquisition of a hotel by a foreign investor also be subject to national security review in Canada? The answer is yes. Or no. Or maybe. It all depends on what the Canadian government of the day decides.

Mark Katz is a partner in the competition and foreign investment review group of Davies Ward Phillips & Vineberg.