

Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China

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Abstract

China and Australia are major trading partners. Both countries have policies to encourage inbound foreign investment and they have both been very successful in attracting it.¹ The approaches of the governments of Australia and China to the admission of foreign direct investment ('FDI') provide an interesting comparison for a number of reasons. First, despite their success in attracting FDI, both Australia and China are rated by the Organisation for Economic Co-operation and Development ('OECD')² as countries which maintain restrictive regimes in relation to the admission of foreign investment. Second, both Australian and Chinese companies and funds invest extensively overseas. Chinese companies in particular have become major investors in Australia, although Australian companies do not invest in China to anywhere near the same extent.³ Third, both countries rely heavily on concepts of the national interest and security in their FDI policies. Australia maintains a case by case screening regime based on a 'national interest' test; China has a detailed, highly regulated investment structure and review process which draws on concepts of 'national security' and 'national economic security', and has recently added an extra case by case review of certain foreign acquisitions on the basis of a 'national security' test. The purpose of this article is to examine and compare

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¹ In 2010, total investment stocks in Australia were US\$508 billion, with inflows of US\$32.5 billion in 2010, US\$25.7 billion in 2009, and US\$46.7 billion in 2008. China had total investment stocks of US\$578.8 billion in 2010, with inflows of US\$105.7 billion in 2010, US\$95 billion in 2009, and US\$108.3 billion in 2008: United Nations Conference on Trade and Development *Reports*, UNCTADstat, <<http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx>>.

² Blanka Kalinova, Angel Palerm and Stephen Thomsen, 'OECD FDI Restrictiveness Index: 2010 Update,' (OECD Working Papers on Investment No 2010/03, OECD Publishing, June 2010) 19. See also Takeshi Koyama and Stephen Golub, 'OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies' (OECD Economics Department Working Papers No 525, OECD Publishing, December 2006).

³ A relatively small amount of Australian capital flows to China (approximately 0.7 per cent of the total in 2009). In contrast, Australia was the recipient of the third largest amount of Chinese investment in 2009, which made China the third largest investor in Australia in that year. See John Larum, 'Into the Dragon's Den: Australian investment in China' (Analysis, Lowy Institute for International Policy, August 2010) 8–9 and figures cited therein; Foreign Investment Review Board, *Annual Report 2009-2010*, xv.

the concepts of national interest and national security and to consider what role they play in the admission of FDI in Australia and China. The article concludes that the 'national interest' and 'national security' criteria in Australia and China do in fact have many conceptual similarities and respond to a number of similar issues. However, the application of these concepts has taken regulatory directions which are fundamentally different.

I Introduction

There are substantial differences between Australia and China. Australia is a developed country, where China is still a developing country, although one with a remarkable rate of growth.⁴ Australia is a democratic federal state with a government which changes at regular intervals, while China is a one-party unitary state which describes itself as being in 'the primary stage of socialism' and aiming to develop a 'socialist market economy'.⁵ There are significant differences in their regulatory approach to investment, both inbound and outbound. Australia generally limits its review to investments which are above a certain size, made in sensitive sectors or made by investors which are owned or controlled by foreign governments. China maintains a complex bureaucratic system pursuant to which all foreign investments are subject to a review and approval system and to comprehensive regulation prescribing the types of industry in which foreign investment will be encouraged, permitted, restricted or prohibited, and, on occasion, the percentage of ownership interest which is considered acceptable.

The basic standard for admission of FDI in Australia ultimately rests on case by case review of certain investment proposals to determine whether they are contrary to the 'national interest,' a concept which was created by legislation and elaborated on by the issue of various guidelines and policies which constitute Australia's foreign investment system.⁶ China's intensively regulated and documented system draws heavily on vague concepts of public interest, national security and national economic security. The system has largely relied on regulatory procedure in preference to ministerial discretion in applying these concepts. A new national security review system for FDI which was introduced in 2011 has, however, introduced an additional layer of review by a Ministerial Panel.⁷ The purpose of this article is to examine and compare the concepts of 'national interest' and 'national security' and to consider what role they play in the admission of FDI in Australia and China. The national interest test in Australia is ostensibly wider than national security, as it incorporates within it the concept of national security in the sense of defence-related issues. As this article shows, however, the concept of 'national security' and associated terms in Chinese law and practice extends well beyond defence issues and the application of the national

⁴ According to the World Bank, in the period 2005 to 2010, China's annual rate of GDP growth was 11.3 per cent, 12.7 per cent, 14.2 per cent, 9.6 per cent, 9.1 per cent and 10.3 per cent. The World Bank, *GDP Growth (Annual %)*, <<http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG>>.

⁵ «中华人民共和国宪法» [Constitution of the People's Republic of China], Preamble.

⁶ Discussed in more detail below.

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security concept in China's foreign investment policy can validly be compared to the Australian concept of the 'national interest'.⁸

II Overview of Australia's Foreign Investment Regulation

Australia's FDI regime is focused on the acquisition of Australian businesses, assets or land, through the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('*FATA*'). The corporate structures through which investments may be made and operated are regulated through the common law and legislative regimes, such as the *Corporations Act 2001* (Cth) ('*Corporations Act*').⁹ An acquisition which is not covered by *FATA* or any special regime¹⁰ may be made without government review of the foreign investment implications.

Many investors are therefore able to establish themselves in Australia without government review on foreign investment grounds or any requirement to notify the government or seek government approval.¹¹ Generally, the FDI regime becomes involved only where a foreign investor proposes to acquire an interest of 15 per cent or more in an Australian business or corporation which is above a certain size,¹² in sectors which are considered to be sensitive (particularly land)¹³

⁸ It is clear from the material studied in United Nations Conference on Trade and Development ('UNCTAD'), (United Nations Conference on Trade and Development, UNCTAD Series on International Investment Policies for Development, *The Protection of National Security in IIAs*, UN Doc UNCTAD/DIAE/IA.2008/5 (2009)) that the concepts of national security and national interest are closely linked and that both terms are widely used internationally in connection with both defence and other issues relevant to the admission and treatment of investment. Although China and Australia have entered into a bilateral investment treaty (*Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July, 1988, [1988] ATS 14, entered into force 11 July, 1988), it does not provide for the extension by either country of preferences in relation to the admission of investments. For reasons of space, the bilateral investment agreements and other international commitments of China and Australia in relation to investment are not discussed in this article. For a more detailed discussion of China's domestic and international policies in relation to the admission of investments, see Vivienne Bath, 'The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

⁹ For example, a foreign company which is considered to be carrying on business in Australia is obliged to register with the Australian Securities and Investment Commission (*Corporations Act* s 601CD) and to comply with filing and other requirements in much the same way as a corporation which is incorporated in Australia.

¹⁰ Pursuant to *FATA* s 5, a 'foreign person' includes a corporation in which a foreign person not normally resident in Australia or a foreign corporation holds a controlling interest.

¹¹ Governmental requirements at local, State and or federal level relating to company and securities requirements, planning, development, tax, environment and so on would of course also apply to any new business, but are not discussed here.

¹² The threshold is indexed on 1 January each year. Currently, the threshold is AU\$244 million, or \$1062 million for US investors in sectors other than sensitive sectors. See *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) ('*FATR*') regs 6, 7 and 13; Treasurer, *Foreign Investment Policy*, (January 2012), Foreign Investment Review Board <http://www.firb.gov.au/content/_downloads/AFIP_Jan2012.pdf>. This was supplemented in January 2012 by the *Policy Statement: Foreign Investment in Agriculture*, which provides more details on factors taken into account in relation to the acquisition of agricultural land: <http://www.firb.gov.au/content/_downloads/Agriculture_policy.pdf>.

or which are specially regulated, or where the proposed acquisition is by a foreign government or a related entity.¹⁴ With the exception of acquisitions by a foreign government or related entity,¹⁵ the establishment of a new business by a foreign investor does not automatically require a prior approval under *FATA*. Separate legislation may, however, have an impact on foreign investment in such sectors as media,¹⁶ banking,¹⁷ airlines,¹⁸ airports,¹⁹ and telecommunications.²⁰ General policies directed at, for example, restricting share ownership in particular entities may also have an impact on foreign investors. Thus the proposal by the Singapore Exchange Ltd (SGX) to acquire a major interest in the Australian Stock Exchange (ASX Limited or ASX), was subject not only to *FATA*, but to the provisions of the *Corporations Act* which limit ownership by a person in the ASX to 15 per cent unless a special regulation is passed to permit a person to hold a higher interest.²¹

Thus, the basic principle underlying *FATA* and the Australian foreign investment regime is that investment is encouraged, subject to the reservation that the Treasurer may determine that a particular acquisition should be prohibited because it is contrary to the national interest. The Treasurer may also, as part of this process, impose conditions on an acquisition.²² As noted above, the circumstances under which a particular transaction will become subject to review may differ, depending on size, subject-matter or the character of the investor. However, each proposal is assessed individually and the standard for review in all cases is whether the transaction would be contrary to the national interest, as determined by the Treasurer. The scope of the concept of national interest is discussed in more detail below.

Under the OECD Foreign Investment Restrictiveness Index,²³ Australia's foreign investment regime is given a relatively high restrictiveness ranking compared to other OECD countries and selected non-OECD countries (0.138, or 14th overall of the countries measured)²⁴. This is primarily due to its screening

¹³ 'Sensitive' sectors are investments in the media, telecommunications, transport, the supply of goods or services (including technology) to the Australian Defence Force and other armed services, manufacture of goods or services able to be used for military purposes, encryption and security services and technology and the extraction of uranium or plutonium or operation of nuclear facilities (*FATR* reg 12). Most acquisitions of land (such as dwellings or mineral rights) require prior approval. *FATA* ss 21A, 26A; Treasurer, above n 12, 3.

¹⁴ Treasurer, above n 12, 2.

¹⁵ *Ibid* 2, 7.

¹⁶ *FATR* reg 12. See also Shane Barber, 'Foreign Ownership: Meeting the Challenges of Globalisation' (2007) 30 *University of New South Wales Law Journal* 307, on reforms to the regime relating to foreign ownership of media in the mid-2000s.

¹⁷ *Banking Act 1959* (Cth); *Financial Sector (Shareholdings) Act 1998* (Cth).

¹⁸ *Qantas Sale Act 1992* (Cth) s 7.

¹⁹ *Airports Act 1996* (Cth) s 40.

²⁰ *Telstra Corporation Act 1991* (Cth) s 8BG.

²¹ *Corporations Act 2001* (Cth), s850B. Singapore Exchange, *ASX-SGX Merger Proposal Application Lodged with Australian FIRB* (11 March 2011) ACN Newswire <http://en.acnnewswire.com/Article.Asp?Art_ID=6129&lang=EN>.

