

Australia's Experience with Foreign Direct Investment by State Controlled Entities: A Move Towards Xenophobia or Greater Openness?

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Over the last few years, there has been considerable debate in Australia as to the appropriate regulation of foreign direct investment by entities affiliated with foreign governments. During that time, Australia has been a significant beneficiary of investment by sovereign wealth funds from many foreign jurisdictions, particularly by Chinese state owned enterprises. The Australian government, similar to governments of many developed Western countries, has struggled to properly calibrate its policy settings for regulating this type of investment activity. This Article considers the Australian regulatory regime and assesses Australia's experience in regulating those investment flows during this period.

I. INTRODUCTION

In the first decade of the twenty-first century, a growing global debate has focused on the appropriateness of restrictions on foreign direct investment (FDI) by entities controlled in some way by foreign governments. It is no surprise that this debate has coincided with the rise in economic power of the BRIC¹ nations, national insecurities arising from the spread of global terrorism, and the challenges of the global financial crisis in the period following the worldwide economic collapse of 2007.

Australia is at the epicenter of this debate. In the early stages of the global financial crisis, the role of sovereign wealth funds (SWFs) came under increasing scrutiny as SWFs invested heavily outside their home

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1. BRIC stands for Brazil, Russia, India, and China.

local jurisdictions, particularly in struggling financial institutions.² Further, as a once-in-a-generation resources boom developed in Australia, increased interest in Australian investment from Chinese state owned enterprises (SOEs) posed certain challenges, particularly when considered in the context of the developing Australia–China trade relationship.

The purpose of this Article is to assess the effectiveness of the Australian regulatory regime in addressing the policy challenges posed by SWF and SOE foreign direct investment in Australia.

II. THE STATE OF THE FDI DEBATE IN AUSTRALIA

Australia has a long history of economic growth facilitated by FDI: In the early part of the twentieth century and in the decades following the Second World War, foreign investment helped fund the expansion of the infrastructure required to support Australia's rapidly growing population. This period of economic growth extended through the 1970s when foreign investment assisted the development of some of Australia's now-key mineral resource projects.³

The significance of foreign investment to Australian growth arises from the historically low level of savings in the Australian economy. Access to foreign investment, particularly in capital-intensive areas such as the resources sector, has enabled Australia to achieve a higher rate of economic growth than would otherwise be the case.⁴ Competition for the limited capital within Australia to fund growth would increase the cost of capital by driving up interest rates and result in slowed rates of investment and growth. Impeding or blocking FDI can also be expected to de-

2. Those investments in late 2007 and early 2008 included a US\$10 billion investment by Singapore General Investment Corporation in UBS; a US\$3 billion investment by Temasek in Barclays; a US\$5 billion investment by China Investment Corporation in Morgan Stanley; a US\$7.5 billion investment by Abu Dhabi Investment Authority; a US\$7 billion investment by Singapore General Investment Corporation in Citigroup; a US\$4.4 billion investment by Temasek; a US\$2 billion investment by Korean Investment Fund; and a US\$2 billion investment by Kuwait Investment Fund in Merrill Lynch. As the global financial crisis developed, the role of SWFs as investors was replaced by direct investment by governments to stabilize the international financial system, leading to partial or full nationalization of a number of financial institutions.

3. For an overview of the historical contribution of FDI in Australia, see Brian Fisher et al., *The Contribution of Foreign Direct Investment and the Mining Industry to Welfare of Australians* (Comm. for the Econ. Dev. of Austl., Information Paper No. 92, 2008), available at https://www.ced.a.com.au/research-and-policy/research/2009/11/infopapers/ip_92.

4. It has been suggested that during the period between the 1960s and the 1980s, when trade and investment were negatively affected by a restrictive foreign policy and other protectionist policies, capital productivity declined by 30%. See Ted Evans, Sec'y to the Treasury, Speech at the Ninth Annual Colin Clark Memorial, Economic Nationalism and Performance: Australia from 1960s to the 1990s 7–10 (June 3, 2009) (Austl.), available at http://espace.library.uq.edu.au/eserv.php?pid=UQ:10449&dsID=econ_dp_258_99.pdf.

press the expected returns from investing in host-country assets. A host-government veto of a proposed FDI signals to potential foreign investors that they will have to deal with only residents of that country in a future sale, thus reducing the potential pool of future purchasers.⁵

Foreign investment has also had spillover benefits for Australian businesses, including technology transfer and improved management expertise.⁶ These forms of intangible capital are difficult to quantify but are believed to have positive implications for domestic economic welfare and yield productivity gains. Foreign investment also contributes to the strength of Australia's trade relationships⁷ and can help to reduce security risks through the development of strong political and economic relationships between investing nations.⁸

The general benefits of FDI are recognized and advanced globally through principles adopted by the Organization for Economic Cooperation and Development (OECD).⁹ The OECD advances the general principle that foreign investment should be treated in the same way as domestic investment. This principle is recognized by the OECD Code of Liberalization of Capital Movements, first enacted in 1961,¹⁰ and the

5. See Dave Heatley & Bronwyn Howell, *Overseas Investment: Is New Zealand 'Open for Business'?*, NEW ZEALAND INST. STUDY COMPETITION & REGULATION, 11 (June 21, 2010), <http://www.iscr.org.nz/n578.html>.

6. Stephen Kirchner, *Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds and the Rise of State Capitalism*, CENTRE INDEP. STUD., 2 (Nov. 1, 2008), <http://www.cis.org.au/images/stories/policy-monographs/pm-88.pdf> (Austl.).

7. Rio Tinto, as a recipient of significant foreign direct investment into assets it owns, has commented that Japan's investment in its Robe River operations helped to underpin rapid growth in its Robe River production and its sales to Japan. See Rio Tinto, *Foreign Investment: A Foundation for Australia's Prosperity*, PARLIAMENT AUSTRALIA, 20 (Apr. 28, 2009), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/firb_09/su

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ons/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/firb_09/submissions/sub47_pdf.ashx (submission to the Australian Senate Standing Committee on Economics, Inquiry into Foreign Investment by State-Owned Entities).

8. KATHRYN GORDON & APRIL TASH, OECD, FOREIGN GOVERNMENT-CONTROLLED INVESTORS AND RECIPIENT COUNTRY INVESTMENT POLICIES: A SCOPING PAPER 7 (2009) (Fr.), available at <http://www.oecd.org/daf/inv/investment-policy/42022469.pdf>.

9. Australia is one of the thirty-four member countries of the OECD. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Nov. 17, 2013).

10. OECD, CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (2013), available at http://www.oecd.org/daf/inv/investment-policy/CapitalMovements_WebEnglish.pdf. In accordance with Article 1 of the Code, member states shall progressively abolish between one another restrictions on movements of capital to the extent necessary for effective economic cooperation, including, without limitation, treating all nonresident-owned assets in the same way irrespective of the date of formation. Members shall endeavor to extend those principles to all members of the International Monetary Fund.

OECD Declaration on International Investment and Multinational Enterprises, first enacted in 1976.¹¹

In advancing this principle, the OECD also recognizes the international legal precept that governments are entitled to protect their national security. National security may be threatened by foreign non-commercial investment in sensitive areas. As such, it is accepted that foreign investment regulation may be appropriate where national security might be at risk. The relevant OECD Council¹² has recommended that where a recipient country imposes restrictions on foreign investment for national security reasons, such measures should be formulated narrowly so that the regulatory regime is predictable, transparent, proportionate, and accountable.¹³

It is an unfortunate political reality in Australia that many members of the general population have a negative attitude toward FDI and do not appear to appreciate the economic benefits derived from access to such investment. A Lowy Institute Poll of Australians' opinions on foreign direct investment reported that 90% of those surveyed believed that the Australian government has a responsibility to keep Australian companies under majority Australian control.¹⁴ Further, 85% of those surveyed said that investments by companies controlled by foreign governments should be more strictly regulated than investments by foreign private investors.¹⁵

The key criticisms leveled against Australia's foreign investment regime are a lack of transparency and accountability. The foreign investment review process in Australia is inherently political in its ultimate decision making. The Treasurer is not required to publish reasons for decisions, and there is no system of appeal after a decision is made.

11. OECD, DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (2011) (Fr.), available at <http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf>. The Declaration provides guidelines of good practice regarding government conduct in relation to multinational enterprises. "National Treatment," Item II of the Declaration, requires that adhering governments should, among other things, "consistent with the need . . . to protect their . . . interests," accord to enterprises operating in their territories and owned by foreign nationals treatment under their laws that are no less favorable than treatment "accorded in like situations to domestic enterprises." *Id.* at 5.

12. In this context, the relevant council is the OECD Council on Recipient Country Investment Policies Relating to National Security.

13. OECD, GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY (2009) (Fr.), available at <http://www.oecd.org/daf/inv/investment-policy/43384486.pdf>.

14. FERGUS HANSON, THE LOWY INSTITUTE POLL 2008: AUSTRALIA AND THE WORLD: PUBLIC OPINION AND FOREIGN POLICY 6-7 (2008), available at http://lowyinstitute.org/files/pubfiles/Lowy_Poll08_Web1.pdf.

15. *Id.*

III. GOVERNMENT-CONTROLLED ENTITIES: SWFs AND SOES.

A. *What Is An SWF, and What Special Concerns Arise?*

An SWF is defined as a special purpose investment fund or other arrangement that is owned by a general government.¹⁶ SWFs are not new as an asset class. The oldest SWF, the Kuwait Investment Authority, was established in 1953. In recent years, the number of SWFs has proliferated. There are now SWFs in many parts of the world, including Australia.¹⁷ SWFs are currently estimated to hold assets of approximately US\$5.2 trillion,¹⁸ and this is expected to grow significantly in the coming years.

SWFs cover a broad range of investment vehicles, investment objectives, and governance structures. Some of the different types of SWFs include the following:

- Revenue stabilization funds,¹⁹
- Future generation savings funds,²⁰
- Holding funds,²¹ and
- General SWFs.²²

16. INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES "SANTIAGO PRINCIPLES" 3, 27 (2008) [hereinafter SANTIAGO PRINCIPLES], available at <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

17. The Future Fund and Queensland Investment Corporation are Australian examples of SWFs.

18. THECITYUK, SOVEREIGN WEALTH FUNDS 2013, at 1 (2013), available at <http://www.thecityuk.com/research/our-work/reports-list/sovereign-wealth-funds-2013/>. This report states that there is an additional US\$7.7 trillion held in other sovereign investment vehicles, such as pension reserve funds and development funds. *Id.*

19. Revenue stabilization funds are designed to cushion the impact of commodity price volatility on fiscal revenues. Examples include the Russian Reserve Fund, Kuwait Reserve Fund, and Mexico Oil Stabilization Fund.

20. Future generation savings funds are investments of national wealth intended to be held over long timeframes. Funding sources are typically commodity or fiscal based. They are generally earmarked for particular purposes, e.g., future pension liabilities. Examples include Australia's Future Fund, the Norway Government Pension Fund, and the Kuwait National Prosperity Fund.

21. Holding funds constitute management of government direct investments in companies and generally support government development strategies. Examples include Temasek, the China Investment Corporation, and the Saudi Arabia Public Investment Fund.

22. General SWFs cover one or more of the above-listed examples and typically manage government excess wealth. Examples include the Abu Dhabi Investment Authority and the Singapore Government Investment Corporation.

FDI by SWFs gives rise to various policy concerns for recipient countries, particularly with respect to an SWF's potential impact on financial stability, political motivations, and national security.

The debate regarding financial stability centers around the fact that the governance arrangements surrounding SWFs and their operations may be unregulated and lack transparency. Due to the size and financial capacity of some SWFs, there are concerns that a lack of transparency may mean that investment decisions made by SWFs could have destabilizing effects on financial systems.²³ On the other hand, some commentators suggest that SWFs actually have a stabilizing effect on the financial system by virtue of their long-term investment horizon, generally unleveraged positions, and capacity to enhance the depth and breadth of markets they serve. There is little, if any, evidence of investments being made by SWFs for political rather than commercial purposes.²⁴

Due to the potential influence the state may have over the operations and investment decisions of SWFs, there is a concern that SWFs may exercise its control over recipient companies for political rather than commercial purposes. There is also a concern that the closeness between an SWF and the government of the SWF's country may give that entity privileges and advantages that are not available to other enterprises. Finally, there is concern that foreign governments may obtain access to information or technology through the investments of SWFs, which jeopardizes the recipient country's national security.²⁵

In view of some of these concerns, an International Working Group (IWG) of SWFs was established by the International Monetary Fund (IMF) in 2008.²⁶ The working group drafted a set of generally accepted principles reflecting agreed upon investment practices and objectives.²⁷

23. See *Sovereign Wealth Funds—A Work Agenda*, INT'L MONETARY FUND, 4, 13 (Feb. 29, 2008), <http://www.imf.org/external/np/pp/eng/2008/022908.pdf>.

24. There is no example of an SWF exercising decision making in a way that has compromised national security in any country in five decades. DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, COUNCIL ON FOREIGN RELATIONS SPECIAL REPORT NO. 34, *GLOBAL FDI POLICY: CORRECTING A PROTECTIONIST DRIFT* 27 (2008), available at <http://www.cfr.org/international-finance/global-fdi-policy/p16503>.