²² *FATA* ss18, 19, 20, 21, 21A, 25.

²³ Kalinova, Palerm and Thomsen, above n 2.

²⁴ Australia received a score of 0.138, on a scale on which the Netherlands and Luxemburg were ranked as the least restrictive countries (0.004) and China was the most restrictive (0.457). The OECD average was 0.095, while the non-OECD average was 0.157. Kalinova, Palerm and

process, particularly in relation to the sensitive sectors, especially land, media, telecommunications and financial services.²⁵

III Overview of China's Foreign Investment Regulation

China, another highly attractive destination for foreign investment, receives the highest (most restrictive) score on the OECD's restrictiveness ranking (0.457).²⁶ China has a comprehensive and detailed investment system relating to inbound investment which regulates both the establishment of greenfields foreign investments and foreign acquisitions of foreign-owned and domestic enterprises. In both cases, the investment must be made or held through a foreign investment enterprise. Establishment of a new foreign investment enterprise, acquisition of an interest in a Chinese company and conversion of the Chinese company into a foreign investment enterprise are all subject to government review and require formal governmental approval. A foreign investment, once made, is also subject to on-going regulation and monitoring by government departments (particularly the Ministry of Commerce ('MOFCOM'), which is responsible for foreign trade and investment).²⁷

The Chinese system relating to inbound investment is based on classification by industry. Projects are categorised and listed as encouraged, restricted or prohibited and a project which does not appear on any of these lists is considered to be permitted.²⁸ Regardless of its classification, a foreign investment

Thomsen, above n 2, 19–21. In the 2006 survey, which used slightly different criteria, Australia was considered to be the fifth most restrictive of the countries measured, where China was still the most restrictive. Koyama and Golub, above n 2, 79.

²⁵ This has not escaped the attention of Australian commentators, who have used the ranking as a basis for criticising Australia's policies, particularly in relation to Chinese state-owned enterprises. See Jeffrey Rae, 'Counting the Cost of Regulation' (AOIF Paper 2, Australia's Open Investment Future, November 2008), referring to the 2006 report (Koyama and Golub, above n 2, 10): 'The latest results from the OECD indicate Australia has one of the most restrictive regimes inside or outside the Organisation.'

²⁶ Kalinova, Palerm and Thomsen, above n 2, 19.

²⁷ For example, «关于外国投资者并购境内企业的规定» [Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (People's Republic of China) Ministry of Commerce; State-Owned Assets Supervision and Administration Commission of the State Council; State Administration of Taxation; State Administration of Industry and Commerce; China Securities Regulatory Commission; State Administration of Foreign Exchange, 8 September 2006 (amended 2009) ('M & A Provisions'); «关于开展 2010 年外商投资企业联合年检工作的通知» [Notice on the Commencement of 2010 Joint Annual Inspection of Foreign-Invested Enterprises] (People's Republic of China), Ministry of Commerce; Ministry of Finance; State Administration of Taxation; State Administration for Industry and Commerce; National Bureau of Statistics; State Administration of Foreign Exchange, Ministry of Commerce No 101, 12 February 2010. See generally Kay-Wah Chan, 'Foreign Investment Law in China' in Patricia Blazey, and Kay-Wah Chan (eds), *The Chinese Commercial Legal System* (Lawbook, 2008) 207–40; Vivienne Bath, 'The Company Law and Foreign Investment Enterprises in the People's Republic of China — Parallel Systems of Chinese-Foreign Regulation' (2007) 30 *University of NSW Law Journal* 774.

²⁸ The basic structure is set out in «指导外商投资方向规定» [Provisions Guiding Foreign Investment Direction] (People's Republic of China), State Council, Decree No 346, 11 February 2002, although the Foreign Investment Industry Catalogue — which lists encouraged, restricted, and prohibited industries — has been revised and reissued on a number of occasions. The current catalogue was issued in 2011: «外商投资产业指导目录» [Catalogue for the Guidance of Foreign

project must be reviewed and approved by the relevant government authority. Under Chinese law, a contract for which approval is required does not come into effect until that approval is granted.²⁹

The level of government by which a foreign investment project must be approved or verified (for example, municipal, provincial or central) varies depending on a number of factors, primarily size, but also classification. In particular, there is a difference between the level of governmental review required for encouraged projects and the level for restricted projects. In the case of large projects, review at the central government level is required, but otherwise projects will be approved locally.³⁰ There are also restrictions on the amount of foreign ownership permitted in projects in some industry sectors. Thus foreigners may not take majority interests in many infrastructure projects, such as power grids or basic telecommunications services³¹ or any interest at all in the mining of rare earths.³² The basic provisions relating to foreign investment industries are set out on the Foreign Investment Industry Catalogue, the contents of which may change from time to time when a new catalogue is issued.³³

In addition to the implementation of central government policies on FDI through this system, the Chinese government has developed and implemented policies on the role in the economy to be played by the state-owned sector and the

Investment Industries] (People's Republic of China) National Development and Reform Commission, Ministry of Commerce, 2011, effective 30 January 2012.

²⁹ «中华人民共和国合同法» [Contract Law of the People's Republic of China] (People's Republic of China) National People's Congress, 15 March 1999, art 44; «最高人民法院关于审理外商投资企业纠纷案件若干问题的规定（一）» [Provisions of the Supreme People's Court on Various Issues Concerning the Trial of Cases Involving Disputes Relating to Foreign-invested Enterprises (1)] (People's Republic of China), Supreme People's Court, 5 August 2010, art 1. In contrast, an act done in contravention of *FATA* may constitute an offence but is not automatically invalidated: *FATA* s 38.

³⁰ Currently only encouraged and permitted projects with total investment of more than US\$300million and restricted projects with total investment of more than US\$50 million require approval from the National Development and Reform Commission. «国家发展改革委关于做好外商投资项目下放核准权限工作的通知» [Notice of the National Development and Reform Commission on Delegating Powers on Approval of Foreign Investment Projects to Authorities at Lower Levels] (People's Republic of China) National Development and Reform Commission, Notice No 235, 14 February 2011.

³¹ Catalogue for the Guidance of Foreign Investment Industries, above n 28, Encouraged List, arts IV(2), V(2).

³² Catalogue for the Guidance of Foreign Investment Industries, above n 28, Prohibited List, art II(2).

³³ Changes to the Catalogue reflect Chinese macro-economic policy and do not necessarily increase opportunities for foreign investors. See discussion in OECD, 'OECD Investment Policy Reviews — China 2008: Encouraging Responsible Business Conduct' (Policy Review, OECD 2008) 33 et seq <http://www.oecd.org/document/40/0,3343,en_2649_34893_41735656_1_1_1_34529562,00.html>; Jie Lin, 'China Revised the Guideline Catalog of Industries for Foreign Investment', 6 February 2012, <<http://www.mondaq.com/x/163384/Inward+Foreign+Investment/China+Revised+The+Guideline+Catalogue+Of+Industries+For+Foreign+Investment>>. China made a number of commitments in relation to opening up foreign investment when it acceded to the World Trade Organization ('WTO'), which are reflected in the Catalogue. For an update on China's compliance with its WTO commitments, see John Frisbie, 'China's Implementation of its World Trade Organisation Commitments; an assessment by the US-China Business Council,' (Testimony delivered at The US-China Business Council Trade Policy Staff Committee Hearing, 6 October 2010) <https://www.uschina.org/public/documents/2010/10/wto_commitments_testimony.pdf>.

private sector which have a potential impact on foreign investors. Thus, in 2006, a policy was implemented pursuant to which a number of important industries, including defence, electricity, telecommunications, oil and gas and so on were reserved for state control.³⁴ Policies issued by the government encouraging the development of a strong private sector reserve a major role for state-owned enterprises.³⁵ As noted below, these policies are frequently supported by and draw on concepts of national security and national economic security.

Despite the substantial amount of material issued by the government in the form of regulations, policies and guidelines, the approval process is still to a large extent non-transparent. The grounds upon which a decision will be made if a prospective investor notionally satisfies the regulatory criteria are not set out in the legislation or the guidelines, and opportunities to challenge decisions in relation to approvals are limited. Statistics relating to foreign investment do not include information on rejections of investment proposals.³⁶ Reforms to the system have been mainly directed at enlarging the categories of projects which are available for foreign investment and making administrative reforms intended to improve efficiency (and reduce opportunities for corruption).³⁷ For example, the power to approve foreign investments has been delegated to lower levels of government, and the approval requirement has been removed entirely in relation to certain types of non-investment contracts (such as import and export of technology which is not restricted or prohibited for import or export).³⁸ The considerable amount of discretion involved in the process can be seen from a 2008 Notice issued by the National Development and Reform Commission ('NDRC'), which states that factors which will be considered in relation to a project include 'economic security and safety, proper development and utilisation of resources, protection of the ecological environment, optimization of major planning, safeguarding public interests, prevention of monopoly, investment access, capital project management and other factors'.³⁹

³⁴ «国务院办公厅转发国资委《关于推进国有资本调整和国有企业重组的指导意见》的通知» [Guiding Opinion on Advancing the Adjustment and Reorganization of State Assets] (People's Republic of China), General Office of the State Council, State-Owned Assets Supervision and Administration Commission, 6 December 2006.

³⁵ «国务院关于鼓励和引导民间投资健康发展的若干意见» [Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment] (People's Republic of China), State Council, 13 May 2010.

³⁶ See, for example, Ministry of Commerce People's Republic of China, *Statistics of China's Absorption of FDI from January to December 2010* (27 January 2011) <<http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201101/20110107381641.html>>, which refers only to approved investments.

³⁷ Vivienne Bath, 'Reducing the Role of Government — the Chinese Experiment' (2008) 3(1) *Asian Journal of Comparative Law*, article 9.

³⁸ For example, «国家发展改革委关于做好外商投资项目下放核准权限工作的通知» [Notice on Issues Related to Delegating Powers on Examination and Approval of Foreign Investment to Authorities at Lower Levels] (People's Republic of China), Ministry of Commerce No 235, 14 February 2011; «中华人民共和国技术进出口管理条例» [Regulations of the People's Republic of China on Administration of Technology Import and Export] (People's Republic of China), State Council Order No 331, 18 December 2001, (amended 2011).

³⁹ «国家发展和改革委员会关于进一步加强和规范外商投资项目管理的通知» [Notice on Further Reinforcing and Regulating the Administration of Foreign Investment Projects], (People's Republic of China) National Development and Reform Commission, 8 July 2008.

References to policy considerations such as the public interest, national security, national economic security and similar concepts occur throughout Chinese legislation, in the form of principles to be considered or obligations to be undertaken, including in relation to foreign investment. In particular, a system of national security review of foreign acquisitions of controlling interests in Chinese enterprises has been instituted pursuant to the 2011 Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors ('Security Review System Notice').⁴⁰ The scope of this security review system and its definition of national security and its implications for FDI are discussed below.

IV The National Interest Test in Australia

Under *FATA*, the Treasurer may prohibit a particular transaction if he is satisfied that it will result in a foreign person (or a different foreign person) controlling a particular business or corporation and that result would not be in the national interest.⁴¹ In addition to having the ability to prohibit a particular transaction, the Minister may agree to the transaction subject to the imposition of conditions 'that the Treasurer, when making the decision, considers necessary in order that the proposal, if carried out, will not be contrary to the national interest' (art 25(1A)). *FATA* does not, however, contain a statutory definition of 'national interest' or any guidance as to what considerations the Treasurer should take into account in making a determination on national interest grounds.

The concept of national interest in Australian legislation is not limited to *FATA*, nor is it confined to decisions of the government involving foreign corporations or individuals. In 2003 the Department of Foreign Affairs and Trade issued a Foreign Policy and Trade White Paper which defined national interest as 'the security and prosperity of Australia and Australians'.⁴² The concept also appears in a range of Commonwealth legislation. The relevant Minister may rely on the national interest to require that certain matters be broadcast (*Australian Broadcasting Corporation Act 1983* (Cth)⁴³); the national interest is relevant to the

⁴⁰ «国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知» (People's Republic of China), General Office of the State Council, Decree No 6, 3 February 2011; implemented by «商务部实施外国投资者并购境内企业安全审查制度的规定» [Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (People's Republic of China) Ministry of Commerce, Decree No 53, 25 August 2011 ('Provisions'), replacing «商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定» [Interim Provisions of the Ministry of Commerce on Issues Related to the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (People's Republic of China), Ministry of Commerce., Decree No 8, 7 March 2011 ('Interim Provisions').

⁴¹ Section 18(2). Similar provisions relate to shares, assets, land and so on.

⁴² Department of Foreign Affairs and Trade, *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper*, Parl Paper No 39 (2003). See also Bryan Mercurio and Rebecca LaForgia, 'Expanding Democracy: Why Australia Should Negotiate for Open and Transparent Dispute Settlement in its Free Trade Agreements' (2005) 6 *Melbourne Journal of International Law* 485.

⁴³ *Australian Broadcasting Corporation Act 1983* (Cth) s 78(1).

grant of international broadcasting licences (*Broadcasting Services Act 1992* (Cth)⁴⁴), the exclusion of certain persons from Australia (*Migration Act 1958*(Cth)⁴⁵), pricing practices for international liner cargo shipping (*Australian Consumer and Competition Act 2010* (Cth)⁴⁶), the right of the Commonwealth to override the States on certain issues (*National Environment Protection Measures (Implementation) Act 1988* (Cth) s 11) and the ability of the Governor-General to approve mining on aboriginal land (*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 40). It is also the basis on which the Attorney-General may make orders prohibiting the production of evidence in foreign courts, preventing the enforcement of a foreign judgment or providing for the payment of costs in respect of private anti-trust proceedings instituted before a foreign court (*Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth)).⁴⁷

As in *FATA*, legislative references to the national interest are generally non-specific, although guidance on what factors should be taken into account may be provided to the relevant Minister in some cases. For example, in determining whether or not to grant an exemption to shipping conferences under the *Australian Consumer and Competition Act 2010* (Cth), the Minister may look at Australia's international relations, Australia's international obligations, any relevant principle of international law or practice, the interests of Australian importers and exporters or any other relevant matter (s 10.72B). Under the *National Environment Protection Measures (Implementation) Act 1988* (Cth) (s 5), 'a matter of national interest' includes international relations or obligations, national security, national defence and a national emergency, as well as matters prescribed by regulation or any other matter agreed by the Commonwealth and the States and Territories.

Although a number of cases have been brought before the courts relating to the concept of national interest, the courts are consistent in their view that the exercise of the discretion is a matter for the relevant minister. The courts may review the procedural steps leading to the exercise of the discretion, and will consider the question of procedural fairness and natural justice and other administrative law grounds surrounding or leading up to a determination on the basis of national interest, but the national interest decision itself is one for the relevant minister. As Besanko J commented in *Wight v Honourable Chris Pearce, MP, Parliamentary Secretary to the Treasurer*:

...care needs to be exercised in this area because of the broad nature of the concept of the national interest. A court will be slow to interfere with a Minister's decision as to what is in the national interest on the ground that a matter not taken into account was relevant to the national interest or a matter

⁴⁴ *Broadcasting Services Act 1992* (Cth) s 121FD.

⁴⁵ *Migration Act 1958* (Cth) s 502.

⁴⁶ *Australian Consumer and Competition Act 2010* (Cth) ss 10.61 and 10.62. The Minister may prohibit particular pricing practices relating to outwards or inwards liner cargo shipping services if certain criteria are satisfied and they are not in the national interest: ss 10.72A and 10.72B. The Minister may grant exemption orders for specified shipping conferences or shipping agreements if it is in the national interest to do so.

⁴⁷ *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) ss 7, 9, 11. See Hilary Charlesworth and Deborah Senz, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69.

taken into account was irrelevant to the national interest: *Leisure Entertainment Pty Ltd v Willis* (1996) 64 FCR 205 at 220; *Canwest Global Communications Corporation v Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509 at 525. A court will also be slow to interfere with a Minister's decision as to what is in the national interest under the guise of an argument that it should be inferred from the material before the decision-maker that he or she was not in fact satisfied that the acquisition was contrary to the national interest.⁴⁸

A decision whether to make a ruling on national interest grounds lies within the discretion of the relevant minister — it is not mandatory and the exercise of the Treasurer's discretion to determine that a transaction is contrary to the national interest under *FATA* cannot be compelled.⁴⁹

Under *FATA*, the Treasurer has developed policies as to how the national interest test will be used which significantly complement the provisions of *FATA* and *FATR*. In reviewing applications under *FATA*, the Treasurer is assisted by the Foreign Investment Review Board ('FIRB'), a body comprised of four part-time members (who are not public servants) and a full-time executive member.⁵⁰ The result is a set of policies laid out in the Foreign Investment Policy,⁵¹ speeches and announcements by the Treasurer and his department, decisions of the Treasurer, Annual Reports produced by the FIRB⁵² and the experience of investors and their counsel in negotiating with the FIRB.

The Foreign Investment Policy sets out a number of factors which will be taken into account in making a decision on national interest grounds. Review is on a case by case basis, and 'recognises community concerns about foreign ownership of certain Australian assets'. It also 'recognises the importance of Australia's market-based system, where companies are responsive to shareholders and where investment and sales decisions are driven by market forces rather than external strategic or non-commercial considerations'.⁵³ Specifically, the following matters will be considered: national security (that is, strategic and security interests for which the Treasurer relies for advice on the national security agencies); competition (particularly proposals that involve customers gaining control over an Australian producer of a product or an investment which might allow an investor to control global supply of a product); other government policies such as tax and environment; the impact of the investment on the economy, including an analysis of Australian participation and the interests of employees, creditors and other stakeholders and consistency with the 'Government's aim of ensuring that

⁴⁸ [2007] FCA [120]. See also *Cathay Pacific Airways Limited v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* [2010] FCA 510.

⁴⁹ *Leisure and Entertainment Pty Ltd v the Honourable Ralph Willis, Federal Treasurer of the Commonwealth of Australia, Janola Dale Pty Ltd and Kenneth John Stout and Ross Andrew Duus As Receivers and Managers of Dreamworld Productions Pty Ltd (Receivers and Managers Appointed)* [1996] FCA 1189.

⁵⁰ Foreign Investment Review Board, 'Who Are We?', <<http://www.firb.gov.au/content/who.asp?NavID=48>>.

⁵¹ Treasurer, above n 12.

⁵² Foreign Investment Review Board, *Publications* <<http://www.firb.gov.au/content/publications.asp?NavID=5>>.

⁵³ Treasurer above n 12, 1.

Australia remains a reliable supplier to all customers in the future,' and the character of the investor, particularly in relation to corporate governance and the extent to which the investor operates on a "transparent commercial basis".⁵⁴ In particular, all investments by foreign governments or their related entities, which generally include Chinese state-owned enterprises, for example,⁵⁵ are subject to scrutiny under this policy.

In practice, outright rejections of investment proposals are rare. The 2009-10 FIRB Report, for example, states that only three proposals were rejected in that period, all of which related to real estate. In addition, 167 proposals were withdrawn and 1,729 were approved subject to conditions (of which all but two were in the real estate sector.⁵⁶ (This does not take account of applications which were not submitted because after discussions the applicants felt they were unlikely to succeed.)

In 2001, the then Treasurer, The Hon Peter Costello, refused to allow Shell Australia Investments Limited to buy a majority interest in Woodside Petroleum Limited, the manager of the North West Shelf natural gas consortium, on national interest grounds. He stated:

It is in the national interest for the operator of this project to develop the resource to its maximum and for sales from the NWS to be promoted in preference to competing sales from projects in other parts of the world.⁵⁷

A decision in 2009 refused an application by China Minmetals Non-Ferrous Metals Co Ltd ('CNMC') to buy 100 per cent of Oz Minerals Ltd on national security grounds on the basis that it included mining operations located within the Woomera Prohibited Area weapons testing range.⁵⁸ The application to buy the assets excluding these operations was subsequently approved subject to undertakings by CNMC to operate the mines using companies incorporated in Australia, to set prices on arms-length terms, maintain or increase production, comply with Australian industrial relations terms and maintain and increase levels of Indigenous employment.⁵⁹

Most recently, the Treasurer, The Hon Wayne Swan, rejected the proposed takeover of ASX Limited (ASX) by Singapore Exchange Limited (SGX). He stated:

⁵⁴ Ibid 6–12.

⁵⁵ *FATA* s 17F; *FATR* reg 10. An entity which is controlled by a foreign body politic or in which an interest of more than 15 per cent is held by a foreign body politic is a government investor.

⁵⁶ Foreign Investment Review Board, above n 3, 18.

⁵⁷ Peter Costello, 'Foreign Investment Proposal — Shell Australia Investments Limited (Shell) Acquisition of Woodside Petroleum Limited (Woodside)' (Media Release 025, 23 April 2001) [4].

⁵⁸ Wayne Swan, 'Foreign Investment Decision' (Press Release 029, 27 March 2009). On 6 May 2010, the government initiated a review of the Woomera Prohibited Area and its role in serving 'national security and economic interests' in view of increased demand for access by the resources sector. Australian Government, 'Government Review of the Woomera Restricted Area, Final Report' (Report, 2011). Access is now regulated by the Woomera Prohibited Area Coordination Office, a joint Commonwealth and South Australian government body. See Australian Government Department of Defence, *Woomera Prohibited Area Coordination Office*, <<http://www.defence.gov.au/woomera>>.