25. *Id.*

26. The development of the Santiago Principles was undertaken by the International Working Group of Sovereign Wealth Funds, which comprised twenty-six member states of the IMF (including Australia) with SWFs. SANTIAGO PRINCIPLES, *supra* note 16, at 1.

27. The drafting committee was led by Mr. David Murray, then-Chairman of Australia's Future Fund. *Id.*

In October 2008,²⁸ the Santiago Principles were voluntarily adopted as a set of SWF best practice objectives.

The Santiago Principles have attempted to address these concerns in various ways. While there are thirty-four principles and sub-principles comprising the Santiago Principles, some of the key principles are as follows:

- SWFs should have clearly defined policy purposes²⁹ and clear and publicly disclosed policies, rules, procedures, or arrangements to their general approach to funding and spending operations.³⁰
- SWFs should have sound governance arrangements and clear and effective division of roles and responsibilities³¹ with independent operational management.³²
- The activities of SWFs should be conducted in compliance with applicable regulatory and disclosure requirements in the countries in which they operate.³³
- The investment decisions of SWFs should be aimed to maximize risk-adjusted financial returns³⁴ without seeking or taking advantage of privileged information or inappropriate influence by the broader government.³⁵
- The exercise of ownership rights by SWFs in investments should be consistent with investment policies.³⁶

B. Distinguishing SWFs and SOEs

SWFs and SOEs differ in function as well as purpose. An SOE can be defined as a commercial enterprise of which the state has significant control through full, majority, or significant minority ownership.³⁷

28. Press Release, Int'l Working Grp. of Sovereign Wealth Funds, International Working Group of Sovereign Wealth Funds Presents the "Santiago Principles" to the International Monetary and Financial Committee (Oct. 11, 2008), *available at* <http://www.iwg-swf.org/pr/swfpr0806.htm>.

29. SANTIAGO PRINCIPLES, *supra* note 16, at 7 (GAPP 2).

30. *Id.* (GAPP 4).

31. *Id.* (GAPP 6).

32. *Id.* at 7–8 (GAPP 9).

33. *Id.* at 8 (GAPP 15).

34. *Id.* (GAPP 19).

35. *Id.* (GAPP 20).

36. *Id.* at 9 (GAPP 21).

37. OECD, GUIDELINES ON THE CORPORATE GOVERNANCE OF STATE OWNED ENTERPRISES 11 (2005) (Fr.), *available at* <http://www.oecd.org/daf/corporateaffairs/soe/guidelines>. The preamble further notes that SOEs are often prevalent in utilities and infrastructure industries whose performance is of great importance to broad segments of the population. The rationale for state ownership

While the following is a gross simplification, SWFs tend to make portfolio or indirect investments through investment funds, whereas SOEs typically make more commercially strategic investments to gain synergies, economies of scale, or otherwise supplement or support their commercial operations. Many developing countries, particularly BRIC nations, have pursued growth through the establishment of SOEs to participate in key industries.³⁸

C. The Particular Case of Chinese SOEs

Economic reform in China over the last two decades has been driven by government reliance on the establishment and development of SOEs.³⁹ Chinese SOEs are typically classified as enterprises “owned by the Chinese government, and thus, by the whole people”⁴⁰ of China. Ownership rights are exercised by the State Council,⁴¹ the highest executive organ of the Chinese government. Most of the Council’s powers have been delegated by legislation to the State Assets Supervision and Administration Commission (SASAC).

Chinese SOEs are established under Chinese law as separate legal enterprises from the Chinese government with separate legal identities. SOEs have their own individual operating assets, financial resources, management teams, and workforces. Each SOE has autonomy from the Chinese government in operational policies.

Chinese law precludes SASAC from interfering in the daily operations and business activities of SOEs; however, these limitations are subject to SASAC’s broad discretion to exercise its “contributor’s functions.” This means that SASAC, on behalf of the Chinese government, enjoys the right to “return on assets, participation in major decisions, [and] selection of managers.” In particular, each shareholder representa-

varies among countries and has typically composed of a mix of social, economic, and strategic interests. *Id.* at 9.

38. THECITYUK, *supra* note 18, at 7.

39. In 2007, it was estimated that there were approximately 115,000 SOEs in China. Press Release, State-Owned Assets Supervision & Admin. Comm’n [SASAC], General Information on Reform and Development of SOEs over the Past Five Years Since the Establishment of SASAC (Aug. 10, 2008) (China), available at <http://www.sasac.gov.cn/n2963340/n2964712/5349959.html>.

40. Qi ye guo you zi chan fa (中华人民共和国企业国有资产管理法) [Law on the State-Owned Assets of Enterprises] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2008, effective May 1, 2009) art. 3 (China), available at <http://www.sasac.gov.cn/n1180/n1566/n1183/n11244/5751091.html>.

41. Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises (promulgated by the State Council, effective May 27, 2003) art. 4 (China), available at <http://www.sasac.gov.cn/n2963340/n13933222/13934025.html>.

tive appointed by SASAC to an SOE is required by law to present opinions and exercise voting rights according to the instructions of SASAC.⁴²

There is little evidence that Chinese SOEs operating offshore have engaged in non-commercial behavior.⁴³ In 2009 at the Senate Economics Committee's inquiry into foreign investment by SWFs and SOEs, the Executive Member of the Foreign Investment Review Board (FIRB) stated that commercial behavior was a feature of Chinese SOE conduct in Australia.⁴⁴

When any Chinese domestic enterprise—in such capacity as an SOE, a privately owned enterprise (POE), or a foreign-owned investment enterprise (FIE)—proposes to make a particular investment outside of China, it must obtain approvals from Chinese governmental bodies prior to making that investment. Approval is sought after the investment decision has been made by the relevant enterprise, and it must be obtained from the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM). The NDRC and MOFCOM each apply the same standards to and impose the same requirements on all Chinese commercial entities seeking offshore investment approval (regardless of whether they are an SOE, a POE, or a FIE).

Before the investment approval process begins, the NDRC conducts a preliminary review to confirm that there is no “material adverse factor.”⁴⁵ The NDRC and MOFCOM each consider applications for offshore investment approval in accordance with the provisions of the Countries and Industries for Overseas Investment Guidance Catalogue and the relevant regulations on the examination and approval of overseas investment projects.⁴⁶ Once approvals are received from NDRC and

42. The Law on the State-Owned Assets of Enterprises, *supra* note 40, at art. 13.

43. John Larum & Jingmin Qian, *A Long March: The Australia–Chinese Investment Relationship*, AUSTRALIA CHINA BUS. COUNCIL, 12 (Oct. 5, 2012), http://acbc.com.au/deploycontrol/files/upload/news_nat_fdi_report_oct.pdf.

44. Senate Economic References Committee, Parliament of Australia, *Inquiry into Foreign Investment by State-Owned Entities, Hearing Transcript* (June 22, 2009) E4 (Patrick Colmer, General Manager of the Foreign Investment and Trade Policy Division) (Austl.), available at [http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/12158/toc_pdf/69252.pdf;fileType=application%2Fpdf#search=%22\(%20committees\)%20economics%20references%20committee%20senator%20joyce%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/12158/toc_pdf/69252.pdf;fileType=application%2Fpdf#search=%22(%20committees)%20economics%20references%20committee%20senator%20joyce%22) (“While there is a much greater formal link between a Chinese company and the Chinese government, what we see, by and large, is a fair degree of overt commercial behavior on the part of the Chinese companies seeking to invest in Australia.”).

45. Notice of the National Development and Reform Commission on Issues Concerning the Improvement of the Administration of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, effective June 8, 2009) (China), available at http://www.sdpc.gov.cn/zcfb/zcfbtz/2009tz/t20090619_286696.htm.

46. See Countries and Industries for Overseas Investment Guidance Catalog (promulgated by the Ministry of Commerce & the Ministry of Foreign Affairs, effective July 8, 2004) CHINA L. &

MOFCOM, applications must be made to the State Administration of Foreign Exchange (SAFE) for the purpose of foreign exchange registration relating to such offshore investment. Approval for offshore investment by an SOE must also be obtained from SASAC.

The NDRC is primarily concerned with reviewing the size and nature of the proposed offshore investment and the capacity of the SOE to make that investment, focusing specifically on national economic security and compliance with industry policies of the Chinese government.⁴⁷ MOFCOM considers a variety of factors when reviewing an application to invest offshore.⁴⁸ In 2012, SASAC announced new guidelines requiring greater due diligence and risk management procedures for overseas investments.⁴⁹

While Chinese investment in Australia for the 2011–2012 fiscal year fell short of investment Australia received from the United States and the United Kingdom, FDI from China has increased significantly in recent years, as evidenced by its rise in rank from eleventh on FIRB's 2006–2007 Annual Report (on the sources of proposed foreign invest-

PRAC.; Measures for Overseas Investment Management (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China), available at http://www.procedurallaw.cn/english/law/200904/t20090402_202192.html; Interim Measures on Administration of Examination and Approval of Overseas Investment Projects (promulgated by the Nat'l Dev. & Reform Comm'n, effective Oct. 9, 2004) (China), available at <http://www.asianlii.org/cn/legis/cen/laws/timftaoeaa0toip1038/>.

47. In general, NDRC will consider the following factors when reviewing a foreign investment proposal: compliance with the laws and regulations of the state; compliance with the applicable industry policies; consideration for sustainable development of the economy and society; consideration for the development of strategic resources required for developing the national economy; possible benefits for technology improvement and development; and the financing plan and financial capability of the Chinese investor. Interim Measures on Administration of Examination and Approval of Overseas Investment Projects, *supra* note 46, at art. 18.

48. Measures for Overseas Investment Management, *supra* note 46, at art. 9. ("Where the overseas investment of an enterprise is within any of the following circumstances, the Ministry of Commerce or the provincial commerce department shall disapprove it: (1) endangering the state sovereignty, national security, and public interests of China, or violating a law or regulation of China; (2) damaging the relationship between China and a relevant country or region; (3) likely violating any international treaty concluded by China with a foreign party; or (4) involving any technology or goods prohibited by China from import."); see also Interim Measure on Administration of Examination and Approval of Overseas Investment Projects, *supra* note 46, at art. 18.

49. Wei Chen & Jiahao Xie, *Chinese Update—New SASAC Rules Enacted to Consummate Outbound Investment Supervisory System for Central SOEs*, XBMA FORUM (July 4, 2012), <http://xbma.org/forum/chinese-update-new-sasac-rules-enacted-to-consummate-outbound-investment-supervisory-system-for-central-soes/>. Chinese companies face formidable obstacles in developing the expertise and experience necessary for global business success. David Shambaugh, *Are China's Multinational Corporations Really Multinational?*, E. ASIA FORUM Q., Apr.–June 2012, at 7.

ment in Australia) to third for 2011–2012.⁵⁰ China is now Australia's most important trading partner⁵¹ and is still significantly underrepresented in terms of foreign investment in Australia when compared with its dominant trade relationship.

Public perception of Chinese investment in Australia is one of general disapproval. In 2013, the Lowy Institute Poll reported that 57% of those surveyed said that the Australian government is allowing too much investment from China.⁵² This principally negative community attitude is further illustrated by the general tenor of the submissions received by the Australian Senate Economics Inquiry into Foreign Investment by State Owned Entities in 2009.⁵³ From the Chinese perspective, Chinese investors perceive a lack of trust and have concerns about discrimination as compared with FDI sourced from other countries.⁵⁴

IV. OVERVIEW OF AUSTRALIA'S FOREIGN INVESTMENT REGULATORY REGIME

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (the Act)⁵⁵ and by the Australian gov-

50. *Annual Report 2005–06*, FOREIGN INVESTMENT REV. BOARD, 30 (Dec. 11, 2006), http://www.firb.gov.au/content/publications/annualreports/2005-2006/_downloads/2005-06_FIRB_AR.pdf (Austl.); *Annual Report 2011–12*, FOREIGN INVESTMENT REV. BOARD, 39 (Dec. 20, 2012), http://www.firb.gov.au/content/Publications/AnnualReports/2011-2012/_downloads/FIRB-Annual-Report-2011-12_v4.pdf (Austl.).

51. NEIL BATTY & FRANK BINGHAM, DEP'T OF FOREIGN AFFAIRS & TRADE, AUSTRALIA'S EXPORTS TO CHINA 2001–2011, at 3 (2012) (Austl.), available at <http://www.dfat.gov.au/publication/s/stats-pubs/australias-exports-to-china-2001-2011.pdf>.

52. ALEX OLIVER, THE LOWY INSTITUTE POLL 2013: AUSTRALIA AND THE WORLD: PUBLIC OPINION AND FOREIGN POLICY 6 (2013) (Austl.), available at http://www.lowyinstitute.org/files/lowypoll2013_web_corrected_p5.pdf.

53. On March 18, 2009, the Senate made a referral to the Senate Standing Committee on Economics to inquire and report on the international experience of SWFs and SOEs on its role in acquisitions of significant shareholdings in corporations; the impact and outcomes of such acquisitions on business growth and competition; and the Australian experience in the context of Australia's foreign investment arrangements. The Committee reported its findings on September 17, 2009. No material changes to the Australian regime were recommended in the final report. Senate Economic References Committee, Parliament of Australia, *Foreign Investment by State-Owned Entities* (2009) 61–62 (Austl.), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/firb_09/report/~media/wopapub/senate/committee/economic_s_cte/completed_inquiries/2008_10/firb_09/report/report_pdf.ashx.