⁵⁹ Wayne Swan, 'Foreign Investment Decision' (Media Release 043, 23 April 2009).

It is in the national interest for Australia to maintain the ongoing strength and stability of our financial system, and ensure it is well placed to support the Australian economy into the future. It is important that we continue to build Australia's standing as a global financial services centre in Asia to take best advantage of the benefits of our superannuation savings system. I had strong concerns that the proposed acquisition would be contrary to these objectives.⁶⁰

Approvals with conditions imposed on national interest grounds are much more common than rejections. For example, in 2009, an application by Anshan Iron and Steel Group Corporation (Ansteel) to acquire an additional shareholding in Gindalbie Metals Ltd, taking its interest up to a maximum of 36.28 per cent, was approved subject to undertakings by Ansteel including an agreement that it would not alter 'the proposed 50:50 ownership of the pellet plant that joint venture participants intend to build in China without first seeking the prior approval of the Australian government'.⁶¹ The acquirer is not, of course, obliged to complete a transaction if it finds the conditions unacceptable. In 2009, for example, CNMC withdrew its bid to buy an interest in Lynas Corporation, an entity established to mine rare earths, after the FIRB insisted that CNMC change its bid for a minority interest by agreeing to buy only 49.9 per cent of Lynas, with a right to appoint fewer than one half of the directors of the company. These conditions were to be imposed on the grounds that the proposed equity interest and governance proposals potentially raised national interest issues.⁶²

There are a number of criticisms that can be, and have been, made in relation to Australia's national interest test, starting, of course, with the OECD. These criticisms apply both to the case by case review of investments on a national interest basis and to the policy which has been constructed on the basis of the national interest test. They are based on propositions of fairness and on the economic argument that Australia's policies result in the loss of substantial amounts of investment that would otherwise be made.⁶³ One argument is that the view taken of national interest is too wide and uncertain and should be restricted to national security matters (that is, matters of defence and military security) rather than including community interest, economic considerations and the other matters referred to in the Foreign Investment Policy.⁶⁴ It is also argued that the application of this test and the system of case by case review makes it difficult for investors to

⁶⁰ Wayne Swan, 'Foreign Investment Decision' (Media Release 030, 8 April 2011).

⁶¹ Wayne Swan, 'Foreign Investment Decision,' (Media Release 045, 8 May 2009). Conditions relating to the location of management and operations and retention of jobs were also imposed on SABMiller PLC's acquisition of Foster's Group Ltd: Wayne Swan, 'Foreign Investment Decision,' (Media Release 145, 25 November 2011).

⁶² Letter from Patrick Colmer, Executive Member, Financial Investment Review Board, to John Mollard, dated 29 September 2009, <http://www.treasury.gov.au/documents/1937/PDF/FIRB_advice_to_Baker_&_McKenzie.pdf>.

⁶³ Rae, above n 25; Tony Makin, 'Capital Xenophobia and the National Interest' (AOIF Paper 8, Australia's Open Investment Future, December 2008) 7.

⁶⁴ Makin, above n 63. In contrast, Rae, above n 25, argues that transactions should be allowed to proceed unless they would clearly 'reduce community welfare'. Access Economics' paper on the ASX-SGX merger argues that the transaction is in the national interest, based almost entirely on economic criteria: Access Economics, 'ASX-SGX: Why the Combination is in Australia's National Interest' (report for ASX Limited, 6 December 2010) <http://www.asxgroup.com.au/media/PDFs/20101206_ASX_SGX_AccessReport.pdf>.

predict whether or not their proposed investment will be successful or whether it will be rejected or subjected to conditions.⁶⁵ A related argument is that both individual decisions and policies are subjected to 'arbitrary political influence over investment',⁶⁶ and the reference to 'community concerns' through the nomination of sensitive sectors is purely a political response rather than a reflection of economic issues.⁶⁷ As a separate, but related point, various commentators have argued against the policy of reviewing all investments by state-owned enterprises on the basis, first, that it is discriminatory because it is directed at Chinese investors and, secondly, that the creation of a class of investments which require special scrutiny constitutes an unnecessary departure from the case by case review process.⁶⁸

There is, however, strong support in Australia for the existing approach on the basis that Australia's policies have clearly not deterred foreign investment; the case by case review offers the government the advantage of flexibility and it has not been used as an arbitrary method of rejecting controversial submissions.⁶⁹ The onus is on the Treasurer to reject a proposal on national interest grounds, and, although different Treasurers have administered the legislation, outright rejections have been rare. In 2009, the Senate Economics References Committee report on foreign investment by state owned entities concluded that the current regulatory framework was sufficient, particularly the system of case by case review.⁷⁰

Limiting the scope of 'national interest' purely to issues of defence also presents a number of issues. In the case of Lynas Corporation, for example, in 2009 China reportedly accounted for 93 per cent of the world's production of rare earths, largely under state control,⁷¹ while prohibiting foreign investment in rare earth mining in China itself.⁷² A decision to require continuing Australian control of one of the few non-Chinese producers may not be directly related to defence, but is clearly related to Australia's economic and commercial advantage. Indeed, this decision was subsequently given additional support by China's decision to

⁶⁵ Rae, above n 25, 6. Note that this article was written before the issue of the current policy, which aimed to clarify some of the standards used for review.

⁶⁶ Julie Novak, 'Australia as a destination for foreign capital' (AOIF Paper 1, Australia's Open Investment Future, October 2008) 6.

⁶⁷ Ibid 11.

⁶⁸ Jamie Walker, 'China Foreign Investment Rules Racist, says Clive Palmer', *The Australian* (Sydney), 29 September 2009; Rae, above n 25, 12–15; Senate Economics Reference Committee, Parliament of Australia, *Foreign Investment by State Owned Entities* (2009) 58 (Submission 40, submission of Professors Drysdale and Findlay).

⁶⁹ Mark Thirlwell, 'Is the FIRB Acting Fairly?' (AOIF Paper 4, Australia's Open Investment Future, December 2008).

⁷⁰ Senate Economics Reference Committee, *Foreign Investment by State Owned Entities*, above n 68.

⁷¹ Keith Bradsher, 'China Tightens Grip on Rare Minerals', *The New York Times* (New York) 31 August 2009; Keith Bradsher, 'China Consolidates Grip on Rare Earths', *The New York Times* (New York), 15 September 2011.

⁷² Although foreigners are permitted to take an interest in joint ventures engaged in smelting and separation of rare earths (Catalogue for the Guidance of Foreign Investment Industries, above n 28, Restricted list art (IX)(3)), it is prohibited for any foreigner to invest in mining rare earths in China (Prohibited list art II(2)).

consolidate the domestic rare earths sector and limit exports, as well as by allegations of an export embargo imposed on Japan for political reasons.⁷³

It is also far from clear that the influence of ‘community concerns’ and pressure applied by public opinion and other interested parties in determining policy or, indeed, responses to particular transactions should be regarded as irrelevant in defining the national interest. Australia is a democracy and foreign investment policy is a matter of continuing interest to Parliament and the public, as well as competitors and industry participants.⁷⁴ In 2009, BHP Billiton, which was attempting to take over the Rio Tinto Group, allegedly put significant effort into undermining the highly controversial proposal by Rio Tinto to sell some of Rio’s significant Australian assets to Aluminium Corp of China (Chinalco).⁷⁵ The proposal by SGX to merge with ASX was the subject of intense public comment and debate,⁷⁶ particularly in relation to the role of the Singapore government, through one of its investment arms, Temasek Holdings.⁷⁷

Thus, it is certainly arguable that it is appropriate for an elected government to consider community views on foreign participation in the economy, as provided by the Foreign Investment Policy, although the relative rarity of rejections suggests that Treasurers have not been easily swayed by popular opinion on major investment projects or on policy. A spirited minority opinion by Senators Joyce, Xenophon and Ludlem in the Senate Economics Reference Committee review, for example, which favoured preventing foreign governments investing in Australian ‘strategic assets’ and requiring consideration of reciprocity when an application was submitted for review, was not adopted by the government.⁷⁸

There are exceptions to the general practice of reviewing only substantial investments on a case by case basis. Land purchases, for example, are considered highly sensitive and are closely monitored. Indeed, in late 2010, Senators Xenophon and Milne tabled a private members bill which sought to increase controls over foreign acquisitions of Australian farms and agricultural companies. Among other things, the bill set out detailed criteria defining the national interest. This was referred to the Senate Economics Legislation Committee, which recommended that the bill not be passed.⁷⁹ The Committee considered that the

⁷³ Patrick Chovanec, ‘China-Japan Rare Earth Fracas Continues’, *Forbes* (New York), 17 October 2010; Joe McDonald, ‘China cuts 2012 rare earth export quotas’, *Associated Press*, 28 December 2011 <<http://news.yahoo.com/china-cuts-2012-rare-earths-export-quota-103218360.html>>.

⁷⁴ Fergus Hanson, ‘The Lowy Opinion Poll 2010, Australia and the World Public Opinion and Foreign Policy,’ (Poll, Lowy Institute for International Policy, 2010) found, for example, that 57 per cent of respondents thought there was too much Chinese investment in Australia, figure 12.

⁷⁵ Jessica Burke, ‘Kloppers Feared Chinese Espionage but Offered Secrets to US: WikiLeaks’ *Australian Mining* (Sydney), 15 February 2011, <<http://www.miningaustralia.com.au/news/kloppers-feared-chinese-espionage-but-offered-secr>>.

⁷⁶ For example, Online Press, ‘Singapore Takeover of ASX Proves Hugely Unpopular’ (28 December 2010) TR EMERITUS <<http://www.temasekreview.com/2010/12/28/singapore-takeover-of-asx-proves-hugely-unpopular/>>.

⁷⁷ Rowan Callick, ‘Singapore Sends a Valentine in Latest Bid for Stock Exchange Merger’, *The Australian* (Sydney), 19 February 2011.

⁷⁸ Senate Economics Reference Committee, *Foreign Investment by State Owned Entities*, above n 68, 64–78.

⁷⁹ The bill includes a proposal for a national interest test which would lay out specific considerations, including strategic, economic, competition, tax, and impacts on the Australian economy or

detailed criteria would have the undesirable effect of undermining the flexibility of the concept of national interest, as well as potentially subjecting the Treasurer's decision to judicial review.⁸⁰

The role of foreign governments, sovereign wealth funds and state-owned enterprises has proved particularly controversial. As noted above, it is clear that the implementation of detailed guidelines relating to state-owned enterprises was precipitated by the number and size of Chinese investment proposals in the natural resources sector.⁸¹ The sensitivities about foreign government interests are not, however, confined to China, as the reaction to the proposed SGX-ASX merger indicates. The approach by the Australian government, which was supported by the Senate Economics Reference Committee, has been to treat investments by foreign governments and related entities as a special category. This is justified, generally, by the view that state-owned enterprises do not necessarily pursue commercial objectives. Thus, FIRB will consider whether a transaction 'is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest'.⁸² Conditions imposed on acquisitions by state-owned enterprises may refer to the operation of assets 'on a commercial basis' or 'according to commercial objectives'.⁸³

Even if the concerns about the independence and motivations of government owned entities are justified, however, it is not clear that Australia's strategic or economic interests would be adversely affected by a failure to review each and every investment by a state-owned enterprise, regardless of size or sector. The debate and sensitivities relating to this issue demonstrate the difficulty of finding a generally accepted concept of the national interest in this area and support the view that public sensitivities have a significant role to play in Australia's foreign investment policy.

V China

As noted above, China's foreign investment regime is considerably more complex and highly regulated than the Australian system, and the fundamental

community, including such as benefits to Australia or Australians, creation or retention of jobs in Australia, the introduction of new technology or business skills, the effect on Australian exports, and so on. Foreign Acquisitions Amendment (Agricultural Land) Bill 2010 (Cth) cl 21C. Senate Economics Legislation Committee, Parliament of Australia, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010*, June 2011. A more detailed policy on the acquisition of agricultural land was released in January 2012, see above n 12.

⁸⁰ Economics Legislation Committee, above n 79, 28–9.

⁸¹ Senate Economics Reference Committee, *Foreign Investment by State Owned Entities*, above n 68, 7. Also note the Dissenting Report by Senators Joyce, Ludlem and Xenophon, Senate Economics Reference Committee, *Foreign Investment by State Owned Entities*, above n 68, 64–78; James Grubel, 'Australia wanted to curb China resource investment — Wikileaks', *Reuters* (online), 3 March 2011 <<http://www.reuters.com/article/2011/03/03/us-wikileaks-australia-china-idUSTRE7221A920110303>>.

⁸² Treasurer, above n 12, 7.

⁸³ For example, Wayne Swan, Foreign Investment Decision, (Media Release 093, 19 December 2010) [1] 'relating to the application by Minmetals Resources Limited (Minmetals Resources) to acquire Alumina Resources Private Limited (Alumina) and thereby its Australian mining assets'.

system of restrictions by industry type does not — or until recently did not — provide for a case by case review of proposed investments on the basis of a ‘national interest’ or ‘national security’ standard. Nevertheless, Chinese legislation and policy is replete with references to the ‘public interest’, ‘national economic security’, ‘national security’, ‘national energy resource security’⁸⁴ and ‘national cultural security’.⁸⁵

An industry will be included in the list of investments prohibited to foreign investors if investment ‘jeopardises national security or harms the social public interest’.⁸⁶ Outbound investment by Chinese enterprises will not be approved by the NDRC or the Ministry of Commerce if it ‘endangers the sovereignty, security and social public interest of the State’.⁸⁷ One of the criteria for assessing inbound investment is ‘economic security’.⁸⁸ Chinese law must apply in civil matters if the application of foreign law would undermine social and public interest (社会公共利益) of China.⁸⁹ Houses on state-owned land may be expropriated only if the public interest (公共利益) so requires.⁹⁰ Government information may not be disclosed if it involves state secrets or if disclosure may endanger ‘national security, public safety, economic security or social stability’.⁹¹ Australian Stern Hu, of Rio Tinto, was accused by Chinese officials in 2009 of stealing state secrets and causing massive damage to China’s national economic security.⁹²

⁸⁴ «关于加快推进煤矿企业兼并重组若干意见» [Certain Opinions on Accelerating the Progress of Merging and Restructuring Coal Mining Enterprises] (People’s Republic of China), National Development and Reform Commission, 21 October 2010.

⁸⁵ «2011 年第 1 季度全国文化市场综合执法工作要点» [Key Points on Comprehensive Law Enforcement Work for Nationwide Cultural Market in the First Quarter of Year 2011] (People’s Republic of China), General Office of the Ministry of Culture, Decree No 36, 16 December 2010.

⁸⁶ Provisions Guiding Foreign Investment Direction, above n 28, art 7(1).

⁸⁷ «境外投资管理办法» [Measures for the Administration of Overseas Investment] (People’s Republic of China), Ministry of Commerce, Order No 5, 16 March 2009, art 9; «I 境外投资项目核准暂行管理办法» [Interim Measures for the Administration of Verification and Approval of Overseas Investment Projects] (People’s Republic of China), National Development and Reform Commission Decree No 21, 9 October 2004, art 18(1).

⁸⁸ «国家发展和改革委员会关于进一步加强和规范外商投资管理的通知» [Notice on Further Reinforcing and Regulating the Administration of Foreign Investment Projects] (People’s Republic of China), National Development and Reform Commission No. 1773, 2008.

⁸⁹ «中华人民共和国涉外民事关系法律适用法» [Law of the People’s Republic of China on Application of Laws to Foreign-Related Civil Relations] (People’s Republic of China), Standing Committee of the National People’s Congress, 28 October 2010, art 5.

⁹⁰ 《国有土地上房屋征收与补偿条例》[Regulations Regarding the Expropriation of Houses on State-Owned Land and Compensation Thereof] (People’s Republic of China), State Council No 590, 21 January 2011, art 8, provides that this includes expropriation for defence or foreign affairs purposes, construction of infrastructure, public utilities, subsidised housing and renovation of old districts.

⁹¹ «中华人民共和国政府信息公开条例» [Regulations of the People’s Republic of China on the Disclosure of Government Information] (People’s Republic of China), State Council, Order No 492, 17 January 2007, art 8.

⁹² Embassy of the People’s Republic of China in the United States, ‘Watchdog on secrets: Rio caused “huge loss”’ (11 September 2009) <<http://www.china-embassy.org/eng/zmgx/t577750.htm>> (translation of *Shanghai Daily*). Hu and his colleagues were ultimately charged and convicted of taking bribes and stealing business secrets. Judgment of the First Intermediate Shanghai People’s Court available (in Chinese and English translation) at Michael Sainsbury, “‘Conflict of interest’ in focus in trial of Rio Tinto’s Stern Hu”, *The Australian* (Sydney), 19 April 2010.

These various concepts of national security, national economic security and so on are generally not defined in Chinese legislation. In particular, the differences between these terms is not clarified and the use of the omnibus phrase ‘national security, public safety, economic security or social stability’ (国家安全、公共安全、经济安全和社会稳定)⁹³ suggests that Chinese drafters do not make a clear distinction between the various phrases.

It is clear that national security does not just relate to defence, nor is it restricted to foreigners or foreign-related activities. It also refers to domestic security issues (particularly in relation to the disclosure of information) and the domestic economy. For example, government investment in the Chinese economy is to be directed to ‘economic and social sectors that involve national security and in which the market cannot efficiently allocate resources’.⁹⁴ In this sense, it is similar to the use of the concept of national interest in Australian legislation to apply to purely domestic matters within Australia, such as environmental decisions, which are considered to be in the overall national interest.⁹⁵

It is clearly relevant in the context of foreign investment. Article 7 of the 2002 *Provisions Guiding Foreign Investment Direction*⁹⁶ provides that items should be listed in the Foreign Investment Industry Catalogue as prohibited if they jeopardise national security or harm the public social interest (para 1) or jeopardise the security or efficacy of use of military facilities (para 2).⁹⁷ Article 12 of the 2006 *Provisions on Foreign Investors' Merger with and Acquisition of Domestic Enterprises* (‘M & A Provisions’)⁹⁸ introduced the concept of a security review for a particular investment by requiring an investor to make a declaration to the Ministry of Commerce if an acquisition of a controlling interest in a Chinese company in cases where the transaction could cause a significant impact on the ‘national economic security’ (国家经济安全), although without providing any clarification in relation to the procedure or criteria for the review. The Ministry of Commerce is empowered to terminate the transaction or take measures such as requiring a transfer of assets or equity to remove the threat to national economic security.⁹⁹ Chapter IV of the *Anti-Monopoly Law*,¹⁰⁰ which deals with reviews of

⁹³ Regulations of the People's Republic of China on the Disclosure of Government Information, above n 91, art 8.

⁹⁴ «国务院关于鼓励和引导民间投资健康发展的若干意见» [Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment] (People's Republic of China), State Council, Decree No 13, 7 May 2010.

⁹⁵ For example, *National Environment Protection Measures (Implementation) Act 1998* (Cth).

⁹⁶ Catalogue for the Guidance of Foreign Investment Industries, above n 28.

⁹⁷ Susan Ning, Shan Lining and Zeng Ziqing, ‘Introduction to China's National Security Review Mechanism’ (2011) 46 *China Bulletin*, <<http://www.kingandwood.com/Bulletin/html/article-id%3DIntroduction-to-China-National-Security-Review-Mechanism-en.html>>, suggest that these Provisions introduce the concept of security review. Art 7, however, sets out the types of investments that should be incorporated in the prohibited list. Investment in such industries is by definition prohibited and does not involve case by case review.

⁹⁸ M & A Provisions, above n 27, art 12.

[I]f the merger and acquisition involves any key industry or any factor that causes or is likely to cause impact on national economic security, or if the merger or acquisition causes the transfer of the actual right of control over a domestic enterprise that owns any well-known trademark or China's time-honoured brands. (Translation by Westlaw China.)

⁹⁹ *Ibid.*

concentrations by business operators, provides for the conduct of an additional review in the case of participation by a foreign investor in a concentration of business operators which involves national security (art 31). However, this concept is not mentioned again in any of the numerous items of subordinate legislation dealing with concentrations, with the exception of art 18 of the *Guiding Opinions on the Declaration Documents and Materials for Concentration of Business Operators*, which requires that special explanations be provided for questions relating to concentrations involving 'bankrupt enterprises, national security, industrial policies, State-owned assets, functions of other departments, and famous brands'.¹⁰¹

The question of what this general security-related concept means and how it should be applied, particularly in the context of foreign investment, is a subject of interest for foreign investors and Chinese academics and commentators. Wang Yizhou considers, for example, the question of what he describes as 'non-traditional' security, which could involve economic security (which would include energy, financial, food and ecological security), information security and environment security.¹⁰² Liu Bingyu discusses the idea of 'industry security', which he describes as follows:

The industry security refers to the fact that in international economic competition, the industries of a country can develop healthily, soundly, and sequentially, and maintain leading positions or can be in advantageous statuses [sic].¹⁰³

Wang Zhile looks at foreign investment in the context of economic security and states that 'the theory that perhaps best describes the core of economic security is a nation's competitiveness, which gives it status and influence in international politics'.¹⁰⁴ Clearly, as is the case with the Australian national interest test, these concepts are not restricted to matters of defence and physical security. There is also space for considerable differences of view as to what steps (if any) need to be taken in order to protect the security of the Chinese state in relation to foreign investment. If, for example, the focus is on economic security, is this best promoted by encouraging the further growth of state-owned companies or by approving more foreign investment, which has been a major contributor of jobs and growth?¹⁰⁵ Or is the main issue monopolisation of Chinese markets by foreign investment enterprises?¹⁰⁶

¹⁰⁰ «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China), Standing Committee of the National People's Congress, Order No 68, 30 August 2007.