54. Larum & Qian, *supra* note 43, at 10–11.

55. *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Austl.). Prior to the adoption of the Act, foreign investment had largely been regulated through foreign exchange control mechanisms. *Foreign Investment Policy in Australia—A Brief History and Recent Developments*, TREASURY, 64 (Apr. 16, 2012), <http://archive.treasury.gov.au/documents/195/PDF/round5.pdf> (Austl.) [hereinafter *A Brief History and Recent Developments*]. Interim arrangements had been in place since 1972. *Companies (Foreign Takeovers) Act 1972* (Cth) (Austl.).

ernment's Foreign Investment Policy (the Policy).⁵⁶ The Federal Treasurer is ultimately responsible for all decisions relating to foreign investment and for administration of the Policy. The Treasurer is advised and assisted by the FIRB, which administers the Act in accordance with the Policy. FIRB is an administrative body with no statutory existence, and while the Act makes no reference to it whatsoever, the Policy confirms FIRB's role.⁵⁷ All decisions by the Treasurer relating to a foreign investment proposal are supported by analysis and recommendations made by FIRB.

The purpose of this foreign investment approval regime is to empower the Treasurer to give orders with respect to proposals that are under consideration that may be "contrary to the national interest" of Australia.⁵⁸ There is no definition in either the Act or the Policy for the term contrary to the national interest, and each proposal is assessed on a case-by-case basis.⁵⁹ Under the current Policy, the government determines what is contrary to the national interest by having regard for the widely held community concerns of Australians.⁶⁰ The Australian government does not publish reasons for decisions it makes under the Act or Policy.

When the Act was first introduced into Parliament in 1975, the Treasurer suggested that the "national interest" criterion should be assessed by reference to a determination of (i) whether the proposed investment would have net economic benefits to Australia to justify the change in foreign control; (ii) whether the foreign investor was expected to follow practices consistent with Australian expectations; and (iii) whether the proposal would be consistent with the government's policy objectives. In assessing these matters, the Treasurer suggested that the government would look at factors such as Australian participation in ownership, control, and management, as well as the interests of employees, shareholders, and creditors.⁶¹ In the mid-1980s, the government

56. Treasury, Austl. Gov't, *Australia's Foreign Investment Policy*, FOREIGN INVESTMENT REV. BOARD (Mar. 4, 2013), www.firb.gov.au/content/_downloads/AFIP_2013.pdf [hereinafter *Australia's Foreign Investment Policy*].

57. *Id.* at 1.

58. *Id.*

59. In the Second Reading Speech for the Foreign Takeovers Bill 1975 in the House of Representatives, the Treasurer stated that the criteria for judging applications had not been incorporated into the proposed legislation "because the criteria must be flexible in their interpretation and application[,] and it has been found that it would be impracticable, consistent with the need for such flexibility, to express the criteria with the precision required by legislative form." Commonwealth, *Parliamentary Debates*, House of Representatives, May 22, 1975, 2678 (Frank Stewart) (Austl.).

60. *Australia's Foreign Investment Policy*, *supra* note 56, at 1.

61. Commonwealth, *Parliamentary Debates*, *supra* note 59, at 2678–79.

adopted a more liberal interpretation of the national interest criterion.⁶² The “net economic benefit” test was abandoned on the basis that foreign direct investment was acknowledged to have clear economic benefits for Australia.

Now, in considering whether the national interest test is sufficiently met for approval, the Treasurer may impose conditions that he considers necessary to protect the national interest of the Australian government.⁶³ The Treasurer is under no obligation to justify or explain his reasons for imposing such conditions. In the event that a foreign investor does not comply with a condition, such noncompliance would constitute an offense and would thus reactivate the Treasurer’s powers under the Act.⁶⁴

The Treasurer rarely rejects an investment application by a foreign investor. Approximately 10,000 investment applications are received by FIRB each year,⁶⁵ and typically, less than 100 of these are rejected.⁶⁶ Only two explicit rejections of a significant corporate transaction have occurred in the last decade: the rejection of Shell’s proposal to acquire 100% of Woodside Petroleum Limited in 2001⁶⁷ and Singapore Exchange’s proposal to acquire 100% of Australian Securities Exchange in 2011.⁶⁸ In neither case did the involvement of an SWF or a SOE in the proposed acquisition precipitate the rejection decision. Nevertheless, applicants have no right of administrative or judicial review of foreign investment decisions made under the Act or Policy. The Administrative Decisions (Judicial Review) Act 1977 specifically exempts decisions made under the Act from administrative review.⁶⁹

62. *A Brief History and Recent Developments*, *supra* note 55, at 64.

63. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 25(1A) (Austl.).

64. *Id.* at ss 25(1C), (1D).

65. *Annual Report 2011–12*, *supra* note 50, at 19 (11,420 applications that year).

66. *Id.*

67. *Foreign Investment Proposal—Shell Australia Investments Limited’s Acquisition of Woodside Petroleum Limited*, PETER COSTELLO (Apr. 23, 2001), <http://www.petercostello.com.au/press/2001/2429-foreign-investment-proposal-shell-australia-investments-limited-a-s-shell>. The rejection was based on a view that Shell might not develop the North West Shelf projects of Woodside in Australia as part of Shell’s broader portfolio of assets outside Australia as quickly as it would on a stand-alone basis. *Id.*

68. Wayne Swan, ‘Foreign Investment Decision’ (Media Release, No. 030, Apr. 8, 2011) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/030.htm&pageID=&min=wms&Year=2011&DocType=0>. Swan’s rejection was based on a view that it is in the national interest for Australia to maintain the strength and stability of its financial system and to build Australia’s standing as a global financial services center in Asia to take advantage of its superannuation system and that he had concerns the proposal would be contrary to these objectives. *Id.*

69. *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (h) (Austl.).

In recent years, there have been several parliamentary reviews of the foreign investment regime, particularly concerning SWF and SOE investment⁷⁰—and the associated approval regimes—applicable to rural land.⁷¹ Those parliamentary reviews have not yet resulted in any change to the basic structure of the Australian approval regime.⁷² The approval regime is extremely convoluted in its regulatory structure, which comprises three key areas of regulation: transactions that require prior notification and mandatory approval under the Act; transactions that enliven the Treasurer's powers of divestiture under the Act; and transactions that require prior approval under the Policy.

A. Compulsory Approval Under the Act

Under the Act, foreign persons must seek prior approval to acquire (alone or together with their associates) control of 15% or more of voting rights (or potential voting rights), or to acquire interests in 15% or more of the issued shares (or rights to be issued shares) in an Australian corporation with gross assets of AU\$248 million or more.⁷³ It is an offense to enter into such an acquisition without giving prior notification and obtaining a statement of approval by the government.

70. Senate Economic References Committee, *supra* note 53. No significant changes were proposed by this review. *Id.* at 61–62.

71. Senate Economic Legislation Committee, Parliament of Australia, *Foreign Acquisitions Amendment (Agricultural Land) Bill 2010* (2011), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=economics_ctte/completed_inquiries/2010-13/foreign_acquisition_farmland_2011/index.htm; Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, *Foreign Investment and The National Interest* (2013), available at http://www.aph.gov.au/~media/wopapub/senate/committee/rrat_ctte/completed_inquiries/2010-13/firb_2011/report/report.ashx.

72. The June 2013 Rural and Regional Affairs and Transport References Committee majority report proposes a much lower review threshold for agricultural land-cumulative purchases of AU\$15 million or more for agricultural land and 15% or more of agribusinesses valued at AU\$248 million or more (indexed), or an investment of AU\$54 million or more in an agribusiness, as well as a requirement to consider the interests of local communities in screening those proposals. Senate Rural and Regional Affairs and Transport References Committee, *supra* note 71, at 75.

73. The Act sets out the requirement to give prior notification. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26 (Austl.). However, there is an exemption where the corporation has gross assets of less than AU\$248 million (calendar year 2013). *Id.* s 13A(4)(b)(ii); *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) reg 5(2) (Austl.). For investors in the United States and New Zealand, an AU\$1,098 million threshold applies (calendar year 2013), except for certain prescribed sectors or where an entity is controlled by a United States or New Zealand governmental entity. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 17E (Austl.); *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) reg 9 (Austl.). Separately, the Act provides for a notification regime that is compulsory with respect to acquisitions of interests in Australian urban land for which there is generally no monetary threshold. *Foreign Acquisitions and Takeovers Act 1975* (Cth) § 26A (Austl.). However, this Article is focused on the regulation of investment in corporations.

For purposes of the Act, a foreign person is (I) any non-resident of Australia; (ii) a corporation in which a nonresident holds voting rights or issued shares of 15% or more; (iii) a corporation in which non-residents in the aggregate hold voting rights or issued shares of 40% or more; or (iv) trustees of trusts with foreign ownership beyond these thresholds.⁷⁴ The interests of foreign persons and their associates are aggregated in a given analysis. The meaning of “associate” is notoriously difficult to apply.⁷⁵ For purposes of these provisions, the prohibition applies only to an investment in an Australian corporation, i.e., a corporation incorporated in Australia.⁷⁶

For purposes of calculating a 15% interest in an Australian corporation, the potential right to acquire voting power or the right to be issued shares is included.⁷⁷ These provisions are expressed to capture all arrangements that involve a future right to acquire voting shares or issued shares, regardless of the way in which they are structured, including debt instruments having quasi-equity characteristics and convertible promissory notes.⁷⁸ Structures that do not give rise to potential voting power or rights to issued shares (e.g., cash-settled derivative structures) do not appear to fall within the compulsory notification regime but may nevertheless activate the Treasurer’s powers if the acquisition gives the person the ability to determine the corporate policy in relation to any matter.⁷⁹ This is considered further below.

74. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26(1) (Austl.). For other definitions in the Act, see *id.* at s 5. Where ownership is dispersed, obvious practical difficulties arise in seeking to identify “foreign persons” if the 40% in the aggregate trigger is enlivened.

75. *Id.* at s 6. Unlike other provisions of Australian law seeking to track share ownership thresholds, the “associate” reference is not primarily linked to action in concert. Compare *id.*, with *Corporations Act 2001* (Cth) pt 1.2, div 2 (Austl.). For example, an associate is a company in which a person and their associate have a 15% or more investment. Significant potential confusion is caused by a provision that any person who is an associate of a person by one application of the definition is also an associate of the person by another application of the definition, see *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 6(1) (Austl.), causing a potential infinite regression of applications. The question arises in the foreign investment context in determining whether Chinese SOEs, by virtue of their common government ownership, should be aggregated or assumed to be related or associated. The Executive Member of FIRB has given evidence to the Senate Economics Committee that for the purposes of the Foreign Acquisitions and Takeover Act 1975, Chinese SOEs are not considered to be associated. Senate Economic References Committee, *supra* note 44, at E6.

76. *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 5, 13(I)(a)–(c) (Austl.).

77. *Id.* at s 9(1).

78. *Id.* at s 11(2A).

79. *Id.* at s 21(5).

B. Treasurer's Additional Powers Under the Act

The Act also gives the Treasurer power, in certain circumstances, to give an order prohibiting a proposed transaction and, in cases in which a transaction has already been completed, to direct a foreign person to dispose of shares or terminate arrangements.⁸⁰ The Treasurer's powers apply to a broader range of acquisitions than that which is captured by the pre-approval requirement. However, the powers will only be activated when the Treasurer determines the result of the acquisition to be contrary to Australia's national interest.⁸¹

The Treasurer's powers are enlivened if a prescribed corporation (defined *infra*) becomes controlled by foreign persons or if there is a change in foreign control. Control by a foreign person is control of 15% of the voting power or potential voting power; control of 15% of the issued shares (or rights to be issued shares) by an individual foreign person; control of 40% of the voting power or potential voting power; or control 40% of the issued shares (or rights to be issued shares) by foreign persons in aggregate.⁸² A change in foreign control occurs when a corporation is, in the aggregate, under at least 40% foreign control and when there is a change to the organization of those foreign holders, unless the Treasurer is satisfied that, upon review of all the surrounding circumstances, those persons are not in a position to determine the policy of the corporation.⁸³

The Act does permit that where a proposed transaction enlivens the Treasurer's powers, a foreign person can make an application such that if no objection is raised, the Treasurer's powers will be deactivated.⁸⁴ The practical implication of these provisions is that for significant transactions requiring commercial certainty, the Treasurer's approval is inevitably sought.

The Treasurer's powers extend to investments in prescribed corporations that carry on an Australian business⁸⁵ and holding companies of such prescribed corporations.⁸⁶ A "prescribed corporation" includes off-

80. *Id.* at ss 18(2), 18(4), 19(2), 19(4), 20(2), 20(3), 21(2)–(3).

81. *Id.*

82. *Id.* at ss 9(1), 9(1A).

83. *Id.* at ss 9(1A), 9(2).

84. *Id.* at s 25(2)–(3).