¹⁰¹ «关于经营者集中申报文件资料的指导意见» (People's Republic of China) Anti-Monopoly Bureau of the Ministry of Commerce, 5 January 2009.

¹⁰² Wang Yizhou, 'Defining Non-Traditional Security and Its Implications for China', (2004) 12(5) *China & World Economy* 59.

¹⁰³ Liu Bingyu, 'A Brief Discussion on Legal Guarantee of Industry Security in Foreign Capital Merger and Acquisition', (2011) 7 *Asian Social Sciences* 172.

¹⁰⁴ Wang Zhile, 'Foreign Acquisition in China: Threat or Security', (2007) 3(2) *China Security* 86, 89.

¹⁰⁵ Chen Zhiwu, '国企需要一场哲学反思', [State enterprises need philosophical reflection] (18 November 2010) Southern Weekend, <<http://www.infzm.com/content/52590>>.

¹⁰⁶ Wang Zhile, above n 104, 92.

Liu Bingyu states that selling off state assets at a low price, allowing foreign capital to acquire leading enterprises, thus reducing the competitiveness of Chinese enterprises and allowing foreign capital to control ‘the lifeline of key equipment manufacturing industry of China’ would threaten national economic security and national security.¹⁰⁷ It is this view which seems most accurately to reflect the thinking behind the State Council’s security review system for foreign acquisitions of domestic enterprises.

A formal system for the security review of foreign acquisitions of Chinese companies was created by the 2011 Security Review System Notice.¹⁰⁸ The Security Review System Notice has been further implemented by the Provisions,¹⁰⁹ which replaced the Interim Provisions in August 2011.¹¹⁰ Interestingly (and contrary to normal practice), the Security Review System Notice does not justify the establishment of a security review procedure by reference either to the M & A Provisions or the Anti-Monopoly Law, although presumably the security review deals with the requirements set out in both items of legislation.¹¹¹

The Security Review System Notice defines first the scope of the review (that is, cases where review is required) and then the contents of the review (art 1). Not all mergers and acquisitions of domestic companies by foreign enterprises are subject to review on foreign security grounds. A review will be conducted for any acquisition proposal relating to defence and military enterprises, enterprises located near key or sensitive military facilities and other enterprises related to national defence.

In other cases, review will be conducted if actual control may be obtained by foreign investors (either directly or acting through an existing investment — Art 2) in certain sectors. These are: investments in important agricultural products, important energy and resources, crucial infrastructure, important transport services, key technologies and major equipment manufacturing and so on *which are related to national security*. Unlike *FATA*, which looks at all projects over a certain size as well as projects in sensitive sectors, the concept of security under the Security Review System Notice is tied to particular sectors, although these are very widely drawn. There are no *de minimis* requirements in the Chinese legislation.

Unlike *FATA*, which considers that ‘control’ exists at the relatively low level of 15 per cent, the Security Review System Notice generally regards an enterprise having control if it holds, individually or collectively, more than 50 per cent of the equity, shares or voting rights in an enterprise. ‘Control’ extends, however, to a foreign investor holding actual control in decision-making, finance, personnel or technology (art 3).¹¹² The Provisions include an anti-avoidance

¹⁰⁷ Liu Bingyu, above n 103, 173.

¹⁰⁸ Security Review System Notice, above n 40.

¹⁰⁹ Provisions, above n 40.

¹¹⁰ Interim Provisions, above n 40.

¹¹¹ Anti-Monopoly Law, above n 100.

¹¹² Contrast «中华人民共和国公司法» [Company Law of the People’s Republic of China] (People’s Republic of China), Standing Committee of the National People’s Congress, 29 December 1993 (amended 1999, 2004 and 2005) art 217(3), which refers to control through investment relations, agreements or other arrangements.

provision, making clear that review cannot be avoided by structuring the investment through a trust, lease, loan, variable interest entity, multi-level investment or offshore transaction.¹¹³

The Foreign Investment Industry Catalogue and other policy documents already control investment in these areas to a considerable extent, by prohibiting foreign investment, restricting the amount of foreign investment or by subjecting projects to a higher level of review by putting them on the restricted list. Foreign investment in manufacture of weapons and ammunition or projects that endanger the safety or performance of military facilities is already on the prohibited list.¹¹⁴ Investments in the exploration and mining of tungsten, molybdenum, tin, antimony, fluorite, radioactive mineral products and rare earths are similarly prohibited,¹¹⁵ while foreign participation in many forms of mining and exploration is permitted only if conducted through a joint venture with a Chinese partner and, in some cases, is limited to a minority interest pursuant to the encouraged list (for example, coal-bed gas, oil and petroleum and oil shale)¹¹⁶ or the restricted list (exploration and mining of rare coals, barite, ocean manganese nodules).¹¹⁷ Investment in wholesale, resale and logistic distribution of grain, cotton, vegetable oil, sugar, medicines, tobacco, crude oil, and fertiliser are on the restricted list, with an additional restriction requiring that a Chinese partner have a majority interest in shops with more than 30 branch stores.¹¹⁸ Investment in transportation companies is also constrained,¹¹⁹ while investment in postal services is prohibited.¹²⁰ Investments in technology, on the other hand, are strongly encouraged.¹²¹ The security review is therefore arguably duplicative in that it focuses on investments in particular industries and requires case by case review where the desirability of foreign investment and the manner of control over that foreign investment in a particular sector have already been considered in some detail. This suggests that it is not foreign investment which causes a security concern but control by the foreign party, even in industries where there is no general restriction on foreign investors exercising control.

Second, the potential scope is wide and quite generally expressed. The inclusion of 'important agricultural products', 'key technologies' and so on, means that it will be difficult for a foreign investor to know if it is investing in a project which may be subject to scrutiny. It is significant because if an investor comes within the scope of review, it must file a notice with the Ministry of Commerce,¹²² which will make a determination whether the transaction falls within the scope of review.¹²³ The Provisions clarify that the investor may ask for a discussion with the

¹¹³ Provisions, above n 40, art 9.

¹¹⁴ Catalogue for the Guidance of Foreign Investment Industries, above n 28, Prohibited List, arts, III.4 (1), XI.1

¹¹⁵ Ibid art II..

¹¹⁶ Ibid Encouraged List, art II.

¹¹⁷ Ibid Restricted List, art II.

¹¹⁸ Ibid Restricted List, art VI(2).

¹¹⁹ Ibid Restricted List, art V.

¹²⁰ Ibid Prohibited List, art V(2).

¹²¹ Ibid. The Encouraged List includes numerous references to projects utilising new technology.

¹²² Provisions, above n 40, art 1.

¹²³ M&A Provisions, above n 40, art 6.

Ministry of Commerce on the procedural aspects before filing an official application, but the results of the discussion are not legally effective and do not serve as the basis for filing the formal application.¹²⁴

Third, there are no limits relating to the size of the transaction. Any transaction, however small, which meets the criteria will be submitted for review (although, presumably, the size may affect the determination whether it will or may impact national security).

Fourth, the consequences of an adverse finding are potentially severe, as the investor can be required to terminate the proposed investment or unwind a transaction that has already been completed. If the investor proposes to amend the transaction to deal with the national security issue, it must undergo another review.¹²⁵

The Security Review System Notice gives rights to 'relevant departments under the State Council', national industrial associations, enterprises in the same trade and upstream and downstream enterprises to propose that a national security review be conducted by making proposals through the Ministry of Commerce.¹²⁶ The Ministry of Commerce will submit the proposal to the Ministerial Panel if the scope of the proposed acquisition is within the security review process. If the Ministerial Panel considers it necessary to conduct a review, the foreign investor will be required to submit an application for review.¹²⁷

The review will be conducted by an inter-ministerial joint conference (the Ministerial Panel or Joint Commission), under the leadership of the State Council and led by the NDRC and the Ministry of Commerce in conjunction with other 'relevant departments' in accordance with the 'industries and fields' involved in the merger and acquisition transaction (art 3(2)). Although the review is to be led by the NDRC and the Ministry of Commerce, the two agencies with long-standing experience and expertise in investment, the constitution and size of the panel is unclear and the participation of a number of different ministries with different constituents and interests and little experience or interest in investment policy, strongly suggests that that consensus may be difficult to reach and vested interests will have a stronger voice in investment decisions. The review process involves first a general review (comments in writing from the relevant departments). If consensus is reached that the transaction will not have an impact on national security, no further review will be required. If, however, a Ministry believes that the transaction could have an impact on national security, a special review, involving security assessment of the transaction, will be conducted. In the event of

¹²⁴ Provisions, above n 40, art 4. See also commentary in O'Melveny & Myers LLP, *MOFCOM Releases Interim Measures to Implement the New Foreign Investment National Security Review Mechanism* (11 March, 2011) <<http://www.omm.com/mofcom-releases-interim-measures-to-implement-the-new-foreign-investment-national-security-review-mechanism-03-11-2011/>>. The local authorities should decline to process an application if it comes within the scope of review and the applicant has not filed an application (Provisions, above n 40, art 2).

¹²⁵ Provisions, above n 40, art 7.

¹²⁶ Security Review System Notice, above n 40, art 4(2).

¹²⁷ Provisions, above n 40, art 3.

a major divergence of view within the Ministerial Panel, the matter will be referred to the State Council for a decision.¹²⁸

The content of the review has four bases: the impact of the transaction on national defence security (国防安全), the impact of the transaction on the stable operation of the national economy, the impact of the transaction on basic societal order and people's living conditions and the impact of the transaction on research and development capacity for key technologies related to national security (国家安全).¹²⁹ Impact on national defence security includes impact on domestic manufacturing capacity, domestic service-provision capacity and related equipment and facilities necessary for defence. The other categories are not qualified or explained. However, an examination of the scope of review and the content of review together, suggests that transactions in key industries which are not obviously related to defence will be assessed against the national economic security or basic societal order tests. Similarly, the reference to 'research and development capacity for key technologies related to national security' leaves the definition of 'national security' to be determined by the Ministerial Panel, although it may clearly have implications for dual purpose technologies.

The Security Review System Notice¹³⁰ provides for a security review, rather than a national security review, and the concept of 'national security' appears in art 3, on the scope of review, only in relation to key technologies. However, the role of the Ministerial Panel is to analyse the impact of a foreign acquisition on national security (art 3); the review determines whether it has or may have an impact on national security (art 4) and a transaction may be terminated or undone if it has had an impact on national security (art 4(6)). It seems fair to say, therefore, that the drafters regarded national security as encompassing all of the different matters set out in art 3. The security interest to be protected by the review is therefore very wide and like the Australian national interest test extends well beyond factors related only to defence and military facilities.

The issue of these provisions has given rise to extensive commentary. On one view, the provisions are promoted as providing additional transparency by providing a formal process for the conduct of review of foreign investments on national security grounds.¹³¹ On another, they add an additional layer of uncertainty to a process which is already complex, and may have an effect on foreign acquisitions.¹³² They can also be seen as formalising a process of protectionism by giving formal power to Chinese authorities and other forces within Chinese society to oppose or block transactions which would otherwise be

¹²⁸ Security Review System Notice, above n 40, art 4.

¹²⁹ Security Review System Notice, above n 40, art 2.

¹³⁰ Security Review System Notice, above n 40.

¹³¹ Wang Xing, 'Review of Foreign Takeovers Won't Hurt Investment: NDRC Says New Rules are Expected to Increase M & A transparency', *China Daily* (Beijing), 17 February 2011.

¹³² Toh Han Shin, 'Security Law Will Scare Investors, Lawyers Say', *South China Morning Post* (Hong Kong), 14 March 2011.

permissible under Chinese laws and policies.¹³³ The example most often cited here is the proposal in 2005 by the Carlyle Group, a US firm, to buy an 85 per cent interest in Xugong Group Construction Machinery, a large machinery manufacturer, a transaction reportedly resulting from an open auction process and supported by the Jiangsu provincial government. The transaction attracted strong criticism from one of Xugong's competitors and a storm of criticism for the sale of 'strategic assets,' and ultimately did not proceed despite changes to the proposal to reduce Carlyle's interest first to 50 per cent and then to 45 per cent.¹³⁴ According to the *China Daily*, the Ministry of Commerce rejected the transaction 'amid concern that foreign control of key Chinese firms could threaten the country's economic security'.¹³⁵

The Ministerial Panel and certain other elements of the Chinese national security system bear a resemblance to the constitution of the Committee on Foreign Investment in the United States ('CFIUS'), which is comprised of representatives of various government departments, including Treasury, Defence, Commerce, Homeland Security and others, although the President has the responsibility for the ultimate decision to reject an acquisition on national security grounds. Indeed, the question has been raised whether the Chinese security review system is essentially based on CFIUS and the establishment of the system by the Chinese government is intended to retaliate against actions of CFIUS in relation to a number of proposed Chinese investments in the US. Chinese foreign investment policy does not refer to reciprocity and the Chinese government has been consistent in its refusal to agree to concessions in its international investment agreements in relation to the establishment and admission of investments.¹³⁶ Chinese policy-makers have, however, observed that when it comes to security review of Chinese investments in the US, for example, China wants its companies to be treated fairly and to undergo a transparent and predictable review.¹³⁷

The frequent references to national security in Chinese legislation and policy indicate, however, that 'national security' is a Chinese concern independent of steps taken by other countries which might have an effect on Chinese investment. Despite some similarities in structure between CFIUS and the Chinese system, it should be noted that the criteria set out in the US legislation are much more limited, and clearly relate the concept of 'national security' to matters of

¹³³ Tan Yingzi, Zhong Nan and Meng Jing, 'M & A Plan Worries US Experts', *China Daily* (Beijing), 28 February 2011.

¹³⁴ Sandeep Tucker, 'Carlyle Learns Bitter Chinese Lesson', *Financial Times* (London), 23 July 2008.

¹³⁵ Associated Press, *Carlyle-Xugong, R.I.P.* (13 August 2008) China Business Services <<http://www.chinabusinessservices.com/blog/?p=680>>; 'China's Xugong Drops Equity Sale to Carlyle', *China Daily* (Beijing), 23 July 2008 <http://www.chinadaily.com.cn/bizchina/2008-07/23/content_6870896.htm>. It is not clear whether the proposal was in fact formally submitted and rejected or was merely delayed until it became infeasible.

¹³⁶ See Wenhua Shan and Norah Gallagher, *Chinese Investment Treaties: Policies and Practice*, (Oxford University Press, 2009) 99–103.

¹³⁷ 'US Overreacts to Chinese Company's Normal Acquisition, Experts Say,' *China Daily* (Beijing), 19 February 2011, <http://www.chinadaily.com.cn/china/2011-02/19/content_12045086.htm>.

defence and critical infrastructure.¹³⁸ US government departments with a role in CFIUS are clearly and publicly listed.

Overall, an important question in relation to the new Chinese provisions is the need for additional case by case review in a system which is already very detailed and in which the desirability of foreign investment in particular industry sectors has already been examined and regulated in considerable detail. If foreign investment is permitted or encouraged in a particular industry, without the imposition of any limits on foreign control of a business in that area, why is it necessary to review an acquisition of an existing business in such detail? The Anti-Monopoly Law deals with competition and the impact of concentrations on the Chinese market. Provisions relating to state-owned assets ensure that any acquisition of a state-owned business or state assets is thoroughly reviewed.¹³⁹ The M & A Provisions look at valuations, employee allocation plans and other proposals. It is therefore not clear what the national security review examines that is not already covered by these provisions. Interestingly, the Provisions now require investors to set out their relationships with a foreign government.¹⁴⁰ This suggests that an aspect of the review process is the nationality of the particular investor, although China's regulations relating to foreign investment do not on their face distinguish between investors of different nationalities. The review process may also be a backdoor way of imposing new restrictions in 'key' industries, such as major equipment manufacturing, as in the Xugong case and suggests reluctance to allow foreigners to obtain control of significant Chinese businesses. The move to central government review, and the addition of a formal role for ministries other than the Ministry of Commerce and the NDRC suggests that the central government plans to exercise more control over this aspect of the foreign investment process.

VI Australia-China Comparison

A review of legislation and practice shows that the Chinese view of national security is broader than defence and strategic issues and has many parallels with the Australian national interest approach.¹⁴¹ Australian control over foreign

¹³⁸ See US Department of the Treasury, *Committee for Foreign Investment in the United States* (12 March 2011) Resource Center <<http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx>>; *Defense Production Act*, 50 USC §721 (1950) (as amended by the *Foreign Investment and National Security Act* 15 CFR §700 (2007)); Lucas S Chang, Stephen Paul Mahinka, Sean P Duffy, *China's New National Security Review Process for Foreign Investments: US CFIUS Review Moves East*, (3 March 2011) Morgan Lewis <<http://www.morganlewis.com/index.cfm/publicationID/f29df3a9-48df-4909-a0b3-23ed7bdc3199/fuseaction/publication.detail>>; Anonymous, 'China's New Merger Review: Is it retaliation?' (2011) 11(7) *The M & A Journal* 1.

¹³⁹ See, for example, «中华人民共和国企业国有资产法» [Law of the People's Republic of China on State-Owned Assets of Enterprises] (People's Republic of China), Standing Committee of the National People's Congress, 25 October 2008, ch 5.

¹⁴⁰ Provisions, above n 40, art 4(3).

¹⁴¹ While it is convenient to focus on the Chinese security review legislation for a definition of the concept, China's policies in relation to overall management of the economy are also relevant to the Chinese government's view on what it is in its national interests and what is necessary to protect national security.

investment is administered at the federal government level, although planning and other related considerations are essentially local. China, as a unitary state, has an investment system where policy is determined centrally but administered locally except in the case of large or significant investments. The effect of the security review is to return to the central level the final determination on investments which may have an impact on national security.

Both encompass, but are not limited to, issues of defence and military installations and other matters.¹⁴² Similarly, it is clear that the national interest and national security (or national economic security) include considerations of a competitive marketplace.¹⁴³ The national economy is also fundamental to considerations of both the national interest and the Chinese idea of national security. The Australian Treasurer, in looking at the national interest, considers the impact of the investment by looking at such factors as economic activity, tax revenues and the general economy.¹⁴⁴ China, in addition to its policies of managing the economy by encouraging or discouraging particular forms of investment, looks at the impact of particular investments on the 'stable operation of the national economy'.¹⁴⁵ Similarly, both consider the effect of a particular acquisition on the community. The Australian Foreign Investment Policy considers the interests of employees, creditors and other stakeholders, while the Security Review System Notice refers to 'basic societal order and people's living conditions'.¹⁴⁶ In addition, both systems take the view that the issue of national interest or national security may arise in relation to foreign investment when a foreign investor takes control of a local business, although Australia takes a much more restrictive view of what constitutes control (15 per cent) than China (50 per cent).¹⁴⁷

There are, however, differences in approach. Australia places considerable emphasis on protecting its role as a 'reliable supplier to all customers in the future'.¹⁴⁸ China emphasises Chinese control of particular sectors while at the same time, in relation to its outbound investment, strongly encouraging acquisitions in areas such as natural resources.¹⁴⁹ These different national policies can clearly come into direct conflict. An example is the attempted takeover by CNMC of

¹⁴² Treasurer, above n 12, 6; Security Review System Notice, above n 40, art 1.

¹⁴³ Treasurer, above n 12; Anti-Monopoly Law, above n 100, art 31.

¹⁴⁴ Treasurer, above n 12, 6–7.

¹⁴⁵ Security Review System Notice, above n 40, art 2.

¹⁴⁶ Employment and related issues are a basic concern. M & A Provisions, above n 27, art 21, for example, requires the submission of an employee allocation plan before an acquisition can take place.

¹⁴⁷ Implemented through *FATA* s 17 and *FATR* reg 10; Security Review System Notice, above n 40 art 3. Security Review System Notice, above n 40 art 1, refers to a foreign investor or investors holding 50 per cent or more, but also refers to effective rights to more than 50 per cent of the voting rights or actual control over decision-making, financial affairs, human resources or technology being transferred to foreign investors.

¹⁴⁸ Treasurer, above n 12, 7.

¹⁴⁹ For an overview of Chinese outbound FDI and literature, see Nargiza Salidjanova, 'Going Out: An Overview of China's Outward Direct Foreign Investment' (USCC Staff Report, US-China Economic & Security Review Commission, 30 March 2011) <<http://www.uscc.gov/researchpapers/2011/GoingOut.pdf>>.