85. The Act provides that "a reference in th[e] Act to an Australian business is to a business carried on wholly or partly in Australia in anticipation of profit or gain" either alone or together with another person. *Id.* at s 7(1).

86. *Id.* at s 18(1). The concept of a prescribed corporation is much broader in scope than an "Australian corporation," which is relevant to the prior approval test. *Id.* at s 26.

shore companies with specified categories of Australian assets in which the company's gross Australian assets are valued at AU\$248 million or more and, for certain companies, make up more than 50% of the company's global assets.⁸⁷

The Treasurer's powers also extend to the acquisition of assets, rather than an interest in shares, of a company. The Treasurer may prohibit proposed acquisitions of assets valued at AU\$248 million or more of an Australian business carried on by a prescribed corporation that would lead to the business coming under foreign control (or being controlled by new foreign persons) if the result would be contrary to the national interest.⁸⁸ An Australian business is "a business carried on partly or wholly in Australia in anticipation of profit or gain."⁸⁹ For these purposes, control means being "in a position to determine the policy of" the Australian business.⁹⁰

In addition to outright acquisitions, the Treasurer's powers extend to two situations in which the Australian government enters into such arrangements with foreign persons that may influence the conduct of an Australian business.⁹¹ The first situation arises when the following occurs:⁹²

- An agreement is to be entered into concerning the affairs of a corporation or is to alter an organizational document of a corporation.
- As a result, a director or directors of a corporation will be under an obligation to act in accordance with the directions, instructions, or desires of a foreign person or an associate with control as defined above.
- As a result, the corporation would be controlled by foreign persons or new foreign persons.
- The result would be contrary to the national interest.

87. The Act provides that a foreign corporation whose Australian assets make up not less than one half of its gross assets is a prescribed corporation. *Id.* at s 13(1)(g). There is an exemption for companies where the total assets does not exceed AU\$248 million (calendar year 2013). *Id.* at s 13A(4)(b)(ii); *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) reg 5(2) (Austl.).

88. *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 19(2) (Austl.).

89. *Id.* at s 7(1). The holding of a mineral right is such a business. *Id.* at s 7(2).

90. *Id.* at s 19(7).

91. The Act also applies to acquisition of interests in Australian urban land. *Id.* at s 21A. However, this Article is focused on the regulation of investment in corporations.

92. *Id.* at s 20(2).

The second situation arises when the following occurs:⁹³

- An arrangement is to be entered into or terminated in relation to an Australian business carried on solely by prescribed corporations. For these purposes, an arrangement means leasing, hiring, or the granting of rights to use or, more importantly, participate in profits or management.
- As a result, the business would be controlled by foreign persons or new foreign persons.
- The result would be contrary to the national interest.

The first situation is narrower than the second because it is premised on a foreign person being in control of a corporation, resulting in directors of that corporation being under an obligation to that foreign person. However, in both situations, the result must be that the corporation or business will be “controlled” by foreign persons. The Act expands the concept of control to include circumstances in which a person and her associates are able to determine the policy of the corporation “*in relation to any matter*.”⁹⁴ This provision is potentially broad enough to capture interests, including the following: structures using convertible instruments; economic only interests; or derivative or swap positions in Australian or offshore entities with Australian assets, if that interest gives a foreign person or persons the ability to determine the policy of a corporation in relation to any matter.

C. Applications Under the Act

If a foreign person is required to obtain prior approval under the Act or if they wish to make an application under the Act so that the Treasurer’s powers are deactivated, then the applicant must provide FIRB with specified information about the company, the target, and the transaction. Once notification of the proposed transaction has been lodged, the Treasurer has thirty days to make a decision and ten days to notify the applicant of that decision.⁹⁵ If the applicant has not proceeded with the transaction and the Treasurer does not give any notification within that time, the Treasurer ceases to have power with respect to that proposal.⁹⁶ However, the Treasurer may provide an interim order if more

93. *Id.* at s 21(2).

94. *Id.* at ss 20(5)(a), 21(5)(a) (emphasis added). These provisions were inserted in the Act in 2010.

95. *Id.* at ss 24, 25(1B), 25(2).

96. *Id.* at s 25(2).

time is required to allow due consideration of the application.⁹⁷ An interim order prohibits the applicant from proceeding with the proposal for a period of up to ninety days, after which the Treasurer has a period of ten days in which to notify the applicant of the decision.⁹⁸

D. Australia's Foreign Investment Policy

The Policy imposes additional restrictions on investments by foreign persons in a limited number of sensitive sectors (such as banking, civil aviation, telecommunication, airports, airlines, shipping, and media) as well as investments by foreign governments and their agencies. The Policy has no legislative force, but adherence to its requirements is achieved in practice by a number of means, such as the possibility of refusal to grant necessary ministerial (or other) approvals under other Australian law and the prospect of ongoing resistance from the Australian government to the relevant investor's activities, including the likelihood that future applications under the Act might be refused.

Thus, the Policy imposes additional obligations upon SWFs and SOEs. These obligations are in addition to those imposed by the Act. Applications under the Policy are not governed by the statutory processes set forth in the Act, and therefore, the government is not required to respond to applications arising under the Policy within pre-defined time constraints. Under this regime, applications by Chinese SOEs in 2008–2009 were under review for prolonged periods, which in some circumstances proved commercially significant.⁹⁹

Any “direct investment” by “foreign government investors,” irrespective of size, requires notification for prior approval. These applications are addressed on a case-by-case basis.¹⁰⁰ On February 17, 2008, the Australian Treasurer released a set of additional Guidelines for Foreign Government Investment Proposals,¹⁰¹ which purported to “enhance the transparency of Australia’s foreign investment screening regime” in the areas of SWFs and SOEs. The Treasurer suggested that these new Guidelines did not reflect a new development.¹⁰² However, many commenta-

97. *Id.* at s 22(1).

98. *Id.* at ss 22(2), 24.

99. *See infra* Part V.

100. *See Australia's Foreign Investment Policy, supra* note 56, at 2, 14–15.

101. Wayne Swan, ‘Government Improves Transparency of Foreign Investment Screening Process’ (Media Release, No. 009, Feb. 17 2008) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType>.

102. In a speech to the Australia–China Business Council in Melbourne on July 4, 2008, the Treasurer made the following comments in relation to the Guidelines: “These guidelines were those used by the previous government; they are what we use too. They are not new. . . .” Wayne Swan,

tors argued that the release of these Guidelines indicated an overall shift in the government's approach to FDI, primarily directed at investment by Chinese SOEs.¹⁰³

In understanding the potential scope of the pre-approval requirement for investments by SWFs and SOEs, it is necessary to consider which investors would be considered a foreign government investor and what is meant by direct investment. These terms are defined very broadly and ambiguously in the Policy and reflect the Australian government's experience in seeking to regulate these types of transactions in recent years.

For the purposes of the Policy, a foreign government investor is considered by FIRB to be an entity in which a foreign government or its agencies have an interest of 15% or more; foreign governments or their agencies have an aggregate interest of 40% or more; or it is otherwise controlled by foreign governments or their agencies, or could be controlled by them as part of a controlling group.¹⁰⁴ Experience suggests that in the current political environment, the Australian government would take a broad view of what constitutes a foreign government agency and would instead look at practical decision-making processes and other indicia of control rather than just focus on the ownership structure of a particular entity.¹⁰⁵ For example, the global financial crisis saw a succession of government-sponsored financial bailouts of some of the largest corporate enterprises in the world. All global companies and financial institutions that have had a more than 15% capital injection from a government or SWF are treated as an SOE under Australia's regulatory framework.

A direct investment is considered by FIRB to be an investment that provides the investor with potential influence or control over the target.

Treasurer, Austl., *China and This Asian Century*, Speech Delivered at the Australia–China Business Council (July 4, 2008), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeche/s/2008/021.htm&pageID=005&min=wms&Year=2008&DocType=1>.

103. The Treasurer said at the time,

You will have heard, as I have, a couple of arguments about our approach to Chinese investment—broadly, that we have changed our policy to a more restrictive stance, and furthermore, are slowing down the processing of Chinese applications. I don't think either of these stand up when considered against the facts. I have approved a Chinese investment proposal on average once every nine days since coming into office. This is certainly not a slowing pace.

Id. However, it would seem that the Guidelines were issued shortly after the initial Chinalco investment in Rio Tinto, described *infra* Part V.B, with further Chinese SOE investments announced around that time. See Larum & Qian, *supra* note 43, at 10.

104. *Australia's Foreign Investment Policy*, *supra* note 56, at 17.

105. The Policy states that foreign government investors should notify the government for review if they have any doubt as to whether an investment is notifiable. *Id.* at 2.

Any investment of an interest of 10% or more in an entity is considered a direct investment. An interest of less than 10% may be considered a direct investment if the investor is building a strategic state or can use the investment to influence or control the target. If the investment includes special or veto rights, director appointment rights, is related to contractual arrangements (such as loan, service, or off take arrangements), or if it involves the building or maintaining of a strategic or long-term relationship with the target, the investment will be considered a direct investment.¹⁰⁶

The Guidelines promulgated in 2008 have now been absorbed into the Policy.¹⁰⁷ The primary area of focus for the Australian government will be to assess whether the investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives. This includes assessing whether the governance arrangements could facilitate actual or potential government control, including through funding arrangements. Where there are minority investors in the foreign government investor, the size, nature, and composition of that minority will be considered.

Mitigating factors that the Australian government will consider are external partners or shareholders in the investment, the level of non-associated investment, the governance arrangement, ongoing arrangements to protect Australian interests from non-commercial dealings, and whether the target will remain listed on the Australian Securities Exchange (ASX) or another exchange. The Australian government will also consider the size, importance, and potential impact of the investment.

E. Industry-Based Restrictions

In addition to the review process imposed under the Act and the Policy, Australian legislation restricts foreign ownership in a limited range of sensitive industries, including shipping, aviation, airports, banking, and gaming.¹⁰⁸ There are also specific restrictions relating to foreign ownership of Qantas and Telstra.¹⁰⁹ Any investment by foreign persons

106. Holding an interest of less than 10% following enforcement of a security interest is also considered a direct investment. *Id.* at 14.

107. *Id.* at 2 (section titled “Foreign Government Investors”).

108. For examples of these types of legislation, see *Shipping Registration Act 1981* (Cth) s 12 (Austl.); *Air Navigation Act 1920* (Cth) s 11A(2) (Austl.); *Airports Act 1996* (Cth) s 40 (Austl.); *Banking Act 1959* (Cth) s 9(2) (Austl.); *Financial Sector (Shareholdings) Act 1998* (Cth) s 10 (Austl.); and the Casino Control Acts and the analogous legislation of each Australian state.

109. *Qantas Sale Act 1992* (Cth) s 7(1)(a) (Austl.); *Telstra Corporation Act 1991* (Cth) s 8BD (Austl.).

in these circumstances requires specific consideration under the relevant legislation.

V. CHINESE SOE INVESTMENT IN AUSTRALIA

In the period following 2008, there were a number of significant FDI proposals by Chinese SOEs in Australia, particularly in the resources sector. The case studies in that period, described below, illustrate the journey the Australian government has embarked upon in grappling with the issues associated with SOE and SWF investment in Australia.

The Australian experience during this time was tumultuous. The initial wave of resources investment by Chinese SOEs in early 2008 left the new Labor government ill-prepared for the policy issues arising from SOE investment.¹¹⁰ While not considerable in total numbers, a perceived onslaught of resource-related Chinese proposals in early 2009 resulted in a logjam of applications. Delays arose in processing those applications. While no application was formally rejected, significant pressures nonetheless arose on all sides in the processing of the applications.¹¹¹ Since then, there has been greater predictability of the likely terms for approval of SOE investment. However, the conditions of approval for the higher profile proposals remain harsh.¹¹²

110. David Uren, *Chinalco's Rio Raid Rattled the Government*, AUSTRALIAN (June 4, 2012), <http://www.theaustralian.com.au/archive/business/chinalcos-rio-raid-rattled-the-government/story-fn8sc6jr-1226381969530#>.

111. The Oz Minerals initial proposal would have been rejected, leading to a revised proposal that was accepted. *China's Minmetals Revises Bid for Oz Minerals*, N.Y. TIMES DEALBOOK (Mar. 31, 2009, 6:53 AM), http://dealbook.nytimes.com/2009/03/31/chinas-minmetals-revises-bid-for-oz-minerals/?_r=0. The second Chinalco proposal was commercially terminated in a circumstance where the government's final position was unknown (this was the largest ever FDI proposal made by a Chinese SOE, where the political stakes of a government rejection would likely have been very high). David Barboza & Michael Wines, *Mining Giant Scraps China Deal*, N.Y. TIMES (June 4, 2009), <http://www.nytimes.com/2009/06/05/business/global/05mine.html>. The Lynas proposal was commercially terminated when the government's proposed conditions were not considered commercially acceptable by the Chinese investor. Matthew Murphy, *China Quits Rare Deal with Lynas*, SYDNEY MORNING HERALD (Sept. 25, 2009), <http://www.smh.com.au/business/china-quits-rare-deal-with-lynas-20090924-g4re.html>.