Lynas, where the Treasurer required that CNMC take a minority interest on the basis that a majority interest could raise national interest considerations.¹⁵⁰

There are, however, significant differences in the way in which the national interest or national security standard is applied to foreign investment. Although it does also look closely at investment in a limited number of sensitive sectors, the Australian system of review places considerable emphasis on the character of the investor and the nature of the transaction, particularly in relation to proposed investments by foreign governments and their related entities. The emphasis is on commercial operations, corporate governance, whether a foreign government could exercise actual or potential control and whether the investor is pursuing 'political or strategic objectives that may be contrary to Australia's national interest'.¹⁵¹ Chinese regulators, on the other hand, have traditionally focussed on the desirability of allowing investment in particular industries and sectors, rather than on the investors, although the process of reviewing and approving each investment clearly gives regulators the ability to examine the nature of the particular investment if they so wish. Similarly, the security review process is triggered by investment in particular industries, after which the particulars of the transaction will be examined more closely. As noted above, however, the criteria for review now include a requirement that a description of the foreign investors and affiliates be provided, as well as a description of their relationship with the relevant national government.¹⁵² The introduction of what is effectively a new list of industries for review by the Ministerial Panel, combined with a process of determining whether a particular transaction may give rise to national security concerns, potentially creates a new and additional layer of regulation on foreign acquisition of businesses which it is currently legal for foreigners to control.

How, then, are these policies implemented in practice?

In Australia, the presumption is generally that investment will be permitted — the Treasurer's view becomes relevant only if he considers investment to be contrary to the national interest. Case by case review of proposed investments is limited to a relatively small number of cases, determined on the basis of investment in sensitive industries, size of investment and the nature of the investor. The system therefore operates on the basis of a limited number of reviews and the ability of the Treasurer to be flexible in deciding on prohibiting or imposing conditions on particular investment transactions. Although the Treasurer has flexibility in applying the national interest test, his decision is ultimately transparent, and his reasons are disclosed, not only to the investor but to the public at large. In order to function, this system relies on a clear line of responsibility, ending with the person of the Treasurer, who answers to Parliament and ultimately to the electorate for his decisions. In practice, this has meant that few proposals are directly rejected, although negotiations may result in changes to the structure and conditions may be imposed to make investment acceptable or withdrawal of a proposal.

¹⁵⁰ See above, text relating to n 62.

¹⁵¹ Treasurer, above n 12, 7.

¹⁵² Provisions, above n 40, art 5(3).

In China, in contrast, all investments are subject to review and require a positive approval before they can be made. Foreign investment policy is a complicated construct of laws, regulations, policies and guidelines, in which government views on what is best for China and economy are incorporated. Scope for flexibility is therefore much more limited. The case by case security review requirement applies on top of and in addition to these requirements, regardless of the size of the transaction. The membership of the Ministerial Panel is unclear and offers to vested interests within the government the ability to slow down or potentially veto particular transactions, with final responsibility being vested in the State Council. In this structure, it is unclear how much space is left for flexibility once a transaction enters the review system. The process is not transparent and neither the Security Review System Notice nor the Provisions require the provision of reasons for a particular decision.

In practice, despite the restrictiveness of its investment structure, China has a history of welcoming and accepting large amounts of foreign investment and it appears that it has not, with the possible exception of the Xugong transaction, openly used considerations of national (economic) security to stop specific transactions prior to the enactment of the new security review scheme. However, it has been reported that the Ministry of Commerce has distributed internally a comprehensive list of more than 60 industries where security reviews must be carried out, including medical equipment and machinery and equipment.¹⁵³ Presumably the purpose of this is to reduce the discretion of the lower level authorities and to provide comprehensive guidance in relation to areas in which national security considerations could arise. The effect, however, would be to increase substantially the work of the Ministry of Commerce in determining whether a project should be sent to the Ministerial Panel for review and potentially to delay a large number of projects where the foreign party aims to take an interest or a controlling interest. Where a proposed acquisition is in an industry in which the Foreign Investment Industry Catalogue allows majority or 100 per cent foreign ownership, the national security review potentially constitutes the imposition of a major burden on foreign acquisitions. It appears that at the time of writing the Ministry of Commerce has not responded on any of the transactions for which a filing has been made under the security review system, which does not bode well for the prompt and non-interventionist application of the system.¹⁵⁴

Despite differences in process and government structures, the public plays a role in both China and Australia in relation to investments and investment policy. The Security Review System Notice allows government departments, industry

¹⁵³ Wang Ziwu, '商务部跨境并购安全审查涉 60 行业' [Ministry of Commerce cross-border acquisition security review extends to 60 industries], *New Century*, 29 August 2011, <<http://tech.163.com/11/0829/17/7CL24SS1000915BF.html>>. See also Wang Ziwu, 'Sensitive Inbound M & A Deals to Receive National Security Assessment' *Caixin* (Beijing), 30 August 2011 <<http://english.caixin.com/2011-08-30/100296547.html>>.

¹⁵⁴ See Wang, above n 153; Covington & Burling LLP, *China Issues Final Implementation Provisions for National Security Rules* (31 August 2011) <<http://www.cov.com/files/Publication/df2ca824-2e9a-419e-85f1-2c9a186cbff7/Presentation/PublicationAttachment/a07a96cd-bd23-4a56-8815-33cb9bd5e7bd/China%20Issues%20Final%20Implementation%20Provisions%20for%20National%20Security%20Review%20Rules.pdf>>.

bodies and competitors to propose that particular proposed investments be reviewed and scrutinised,¹⁵⁵ and the Provisions allow the Ministry of Commerce to request explanations from interested parties.¹⁵⁶ As the Xugong transaction showed, competitors and interested parties can and do campaign through the press and elsewhere in relation to foreign acquisitions.¹⁵⁷ In Australia, community concerns are referred to specifically in the Foreign Investment Policy, and the press, politicians and competitors all feel free to express views and attempt to influence the Treasurer's final decision. A recent example is the debate about the proposed merger (or takeover) of the ASX by SGX. The notification was submitted to FIRB on 11 March 2011, after significant changes were made to the original proposal to increase Australian representation in the governance of the final entity, but was nevertheless rejected on national interest grounds.¹⁵⁸

VII Conclusion

Policy in relation to FDI is subject to a number of stresses and pressures. Thus domestic policies, manifested through legislation and regulation, reflect not only the policy of the government of the day towards trade, economic policy and internationalism, but may also constitute a political response to pressures from the public, the press, industry associations, competing companies, opposition political parties, regional governments and other groups. Just as Australian governments are influenced by attacks made by opposition politicians and popular responses to publicity given in the press to different types of foreign investment, the Chinese government responds to pressures from different groups within the government, Chinese competitors, academic and internet commentators and popular resistance to foreign takeovers of well-regarded Chinese companies.

Both Australia and China have been criticised by the OECD for being restrictive in relation to the entry of foreign investment. Certainly this does not seem to have affected either country significantly as a destination for investment, despite views expressed in relation to Australia that Australia's policies on screening have resulted in the loss of significant amounts of investment.¹⁵⁹ Both countries claim to encourage investment and the statistics relating to investment certainly support these claims. The question is what standards should be adopted in order to regulate the flow of investment. As discussed in this article, Australia's national interest test calls for a case by case review of certain investments to determine whether they should be rejected. China's regulatory structure sets out detailed criteria for the sorts of investment which China wishes to encourage, permit, restrict or prohibit, based on the national government's view of China's interests, and subject, of course, to some negotiation under pressure from the

¹⁵⁵ M & A Notice, above n 40, art 4.

¹⁵⁶ M & A Provisions, above n 40, art 3.

¹⁵⁷ Andrew Batson, 'Chinese Blog Tries to Derail Sale of Firm to Carlyle, Businessman Wants to Keep Company From US Investors', *Wall St Journal* (New York), 6 July 2006.

¹⁵⁸ Andrew Main, 'Singapore Exchange Files Application to FIRB Seeking Approval for ASX Merger', *The Australian* (Sydney), 12 March 2011.

¹⁵⁹ Makin, above n 63, 12.

outside world, particularly prior to China's accession to the WTO. In addition to this, Chinese legislation frequently refers to considerations to be made by reference to China's national security, public interest or national economic security. The introduction of a formal security review procedure in 2011 may provide guidance on what is meant by the concept of national security but may also potentially impose substantial new burdens on foreign acquisitions.

A comparison of the concepts of the national interest and national security suggests that the basic considerations relating to foreign investment in Australia and China are very similar. They extend well beyond defence and strategic considerations to include long-term economic goals, general economic factors and social considerations. The views of the community, represented by the public, the press, competitors, and other industry players, as well as government departments (particularly in China) and politicians (particularly in Australia) play a role in the process. In both cases, however, the concept of the national interest or national security, national economic security and so on, is essentially undefined and allows the decision-maker considerable discretion to determine whether a transaction may be contrary to the national interest or have an impact on national security.

The differences between the two systems lie in the way in which these basic principles of national interest and national security have been applied within the foreign investment systems. The Australian system is fundamentally an open system despite the screening system — fewer investments go through individual case review, the decision-making process is more transparent, decisions are hotly debated in the press and the public arena and the Treasurer, who is an elected politician, must ultimately take responsibility for decisions to reject investment proposals. The flexibility inherent in the national interest test is certainly an advantage for government, which can use it to deal with new or unexpected issues, such as the growth in investment by foreign state-owned enterprises, but is also an opportunity for investors, who may have the opportunity to negotiate or reformulate their investments to meet the national interest test. Although this flexibility also potentially means that government may bow to strong public feeling on controversial investments, it is clear from FIRB statistics that this does not have a major impact on Australia's pro-investment policies — the Treasurer, no matter what his political affiliations, has intervened only rarely to refuse foreign investment proposals.

The Chinese system has favoured certainty as a principle, and government policies, incorporating considerations of what is best for the national interest, are contained in comprehensive legislation. Structures, industries, approval levels and other criteria for foreign investment are relatively clearly spelled out in the relevant regulations. In practice, China has been very open to foreign investment under this system. The disadvantage is that the application and approval process is cumbersome, expensive and in some cases opaque. The addition of the security review process, which has the potential to reverse the process whereby the ability to approve projects has been consistently delegated to lower levels of government, is a particularly unconstructive addition to the regulatory process, as it adds time, complexity, uncertainty and lack of transparency. In particular, the creation of the Ministerial Panel — a group drawn from various government departments —

potentially introduces to vested interests new avenues to push their own agendas while blurring lines of responsibility for investment decisions and creating a new non-transparent decision-making process. It is doubtful that a coherent or consistent definition of China's national security will result from the procedures set up by the Security Review System Notice.

Thus, in China, national security considerations are imbedded in a complex system of regulation and are now entrenched in an additional opaque level of regulatory review. In Australia, the national interest test is applied with a relatively light hand. Although the 'national interest' and 'national security' criteria in Australia and China have many conceptual similarities and respond to a number of similar issues, the application of these concepts has taken regulatory directions which are fundamentally different.