112. *E.g.*, Nick Sherry, 'Foreign Investment Proposal: Yanzhou Coal Mining Company Limited Acquisition of Felix Resources Limited' (Media Release, No. 081, Aug. 31, 2012) (Austl.) [hereinafter Yanzhou Conditions], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/081.htm&pageID=003&min=njsa&Year=2009&DocType=0>; Wayne Swan, 'Foreign Investment Decision: Shandong RuYi Scientific & Technological Group Co. Ltd. and Lempriere Pty. Ltd. Acquisition of the Assets of Cubbie Group Limited' (Media Release, No. 079, Aug. 31, 2012) (Austl.) [hereinafter Cubbie Conditions], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/079.htm&pageID=003&min=wms&Year=&DocType=0>.

A. Key Areas of Focus When Assessing Investments by SWFs and SOEs

Several key considerations for Australian governmental approval of FDI by SWFs and SOEs (and, in particular, investments by Chinese SOEs) can be summarized from the case studies reviewed below. Those considerations are as follows:

- Consideration of the resource in question (or other industry in which the investment is proposed) to ascertain the dynamics of how price and supply are determined so as to ensure that pricing and supply will continue to be market-based;¹¹³
- Sensitivity to national security issues (real or perceived);¹¹⁴
- Diversity of ownership of Australian assets in the relevant industry sector;¹¹⁵
- Assets to be developed according to market-based principles;¹¹⁶
- Possible need for majority or substantial minority local ownership;¹¹⁷
- Commitment to sell down over medium term in appropriate cases to allow market-based ownership.¹¹⁸
- Majority or substantial Australian-resident independent board members;¹¹⁹

113. *E.g.*, Wayne Swan, 'Foreign Investment Decision: Minmetals Resources Limited Acquisition of Album Resources Private Limited' (Media Release, No. 093, Dec. 19, 2010) (Austl.) [hereinafter *Minmetals Conditions*], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/093.htm&pageID=003&min=wms&Year=2010&DocType=0>; Yanzhou Conditions *supra* note 112; Cubbie Conditions, *supra* note 112.

114. *E.g.*, Wayne Swan, 'Foreign Investment: China Minmetals Non-Ferrous Metals Co. Ltd.—Proposed Acquisition of OZ Minerals Ltd.' (Media Release, No. 029, Mar. 27, 2009) (Austl.) [hereinafter *Original Minmetals Decision*], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=&DocType=0>.

115. *E.g.*, Wayne Swan, 'Foreign Investment Approval: Sinosteel's Interest in Murchison Metals Ltd. (Media Release, No. 100, Sept. 21, 2008) (Austl.) [hereinafter *Sinosteel Decision*], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/100.htm&pageID=003&min=wms&Year=2008&DocType=0>.

116. *E.g.*, *Minmetals Conditions*, *supra* note 113; Peter Costello, 'Foreign Investment Proposal—Shell Australia Investments Limited's Acquisition of Woodside Petroleum Limited (Media Release, No. 025, Apr. 23, 2001) (Austl.) [hereinafter *Shell Rejection*], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2001/025.htm&pageID=003&min=phc&Year=2001&DocType=0>.

117. *E.g.*, Wayne Swan, 'Chinalco's Acquisition of Share in Rio Tinto' (Media Release, No. 094, Aug. 24, 2008) (Austl.) [hereinafter *Chinalco Decision*], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/094.htm&pageID=003&min=wms&Year=2008&DocType=0>; *Sinosteel Decision*, *supra* note 115; Cubbie Conditions, *supra* note 112; Murphy, *supra* note 111.

118. *E.g.*, Yanzhou Conditions, *supra* note 112; Cubbie Conditions, *supra* note 112.

- Australian headquarters and management in appropriate cases;¹²⁰ and
- Possible need to create information barriers to prevent nominee-director access to pricing information.¹²¹

B. Experience in Recent Years

Date	Transaction
2008	<p><u>Target:</u> February 1, 2008: Acquisition by Chinalco¹²² of a 9% shareholding in Rio Tinto Group¹²³ for \$12 billion by open market purchase.</p> <p><u>Application Status:</u> August 24, 2008: Acquisition approved.¹²⁴</p> <p>Undertakings were given that prohibited the company from increase shareholding without further approval and from seeking to appoint director while shareholding is below 15%.</p>
2008	<p><u>Target:</u> Possible reverse takeover of Murchison Metals Ltd. (iron ore exploration company) by Sinosteel¹²⁵ seeking to acquire 100% of Midwest Corp. by takeover offer announced March 14, 2008, and Murchison Metals Ltd. (iron ore exploration</p>

119. *E.g.*, Wayne Swan, 'Foreign Investment Decision: Hunan Valin Iron and Steel Group—Acquisition of up to a 17.55 Percent Interest in Fortescue Metals Group (Media Release, No. 032, Mar. 31, 2009) (Austl.) [hereinafter Hunan Valin Conditions], available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/032.htm&pageID=003&min=wms&Year=&DocType=0>; Yanzhou Conditions, *supra* note 112.

120. *E.g.*, Minmetals Conditions, *supra* note 113; Yanzhou Conditions, *supra* note 112; Cubbie Conditions, *supra* note 112.

121. *E.g.*, Hunan Valin Conditions, *supra* note 119.

122. Chinalco is a Chinese SOE 100% owned by the Chinese people. *Overview*, CHINALCO, http://www.chalco.com.cn/zl/web/chinalco_en_show.jsp?ColumnID=122 (last visited Oct. 24, 2013) (China).

123. Rio Tinto PLC is a company incorporated in England and listed on the London Stock Exchange as the English arm of the dual-listed Rio Tinto Group. *Group Overview*, RIO TINTO, <http://www.riotinto.com/aboutus/group-overview-5231.aspx> (last visited Oct. 24, 2013) (U.K.). The Australian arm of the Rio Tinto Group is Rio Tinto Ltd., a company incorporated in Australia with its primary listing on the ASX. *Id.* By virtue of the dual listing arrangements, the two Rio Tinto listed entities are intended to operate and be managed as a single economic unit. *Id.* Chinalco's 12% shareholding in Rio Tinto PLC equated to an approximate 9% economic interest in the Rio Tinto Group, and it was reported Chinalco received had legal advice that it did not require prior approval for an investment in Rio Tinto PLC up to 14.9% because it was acquiring shares in a company incorporated in England and listed on the London Stock Exchange. Uren, *supra* note 110.

124. Wayne Swan, 'Chinalco's Acquisition of Shares in Rio Tinto' (Media Release, No. 094, Aug. 24, 2008) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/094.htm&pageID=003&min=wms&Year=2008&DocType=0>.

125. Sinosteel is a Chinese SOE that is 100% owned by the Chinese people. *See About Sinosteel*, SINOSTEEL, <http://en.sinosteel.com/zggk/jtjj/> (last visited Oct. 24, 2013) (China).

Date	Transaction
	<p>company) seeking to acquire 100% of Midwest Corp. by scrip scheme of arrangement announced May, 26, 2008.¹²⁶ Sinosteel acquired 100% of Midwest. Both Murchison Metals and Midwest were seeking to develop the Midwest iron ore region of Western Australia together with the infrastructure required for that development. The Murchison transaction did not proceed.</p> <p><u>Application Status:</u> Midwest acquisition approval given.¹²⁷</p> <p>Interim orders made on Murchison transaction.¹²⁸ Approval to acquire up to 49.9% of the shares in Murchison with no approval given for a higher shareholding in the interests of “diversity of ownership” of iron ore in the Midwest region.¹²⁹</p>
2009	<p><u>Target:</u> On February 12, 2009, Rio Tinto Group announced that it had entered into a Co-operation and Implementation Agreement with Chinalco for a further proposed US\$19.5 billion strategic partnership. The proposed transaction involved the investment by Chinalco of US\$7.2 billion through convertible bonds as well as a US\$12.3 billion investment in certain Rio Tinto assets.</p> <p>On June 24, 2009, Rio Tinto Group announced that it had terminated the Co-operation and Implementation Agreement with Chinalco and instead would pursue an AU\$15 billion rights issue at £14 per share and joint venture with BHP in relation to its iron ore assets in the Pilbara region.</p> <p><u>Application Status:</u> Interim order.¹³⁰ No decision reached.</p>

126. If Murchison acquired Midwest when Sinosteel controlled Midwest, Sinosteel would then control Murchison.

127. Sinosteel obtained unconditional FIRB approval to make the takeover bid at the time it sought clearance for its initial investment in January 2008. Tim Lee Master, *Sinosteel Taps Midwest's Minority Investors in Pursuit of 20pc Stake*, S. CHINA MORNING POST (Jan. 25, 2008), <http://www.scmp.com/article/624211/sinosteel-taps-midwest-minority-investors-pursuit-20pc-stake>.

128. On June 25, 2008, an interim order dated June 16, 2008, was published in the *Commonwealth Gazette* prohibiting Sinosteel from acquiring a substantial shareholding in or assets of Murchison Metals Ltd. Commonwealth, *Gazette, Foreign Acquisitions and Takeovers Act 1975: Order Under Subsection 22(1)*, No. 25, June 25, 2008, 1858 (Austl.), available at <http://www.comlaw.gov.au/file/2008GN25>.

129. Sinosteel Decision, *supra* note 115. The media release noted that Sinosteel's application to acquire up to 100% of Murchison had been withdrawn and that a revised application for up to 49.9% of Murchison was approved:

In approving Sinosteel's application, I have determined that a shareholding of up to 49.9 percent in Murchison will maintain diversity of ownership within the Mid West region. The Government considers the development of such potentially significant new resource areas should occur through arrangements that are open to multiple investors. This approach is consistent with the national interest principles we released in February and with the approach I have outlined previously, including in discussions with my Chinese counterparts.

Id.

Date	Transaction
2009	<p><u>Target:</u> Proposal by China Minmetals Non-Ferrous Metals Co.¹³¹ on February 16, 2009, to acquire 100% shareholding in OZ Minerals Ltd. (diversified mining company) by cash scheme. OZ Minerals had been struggling financially following the collapse of commodity markets in 2008 and had been unable to complete the sale of various assets, which it had hoped would allow it meet a AU\$1.3 billion debt repayment due on March 31, 2009.</p> <p><u>Application Status:</u> Revised proposal to acquire most of the assets of OZ Minerals on April 1, 2009 by asset sale for AU\$1.2 billion.</p> <p>Interim order issued.¹³² Initial proposal would not have been approved if it included the Prominent Hill site on national security grounds.¹³³</p> <p>Revised proposal approved April 29, 2009, with undertakings that required the acquiring company to do the following:¹³⁴</p> <ul style="list-style-type: none"> - operate the assets as a separate business unit according to commercial objectives, including the maximization of product prices and long-term profitability and value; - own the Australian assets through companies incorporated, headquartered,

130. On March 23, 2009, FIRB issued an Interim Order extending the period of consideration of the proposal by up to 90 days. Commonwealth, *Gazette: Special*, No. S 48, March 24, 2009, 1 [hereinafter *Special*], available at <http://www.comlaw.gov.au/file/2009GN12>.

131. Minmetals is a Chinese SOE controlled by China Minmetals Corporation as a 90% shareholder (which is wholly owned by the Chinese government). *About Us*, CHINA MINMETALS NON-FERROUS METALS CO., http://cmnlt.minmetals.com.cn/article.do?method=gettop&version=english&column_no=2103 (last visited Oct. 24, 2013); *Central SOEs*, SASAC, <http://www.sasac.gov.cn/n2963340/n2971121/n4956567/4956583.html> (last visited Oct. 24, 2013) (China).

132. On March 23, 2009, FIRB issued an interim order extending the period for evaluation of Minmetal's application by 90 days. *Gazette: Special*, *supra* note 130.

133. Wayne Swan, 'Foreign Investment' (Media Release, No. 029, Mar. 27, 2009) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=&DocType=0>.

Under the *Foreign Acquisitions and Takeovers Act 1975*, all foreign investment applications are examined against Australia's national interest. An important part of this assessment is whether proposals conform with Australia's national security interests, in line with the principles that apply to foreign government related investments. OZ Minerals' Prominent Hill mining operations are situated in the Woomera Prohibited Area in South Australia. The Woomera Prohibited Area weapons testing range makes a unique and sensitive contribution to Australia's national defence [sic]. It is not unusual for governments to restrict access to sensitive areas on national security grounds. The [g]overnment has determined that Minmetals' proposal for OZ Minerals cannot be approved if it includes Prominent Hill. . . . Discussions between the Foreign Investment Review Board and Minmetals are continuing in relation to OZ Minerals' other businesses and assets . . .

Id.

134. Wayne Swan, 'Foreign Investment Decision: Approval for Revised Application by China Minmetals Non-Ferrous Metals Co. Ltd. of OZ Minerals Ltd.' (Media Release, No. 043, Apr. 23, 2009) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/043.htm&pageID=003&min=wms&Year=&DocType=0>.

Date	Transaction
	<p>and managed in Australia under a predominantly Australian management team;</p> <ul style="list-style-type: none"> - comply with financial reporting requirements under the <i>Corporations Act 2001</i> (Cth); - sell products produced on arms-length terms by a sales team headquartered in Australia, with pricing being determined by reference to international observable benchmarks and in line with market practice; - continue to operate certain assets at current or increased production and employment levels - pursue the growth of certain projects and comply with Australian industrial relations laws - honor employee entitlements and support indigenous Australian communities
2009	<p><u>Target:</u> Acquisition by Hunan Valin Iron and Steel Group Co.¹³⁵ of a 17.4% shareholding in Fortescue Metals Mining Group Ltd. (iron ore mining company). Joint venture to develop certain iron ore tenements and off-take arrangement valued at AU\$650 million announced February 25, 2009.</p> <p><u>Application Status:</u> Interim order issued.¹³⁶ Approval given March 31, 2009, on the basis of undertakings that include the following:¹³⁷</p> <ul style="list-style-type: none"> - any person nominated by Hunan Valin to Fortescue's Board will comply with the Director's Code of Conduct maintained by Fortescue; - any person nominated by Hunan Valin to Fortescue's Board will submit a standing notice under the <i>Corporations Act</i> of their potential conflict of interest relating to Fortescue's marketing, sales, customer profiles, price setting, and cost structures for pricing and shipping; - Hunan Valin and any person nominated by it to Fortescue's Board will comply with the information segregation arrangements agreed between Fortescue and Hunan Valin; - Hunan Valin must report to FIRB on its compliance with the undertakings with penalties payable for non-compliance.

135. Hunan Valin is a Chinese SOE 100% owned by the Hunan provincial government. *Hunan Valin Iron and Steel Group Co., Ltd.*, HUNANGOV, http://www.enghunan.gov.cn/Business/Enterprises>ShowList/201005/20100513_299307.htm (last visited Oct. 24, 2013) (China).

136. FIRB issued an interim order on March 18, 2009, extending the FIRB review period of the proposed transaction for up to 30 days. Commonwealth, *Gazette, Foreign Acquisitions and Takeovers Act 1975 Order Under Subsection 22(1)*, No. 11, March 25, 2009, 794 (Austl.), available at <http://www.comlaw.gov.au/file/2009GN11>.

137. Hunan Valin Conditions, *supra* note 119.

Date	Transaction
2009	<p><u>Target:</u> Proposed investment by China Non-Ferrous Metal Mining Group (CNMC) in Lynas Corp. through heads of agreement dated May 1, 2009, for CNMC to become a 51.6% shareholder in Lynas at AU\$0.36 per share and facilitate the arranging of bank debt in a transaction valued at over AU\$500 million. The investment would have permitted Lynas to complete and commission a rare earths project. On September 24, 2009, Lynas announced that CNMC had terminated the heads of agreement.</p> <p><u>Application Status:</u> Interim orders issued.¹³⁸ No FIRB approval at the time the transaction was terminated.</p>
2009	<p><u>Target:</u> Acquisition by Yanzhou Coal Mining Co.¹³⁹ of 100% of Felix Resources Limited (coal mining company) for a cash amount and shares in a subsidiary of Felix valued at approximately AU\$3 billion announced August 13, 2009.</p> <p><u>Application Status:</u> Application was re-lodged.¹⁴⁰</p> <p>Approval given October 26, 2009, on the basis of undertakings that include the following:¹⁴¹</p> <ul style="list-style-type: none"> - Felix and Yanzhou's other Australian assets to be owned by an Australian holding company headquartered and managed in Australia by a predominantly Australian management and sales team with the following: - the Australian holding company and its operating subsidiaries having at least two Australian resident directors, one to be independent of Yanzhou; - all future Australian operations to be owned by the Australian holding company;

138. On July 8, 2009, Lynas announced that FIRB had asked CNMC to resubmit its application. *CNMC Transaction Update*, LYNAS CORP. (July 8, 2009), http://www.lynascorp.com/Announcements/2009/CNMC_Transaction_Update_8_July_2009_739157.pdf (Austl.). On August 3, 2009, Lynas announced that FIRB had yet not made a decision and that the thirty-day period for FIRB review would now expire in early September 2009. *CNMC Transaction Update*, LYNAS CORP., (Aug. 3, 2009), http://www.lynascorp.com/Announcements/2009/CNMC_Transaction_Update_3_August_2009_V2_747294.pdf (Austl.). On September 2, 2009, Lynas announced that FIRB had not yet made a decision and that the thirty-day period for FIRB review would now expire in early October 2009. *CNMC Transaction Update*, LYNAS CORP., (Sept. 2, 2009), http://www.lynascorp.com/Announcements/2009/CNMC_Transaction_Update_2_September_2009_758500.pdf (Austl.). It follows that CNMC withdrew and re-submitted its application three times. By then, five months had passed.

139. Yanzhou is a Chinese company listed on the Hong Kong Stock Exchange, New York Stock Exchange, and Shanghai Stock Exchange. Yankuang Group Corporation holds approximately 53% of Yanzhou which is ultimately controlled by the Shandong Provincial Government. *Company Overview*, YANZHOU COAL MINING CO., http://www.yanzhoucoal.com.cn/en/text/2009-11/10/content_88347.htm (last visited Oct. 24, 2013) (China); *About Us*, YANKUANG GROUP, http://www.yankuanggroup.com.cn/node_6387.htm (last visited Oct. 24, 2013) (China).

140. FIRB consideration of the proposal required the application to be re-lodged once to reactivate the thirty-day review period.

141. Yanzhou Conditions, *supra* note 112.

Date	Transaction
	<ul style="list-style-type: none"> - the chief executive officer and chief financial officer to have a principal place of residence in Australia; and - the majority of board meetings to take place Australia. <p>The Australian holding company must be operated in accordance with commercial objectives, including maximization of product prices, long-term profitability and value with production sold at an arms-length, and a non-discriminatory basis to all customers at prices determined by reference to international benchmarks in line with market practice. The requirements for the Australian holding company included the following:</p> <ul style="list-style-type: none"> - Seek to list on ASX by no later than the end of 2010; - Yanzhou's economic ownership of the Australian holding company to be less than 70% and of Felix's existing assets to be less than 50% (there are joint venture arrangements in relation to those assets). - The chief executive officer of the Australian holding company must report to FIRB on compliance with the undertakings at least annually.
2011	<p><u>Target:</u> Acquisition by Yanzhou Coal Mining Co. of 100% of Gloucester Coal Ltd. (coal mining company) by Yancoal Australia by the issue of scrip in Yancoal Australia and cash return valued at approximately AU\$2.2 billion announced in December 2011. Gloucester shareholders received shares representing 23% of the enlarged bidder.</p> <p><u>Application Status:</u> Approval given March 8, 2012, subject to undertakings that included the following:¹⁴²</p> <ul style="list-style-type: none"> - Felix conditions to continue with following amendments; - Yancoal to list on ASX by end 2012 and Yanzhou's ownership to be less than 70% by end 2013; - Reduce economic ownership in Syntech Resources and Premier Coal to 70% by the end of 2014 and manage these mines through Yancoal in the interim.

142. Wayne Swan, 'Foreign Investment Decision: Yancoal Australia Limited's Merger with Gloucester Coal Limited Approved' (Media Release, No. 009, Mar. 8, 2012) (Austl.), available at <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/009.htm&pageID=003&min=wms&Year=&DocType=0>.

Date	Transaction
2012	<p><u>Target:</u> Consortium acquisition by Shandong RuYi Scientific & Technological Group Co.¹⁴³ with Lempriere Pty. Ltd. (an Australian investor) of the assets of Cubbie Group for an undisclosed price.¹⁴⁴</p> <p><u>Application Status:</u> Approval given August 31, 2012, subject to undertakings:¹⁴⁵</p> <ul style="list-style-type: none"> - RuYi to sell down interest from 80% to 51% to independent parties within 3 years and ensure board representation is proportionate to its shareholding; - Cubbie to be managed by Lempriere and sell cotton at arms-length terms; - comply with law and offer to employ existing employees; and - investigate ways to improve water efficiency and sell surplus water allocations.

VI. COMPARATIVE ANALYSIS WITH SOME OTHER KEY JURISDICTIONS

The fact that Australia has grappled with the issue of FDI by SWFs and SOEs in recent years is not unique to western nations. The extent of regulation of FDI has been a growing issue in many jurisdictions over the last decade for the reasons advanced in the introduction. This Part considers comparative analysis and case studies from some other similarly developed Western countries.

Many jurisdictions, including a number of European countries, do not have a general statutory regime for regulating FDI but instead rely on more opaque general arrangements, such as the following:¹⁴⁶

1. Sectoral restrictions on foreign ownership in various key industries;
2. Opaque regulatory approval requirements that apply to any control transaction in various key industries but where foreign ownership is discouraged as a practical matter in decision making;

143. A leading Chinese textile manufacturer owned by Chinese and Japanese investors. *About Us*, SHANDONG RU YI GROUP, <http://www.chinaruyi.com/doce/about/about.asp> (last visited Oct. 24, 2013) (China).

144. Cubbie Conditions, *supra* note 112. Cubbie Group owns substantial agricultural land in Southern Queensland and is involved in a variety of irrigated agricultural activities including the production of significant amounts of cotton. *About Cubbie Ag*, CUBBIE, http://www.cubbie.com.au/index.php?option=com_content&task=view&id=26&Itemid=61 (last visited Oct. 24, 2013) (Austl.); *Our Production*, CUBBIE, http://www.cubbie.com.au/index.php?option=com_content&task=view&id=13&Itemid=45 (last visited Oct. 24, 2013) (Austl.).

145. Cubbie Conditions, *supra* note 112.

146. For a detailed analysis of these factors and case studies, see ANDREA MANDEL-CAMPBELL, CONFERENCE BD. OF CAN., FOREIGN INVESTMENT REGIMES: HOW CANADA STACKS UP ch. 2 (2008), available at <http://www.conferenceboard.ca/e-library/abstract.aspx?did=2531>.

3. Golden shares and unequal voting right mechanisms in corporate governance structures; and
4. Political meddling in merger and acquisition transactions where political support is provided to local bidders to contest control proposals made by foreign bidders.

The OECD measures the restrictiveness of national regimes for regulating inwards foreign direct investment and currently ranks Australia as the thirteenth most restrictive regime out of the more than forty-four countries surveyed, which included both member and some non-member states.¹⁴⁷ If Australia were to abolish its screening processes, it has been suggested that Australia would be ranked towards the middle of OECD countries on these measures.¹⁴⁸

The OECD restrictiveness index does not seem to give a fair representation of Australia's relative position in regulating FDI. Pre-screening is not itself a significant impediment to FDI if the approval process is timely, transparent, and predictable. That would not always seem to be the case in jurisdictions that do not have a general foreign investment approval regime.

A. United States of America

Foreign investment in the United States is regulated by the Committee on Foreign Investment in the United States (CFIUS).¹⁴⁹ The man-

147. Blanka Kalinova et al., *OECD's FDI Restrictiveness Index: 2010 Update* 18 (OECD Working Papers on Int'l Inv., Paper No. 2010/03, 2010) (Fr.), available at <http://www.oecd.org/daf/inv/investmentfordevelopment/45563285.pdf>. An earlier survey had ranked Australia as the sixth most restrictive regime. OECD, INTERNATIONAL INVESTMENT PERSPECTIVES 2007: FREEDOM OF INVESTMENT IN A CHANGING WORLD 140 (2007), available at http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/international-investment-perspectives-2007_iip-2007-en.

148. See Sinclair Davidson et al., *Submission to the Senate Inquiry into Investment by State-Owned Enterprises*, INST. PUB. AFFAIRS, 10 (Apr. 1, 2009), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2008-10/firb_09/submissions/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/firb_09/submissions/sub32_pdf.ashx (Austl.).

149. CFIUS is an interagency committee that works for the President. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1 (2013). CFIUS was initially established in 1975 by Presidential Executive Order. *Id.* The current CFIUS process arises from the 1988 "Exon-Florio" provision of the Omnibus Trade and Competitiveness Act, *id.* at 3–5, as amended in 1992 by the Byrd Amendment of the National Defense Act for Fiscal Year 1993, *id.*, and in 2007 by the National Security Foreign Investment Reform and Strengthened Transparency Act. *Id.* at 7–8. The CFIUS regime is contained in section 721 of the Defense Production Act. Defense Production Act of 1950 § 721, 50 U.S.C. App. § 2170 (2012).

date of CFIUS is to review the national security implications of foreign investment.¹⁵⁰ In this context “national security” extends to “critical infrastructure”¹⁵¹ and “critical technologies.”¹⁵² As such, the scope of the regime is narrower than the national interest criteria of Australia.

A CFIUS review can be initiated by a voluntary filing by the President or by CFIUS.¹⁵³ The advantage of a voluntary filing is the expectation that once a transaction is approved, it will be exempt from further review or action.¹⁵⁴ The legislation applies to any “covered transaction,” meaning a merger, acquisition, or takeover that could result in a foreign person controlling an entity engaged in interstate commerce in the United States.¹⁵⁵

Importantly, in the context of SWFs and SOEs, a review must be undertaken if the transaction involves an entity that is a foreign government or one that is controlled by or acting on behalf of a foreign government.

When a CFIUS review is initiated, CFIUS has thirty days to review the transaction to determine its effects on the national security of the United States.¹⁵⁶ If the review results in a determination that the transaction threatens to impair national security and that threat has not yet been mitigated, CFIUS must conduct an investigation of the effects of the transaction within forty-five days and take any necessary actions to protect national security.¹⁵⁷ After conducting that investigation, CFIUS must submit a report to Congress on the results of the investigation or submit the matter to the President for decision.¹⁵⁸ The President has authority to take action within fifteen days to prohibit the transaction for such time as

150. CFIUS consists of nine members—the Secretaries of State, Treasury, Defense, Homeland Security, Commerce and Energy, the Attorney General, the United States Trade Representative, and the Director of the Office of Science and Technology. The Secretary of Labor and Director of National Security are ex officio members. JACKSON, *supra* note 149, at 8 n.31.

151. Critical infrastructure means systems and assets, physical or virtual, so vital that their incapacity or destruction would have a debilitating impact on national security. 50 U.S.C. App. § 2170(a)(6).

152. The definition of critical technologies includes critical technology, critical components, or critical technology essential to national security. *Id.* § 2170(a)(7).

153. *Id.* § 2170(b)(1)(C)–(D).

154. The legislation allows CFIUS to reopen a review if the person materially fails to comply with an arrangement entered into in relation to an approval or has provided false or misleading material information. *Id.* § 2170(b)(1)(D)(ii).

155. *Id.* § 2170(a)(3). Control is defined in the Treasury Department regulations as a majority or dominant minority of voting securities, or the power to determine or decide certain specified decisions. 31 C.F.R. § 800.204(a) (2008).

156. 50 U.S.C. App. § 2170(b)(1)(E).

157. *Id.* § 2170(b)(2)(A),(C).

158. *Id.* § 2170(b)(3)(B).

he considers appropriate if he finds credible evidence that a foreign controlling interest might take action that threatens national security.¹⁵⁹ The CFIUS Act lists a variety of factors that the President may take into account when considering national security, including the following:¹⁶⁰

- Domestic production needed for projected national defense requirements;
- Capacity of domestic industries to meet national defense requirements;
- Potential effects on sale of military materials to countries of concern;
- Effects on critical infrastructure or critical technologies; and
- Whether it is a foreign government controlled transaction.

As a result of the rigidity of the thirty-fourty-five-fifteen-day process, CFIUS has developed a practice of allowing an informal preliminary stage of consultancy of unspecified length. This allows for additional time to resolve concerns and confidentiality protections, particularly if a transaction would otherwise be publicly prohibited.¹⁶¹

The number of transactions subject to CFIUS review is significantly less than transactions subject to FIRB review, especially so considering the significantly smaller size of the Australian economy and mergers and acquisitions market. The most noteworthy recent development is the 2012 presidential rejection of the Sany wind farm investment (see below). Some broad statistics concerning the results of CFIUS review in recent years are as follows:

Foreign Investment Transactions Reviewed by CFIUS, 2008–2010¹⁶²

Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn During Investigation	Presidential Decisions
2008	155	18	23	5	0
2009	65	5	25	2	0
2010	93	6	35	6	0
Total	313	29	93	13	0

159. *Id.* § 2170(d)(1)–(2).

160. *Id.* § 2170(f).

161. See JACKSON, *supra* note 149, at 7–8.

162. COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS FOR CY 2010, at 3 (2011), available at <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2011%20CFIUS%20Annual%20Report%20FINAL%20PUBLIC.pdf>.

Some of the more contentious decisions made in connection with the CFIUS regime in recent years include the following:

Date	Transaction
2000	Acquisition by NTT Communications (Japan) of Verio Inc. (firm providing internet services) for US\$5.5 billion. The transaction was approved by CFIUS. NTT was controlled by the Japanese government. CFIUS review was instigated by the FBI who was concerned NTT could access information on U.S. government wire-taps. ¹⁶³
2005	Proposed acquisition by CNOOC (Chinese SOE) of Unocal (oil producer) for US\$18.5 billion. The proposal was withdrawn after the House of Representatives approved a provision that would have delayed the transaction and because of a likely CFIUS investigation.
2005/ 2006	Proposed acquisition of commercial port operations by Dubai Ports World (an Arab SOE entity) from P&O for approximately US\$6.7 billion. The transaction was approved by CFIUS without undertaking a forty-five day investigation. ¹⁶⁴ As a result of vocal criticism from members of Congress and the public, DPW disposed of the U.S. ports to AIG Global Investment Group (a U.S. asset manager) in 2006. ¹⁶⁵
2006	Acquisition by Check Point Software Corp. (Israel) of Sourcefire, a specialist in security appliances for computer networks, for US\$225 million. The transaction was terminated following CFIUS concerns. ¹⁶⁶
2008	Proposed acquisition by Bain Capital and Huawei (China telecommunications company) of 3Com, a network and software provider, for US\$2.2 billion. The transaction did not proceed after failure to negotiate a mitigation agreement with CFIUS. Certain 3Com software is used to protect the confidentiality of databases used by U.S. defense forces. ¹⁶⁷
2009	Proposed investment by Northwest Non-Ferrous International Investment Co. to acquire 50.1% interest in First Gold Corp. for US\$26 million. The proposal was withdrawn when CFIUS advised it would recommend the investment be blocked. First Gold was a junior mining company listed on the Toronto Stock Exchange (incorporated in the United States) that was seeking to develop gold mines adjacent to U.S. military installations in Nevada. The rejection was based on national security concerns.

163. JACKSON, *supra* note 149, at 9.

164. *Id.* at 25.

165. *Id.* at 1.

166. *Id.* at 9.

167. *Id.* at 19.

Date	Transaction
2010	Proposed investment by Tangshan Caofedian Investment Corp. (China) in Emcore, a maker of components for fibre optics and solar panels, valued at approximately US\$54 million. The transaction was terminated following CFIS concerns. ¹⁶⁸
2011	Proposed acquisition by Huawei (Chinese telecommunications company) of server assets of 3 Leaf (a technology company in bankruptcy) for US\$2 million. The transaction was terminated following CFIUS's advice that it would recommend the transaction be blocked. ¹⁶⁹
2012	<p>Proposed acquisition by Ralls Corp. (owned by executives of Sany of China) of several wind farms in Oregon. In September 2012, President Barak Obama signed an Executive Order prohibiting the acquisition, requiring the dismantling of Sany turbines on the sites, and ordered that no purchaser of the sites be sold to Sany turbines.¹⁷⁰</p> <p>In October 2012, Sany commenced proceedings before the District Court of Columbia, challenging the President's decision on the basis that it exceeded his powers under the CFIUS legislation, particularly in requiring the turbines be dismantled and not sold for use at the sites and on the basis that the action discriminated against Sany. Wind farms in the restricted air space area use turbines made by German and Danish companies, and some are owned by an Indian conglomerate.</p> <p>On February 26, 2013, Judge Amy Jackson dismissed Sany's complaint for lack of jurisdiction on the basis that the CFIUS legislative provisions exempt Presidential actions from judicial review.¹⁷¹ Sany's further complaint that due process required a more detailed explanation of the President's findings was not struck, and that claim continued.¹⁷² Ralls Corp. has appealed the decision.</p>
2013	Acquisition by Wanxiang Group (China) of assets of A123 Systems, an electrical battery maker, out of bankruptcy for approximately US\$250 million. Approved by CFIUS despite congressional criticism that the acquisition could jeopardize energy security and because of the government grants A123 has received in developing its technology. ¹⁷³

168. *Id.* at 9.

169. For details, see Ken Hu, *Huawei Open Letter*, HUAWEI (Feb. 25, 2011), <http://pr.huawei.com/en/news/hw-092875-huaweiopenletter.htm#.UnVr9vmkqt-> (China).

170. Press Release, White House, Order Signed by the President Regarding the Acquisition of Four US Wind Farm Projects by Ralls Corporation (Sept. 28, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

171. *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 926 F. Supp. 2d 71, 91 (D.D.C. 2013).

172. *Id.* at 95.

173. JACKSON, *supra* note 149, at 10.

The recent cases involving China demonstrate that CFIUS is struggling with its review of Chinese investment to an even greater degree than is experienced in Australia.¹⁷⁴ This was taking place at a time when Chinese FDI into the United States had matched Australia for the first time as the primary destination of Chinese investment in 2012.¹⁷⁵

There currently appears to be much greater political and community hostility to Chinese investment in the United States than there is in Australia. The vituperative tone of the House of Representatives' Permanent Select Committee on Intelligence regarding the telecommunications activities of Huawei and ZTE of China (neither company is an SOE) and the suggestion that their sales of computer equipment are injurious to U.S. national security interests illustrate the level of suspicion that exists in the United States in relation to Chinese FDI.¹⁷⁶

B. Canada

Foreign investment is primarily regulated in Canada under the Investment Canada Act of 1985.¹⁷⁷ Transactions that exceed certain control (equity) and monetary thresholds are reviewable and subject to approval by the Minister of Industry on the basis that the investment is likely to be of "net benefit" to Canada.¹⁷⁸ The term net benefit is not defined but, when considered objectively, is likely to be a higher hurdle than Australia's national interest test because of the need for the Minister to positively form that view of net benefit.¹⁷⁹ Indeed, it is not sufficient that the investment continue the status quo; the investment must enhance the ability of the Canadian business to achieve the factors set out in the net benefit test.¹⁸⁰ Of course, at the end of the day, each of these tests involves a

174. See Greg Golding, *Western Regulation of Chinese Foreign Direct Investment: Sany Slapped by CFIUS*, UNIV. NEW SOUTH WALES, CENTRE L., MKTS., & REGULATION (May 7, 2013), <http://clmr.unsw.edu.au/article/accountability/berle-v/western-regulation-chinese-foreign-direct-investment-sany-slapped-cfius>.

175. Derek Scissors, *China's Global Investment Rises: The U.S. Should Focus on Competition*, BACKGROUND (Heritage Found., Washington D.C.), Jan. 8, 2013, at 5, available at http://thf_media.s3.amazonaws.com/2013/pdf/bg2757.pdf.

176. STAFF OF H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 112TH CONG., INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE (2012).

177. Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.). The author thanks Julie Soloway of Blake, Cassels & Graydon LLC, Canada, for her comments on this section.

178. *Id.* § 21(1).

179. Compare the debate in Australia in 1975 when a net economic benefit test was proposed in Part IV, *supra*.

180. BRIAN A. FACEY & JOSHUA A. KRANE, INVESTMENT CANADA ACT: COMMENTARY AND ANNOTATION 54 (Lexis 2013).

very subjective political decision-making process rather than a reviewable objective standard.

Investment Canada review applies to the acquisition of control by a non-Canadian person of a Canadian business or the establishment of a new business.¹⁸¹ Control is defined such that the acquisition of 50% or more of voting interests in any form of business association is deemed to be control. The acquisition of 33.3% or more—but less than 50%—of voting shares in a Canadian corporation is presumed to be an acquisition of control, unless there is evidence to the contrary and the acquisition of less than 33.3 % of voting interests is deemed not to be control.¹⁸² A threshold amount applies to reviewable transactions indexed each year; in 2013, the threshold was C\$344 for a World Trade Organization (WTO) member.¹⁸³ The general threshold is set to be increased substantially in 2013 to an enterprise value of C\$600 million, rising to C\$1 billion over four years, where the acquisition is made by a WTO member.¹⁸⁴

The filing of an application for review triggers a process under which the Minister generally has forty-five days to make a decision,¹⁸⁵ unilaterally extendable by thirty days or longer by agreement. As the case studies below demonstrate, a thirty-day extension following the expression of a “no net benefit” opinion has significant implications to the implementation of a transaction: The extension may allow an opportunity for the investor to persuade the Minister that the investment is of net benefit. Applications are generally reviewed and administered by the Investment Review Division of Industry Canada.¹⁸⁶ In considering the

181. Investment Canada Act §§ 11, 14(1).

182. *Id.* §§ 14(2), 28(3).

183. Investment Canada Act: Amount for the Year 2013, 147 C. Gaz. pt. I 52 (Can.). Much lower thresholds apply for direct and indirect acquisitions of control where the investor and the entity controlling the Canadian business are not WTO investors. Investment Canada Act §§ 14(3)–(4).

184. Economic Action Plan 2013 Act, No. 1, S.C. 2013, c. 33, § 137 (Can.). For non-WTO entities the threshold is C\$5 million. Investment Canada Act § 14(3). A different regime applies to SOEs. See *infra* note 196 and accompanying text. See generally Julie Soloway & Charles Layton, *Foreign Investment Review in Canada: Assessing Risk in the Wake of Nexen*, COMPETITION POL'Y INST. ANTITRUST CHRON., Apr. 2013, available at <https://www.competitionpolicyinternational.com/foreign-investment-review-in-canada-assessing-risk-in-the-wake-of-nexen/>.

185. Investment Canada Act § 21(1).

186. INDUSTRY CAN., INVESTMENT CANADA ACT ANNUAL REPORT 2009–2010, at 9 (2010). However, transactions involving cultural issues are handled by the Department of Canadian Heritage. *Id.* at 11.

net benefit of an acquisition, certain factors are to be taken into account where relevant:¹⁸⁷

1. The effect of the investment on the level and nature of economic activity in Canada;
2. The participation of Canadians in the business;
3. The effect on productivity, industrial efficiency, technological development, product innovation, and variety in Canada;
4. The effect on competition in Canada;
5. The compatibility with national industrial, economic, and cultural policies; and
6. The impact on Canada's ability to compete in world markets.

A separate regime applies to investments involving national security concerns. If the Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security, the investment can be prohibited.¹⁸⁸ In this situation, there is no monetary threshold. The term "injurious to national security" is not defined and is much more ambiguous in its scope compared to, for example, the CFIUS regime.

A special regime has applied to SOE investment since 2007, with important revisions in 2012.¹⁸⁹ An SOE is defined as an enterprise owned, controlled, or influenced by a foreign government. The C\$ threshold for investment by SOEs is a book value of assets of C\$344 million for 2013 and will remain unchanged as the general review threshold increases. The guidelines specify that, in considering net benefit, the Minister will consider the corporate governance and reporting structure of the SOE, including whether the SOE adheres to Canadian standards of corporate governance, Canadian laws, and practices and to free market principles. Further, the Minister will assess whether the SOE will operate on a commercial basis, including where to export, where to process, participation of Canadians in management, support for innovation, and levels of capital expenditure. SOEs are expected to give undertakings to

187. Investment Canada Act § 20.

188. *Id.* §§ 25.2, 25.4.

189. INDUSTRY CAN., GUIDELINES—INVESTMENT BY STATE-OWNED ENTERPRISES: NET BENEFIT ASSESSMENT (2012), available at <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2>. The guidelines were amended on December 7, 2012. Press Release, Industry Canada, Government of Canada Releases Policy Statement and Revised Guidelines for Investments by State-Owned Enterprises (Dec. 7, 2012), available at <http://news.gc.ca/web/article-eng.do?nid=711489>.

satisfy the Minister so that the above-referenced principles will be achieved through the investment.

The regime described above has developed against a backdrop of public debate about the appropriate scope of regulation and the role of FDI in shaping the Canadian economy. Canada has been particularly anxious that key industries are being “hollowed out,” with industry champions being acquired by foreign persons, and head offices and jobs increasingly going offshore.¹⁹⁰ In the hollowing out debate, Canada has had more to fear from United States FDI than SOE investment in Canadian resources.

Some of the major transactions that have shaped this debate in Canada are as follows:

Date	Transaction
2008	Proposed acquisition by Alliant Techsystems Inc. (U.S.) of space technology division of MacDonald, Dettwiler & Associates for C\$1.3 billion blocked by the Minister. ¹⁹¹ The basis of the decision was the loss of important technology to Canada and a threat to Canadian surveillance of disputed arctic territory. This was the first investment blocked under the Investment Canada Act. ¹⁹²
2009	Proposed acquisition by George Forrest International of Forsys Metals Corp. (a Namibian uranium producer) for C\$585 million. The proposal was terminated in contentious circumstances following receipt of advice from Investment Canada that GFI was prohibited from implementing the transaction pending further notice. ¹⁹³

190. See MICHAEL GRANT & MICHAEL BLOOM, CONFERENCE BD. OF CAN., “HOLLOWING OUT”—MYTH AND REALITY: CORPORATE TAKEOVERS IN AN AGE OF TRANSFORMATION 1–2 (2008), available at <http://www.conferenceboard.ca/e-library/abstract.aspx?did=2414>.

191. Press Release, Industry Canada, Minister of Industry Confirms Initial Decision on Proposed Sale of MacDonald, Dettwiler and Associates Ltd. to Alliant Techsystems Inc. (May 8, 2008), available at <http://www.spaceref.com/news/viewpr.html?pid=25412>.

192. The investment was blocked on “net benefit” grounds and not on “national security” grounds, *see id.*, as the latter regime did not enter into force until 2009; however, public proceedings following the decision confirmed that national security was the motivating factor behind the Minister’s decision. Matt Hartley, *Alliant to Press Ottawa Over MDA Veto*, GLOBE & MAIL (Apr. 14, 2008), <http://www.theglobeandmail.com/report-on-business/alliant-to-press-ottawa-over-md-a-veto/article1054382/>.

193. Press Release, Forsys Metals Corp., GFI Investment Update (Aug. 19, 2009), available at http://forsysmetals.com/PDF/News_2009/NR%20081909.pdf. In 2011, Wikileaks released documents suggesting U.S. and Canadian diplomatic concerns that GFI may supply uranium to Iran. Gordon Rayner, *WikiLeaks: Sale of Uranium Mine Blocked over Iran Fears*, TELEGRAPH (Feb. 3, 2011), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8299360/WikiLeaks-Sale-of-uranium-mine-blocked-over-Iran-fears.html> (U.K.).

Date	Transaction
2010	Proposed acquisition by BHP Billiton of Potash Corp. of Saskatchewan Inc. (a significant global producer of potash) for C\$43 billion. The proposal was withdrawn following a preliminary finding by the Minister that the investment was not likely to be of net benefit and an invitation to make further submissions to the Minister within thirty days. ¹⁹⁴ BHP had proposed various capital expenditure commitments, Canadian employment commitments, and community programs to satisfy the net benefit test. ¹⁹⁵
2012	Proposed acquisition by Petronas (Malaysian SOE) of Progress Energy Resources Corp. (an oil and gas exploration and production company) for C\$5.2 billion. On October 19, 2012, the Minister advised Petronas that he was not satisfied that the investment would likely be of net benefit and invited further submissions within 30 days. ¹⁹⁶ On Dec. 7, 2012, the Minister advised that the investment was likely to be of net benefit. ¹⁹⁷ The Minister's press release indicated undertakings had been given in the areas of transparency and disclosure; adherence to free market principles and to Canadian laws and practices; and employment and capital investments. Petronas had previously advised that it planned to combine its Canadian business with Progress and retain all employees of Progress.
2012	Proposed acquisition by CNOOC Ltd. (Chinese SOE) of Nexen Ltd. (significant oil sands explorer and producer) for C\$14 billion. On Dec. 7, 2012, the Minister advised that he was satisfied that the investment would likely be of net benefit to Canada. ¹⁹⁸ The Minister's press release indicated undertakings has been given in the areas of transparency and disclosure, adherence to free market principles and to Canadian laws and practices; and employment and capital investments. CNOOC previously advised that it planned to establish Calgary as its American head office, retain Nexen's expenditure plans, list on the Toronto Stock Exchange, and support oil sands research.

194. Press Release, Industry Canada, Industry Minister Clement Confirms BHP Billiton's Withdrawal of its Application for Review Under the Investment Canada Act (Nov. 14, 2010), *available at* <http://www.ic.gc.ca/eic/site/064.nsf/eng/06068.html>.

195. Press Release, BHP Billiton, BHP Billiton Withdraws Its Offer to Acquire Potash Corp. and Reactivates Its Buy-Back Program (Nov. 15, 2010), *available at* <http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP%20Billiton%20Withdraws%20Its%20Offer%20To%20Acquire%20PotashCorp%20And%20Reactivates%20Its%20Buy-back%20Program.aspx>.

196. Press Release, Industry Canada, Minister of Industry Confirms Notice Sent to PETRONAS Carigali Canada Ltd. Regarding Proposed Acquisition of Progress Energy Resources Corp. (Oct. 19, 2012), *available at* <http://finance.yahoo.com/news/minister-industry-confirms-notice-sent-035735659.html>.

197. Press Release, Industry Canada, Petronas' Acquisition of Progress (Dec. 7, 2012), *available at* <http://news.gc.ca/web/article-eng.do?nid=711509>.

198. Press Release, Industry Canada, CNOOC Limited's Acquisition of Nexen Inc. (Dec. 7, 2012), *available at* <http://news.gc.ca/web/article-eng.do?nid=711499>.

The record outlined above illustrates a trend towards increased scrutiny of high profile transactions in Canada over the last few years. In some ways, the debate in Canada in 2012 mirrored the Australian experience in 2009, both at a policy and political level. At the same time as announcing the last two approvals listed above, the Minister announced various changes to the regime as well as to the SOE policy. In particular, the Minister advised that the future acquisition of control of a Canadian oil sands business by an SOE will be found to be of net benefit “on an exceptional basis only.”¹⁹⁹

There is a concern in some Canadian quarters that the regulatory regime is calibrated too harshly against foreign investors, particularly Chinese SOEs, and that Canada has been losing foreign direct investment to other countries that have better dealt with Chinese FDI, particularly Australia.²⁰⁰ The legislative framework of the Canadian regime is clearly more restrictive in its scope than that of Australia. It has therefore been suggested that changes should be made to Canadian legislation in the following areas:²⁰¹

1. Replace the net benefit test with a contrary to national interests test (i.e., the Australian test);
2. Include in the SOE standards guidelines undertakings at arm’s length marketing and international price benchmarks;
3. Explicitly state that Canada has a national interest in companies operating on a commercial basis under the laws of Canada;
4. Recognize the economic importance of resources mergers and acquisitions; and
5. Engage with Chinese companies and make them aware of Canadian sensitivities and requirements to develop a model of Chinese investment in Canada.

199. INDUSTRY CAN., STATEMENT REGARDING INVESTMENT BY FOREIGN STATE-OWNED ENTERPRISES (2012), available at <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html>.

200. See MICHAEL GRANT, CONFERENCE BD. OF CAN., FEAR THE DRAGON? CHINESE FOREIGN DIRECT INVESTMENT IN CANADA (2012), available at <http://www.conferenceboard.ca/e-library/abstract.aspx?did=4884>; Josephine Smart, *Dancing with the Dragon: Canadian Investment in China and Chinese Investment in Canada*, UNIV. CALGARY SCH. PUBLIC POL’Y, Sept. 2012, at 1, available at <http://policyschool.ucalgary.ca/sites/default/files/research/smart-dancing-dragon-final.pdf>.

201. GRANT, *supra* note 200, at 25–26.

C. New Zealand

Foreign investment in New Zealand is regulated by the Overseas Investment Act 2005.²⁰² Reviewable transactions are assessed by the Minister of Finance and Minister for Land Information based on a variety of prescriptive criteria, including “likely” benefit for New Zealand where sensitive land is involved.²⁰³ The Overseas Investment Office review applies to transactions that result in overseas investment in significant business assets or overseas investments in sensitive land.²⁰⁴ The Act proceeds on the basis that it is a “privilege” for overseas persons to own or control sensitive New Zealand assets.²⁰⁵ The Act is unusual in its focus on land.²⁰⁶

Overseas investment in significant business assets is defined as the acquisition by an overseas person of a 25% or more ownership or control interest where the value of the securities acquired exceeds NZ\$100 million, the establishment of a business by an overseas person involving expenditures exceeding NZ\$100 million, or the acquisition of a foreign person of property used in carrying on a business exceeding NZ\$100 million.²⁰⁷ An overseas investment in sensitive land is defined as the acquisition by an overseas person of land that is scheduled as sensitive land, or a 25% ownership or control interest in a person that owns an interest in such sensitive land.²⁰⁸ For these purposes, a 25% or more ownership or control interest is a beneficial interest in 25% or more of securities, the power to control the composition of 25% or more of the governing body, or the right to exercise 25% or more of voting power.²⁰⁹

202. Overseas Investment Act 2005 (N.Z.); Overseas Investment Regulations 2005, SR 2005/220 (N.Z.).

203. Overseas Investment Act 2005 § 16(e)(ii).

204. *Id.* § 10(1). A separate regime applies to the acquisition of fishing quotas. *Id.* § 10(2).

205. *Id.* § 3.

206. New Zealand legislation has historically discouraged the undue aggregation of land. Heatley & Howell, *supra* note 5, at 22. The predecessor Overseas Investment Act 1973 had dealt with investment in businesses and the Land Settlement Promotion and Land Acquisition Act 1952 had dealt with the purchase of farm land.

207. Overseas Investment Act 2005 § 13(1). For Australian non-government investors, the threshold is increased to NZ \$477 million in 2013 (indexed for inflation thereafter). Overseas Investment Regulations 2005, SR 2005/220, reg 36(A), sch 5 (N.Z.).

208. Overseas Investment Act 2005 § 12. Schedule 1 lists various categories of land, including non-urban land exceeding five hectares; land on islands or lake beds; heritage order land; historic places exceeding 0.4 hectares; land adjoining foreshore exceeding 0.2 hectares; land adjacent to historic areas, parks, seas, lakes; or heritage areas exceeding 0.4 hectares. The Act also extends to a situation where an owner of land becomes an overseas person. *Id.* § 12(b)(iii).

209. *Id.* § 6(4).

An overseas “person” is an individual who is neither a New Zealand citizen nor a resident, or a company where overseas persons have 25% or more of securities, the power to control the composition of 25% or more of the governing body, or the right to exercise 25% or more of voting power.²¹⁰ The restrictions apply to both transactions involving foreign persons and their associates.²¹¹

Transactions subject to review must be notified to the Overseas Investment Office before the overseas investment is given effect.²¹² The regime does not provide for time limits in which consent must be given. Applications are generally processed and approved by the Overseas Investment Office under delegated authority, with more significant decisions made by the relevant Ministers.²¹³ The regime provides a mechanism for approvals to be given subject to conditions.²¹⁴

Where the transaction involves significant business assets, the criteria for review are the business experience acumen of the person, the financial commitment demonstrated by the person, and the good character of the person (the character test).²¹⁵ Much more extensive economic review criteria apply to transactions involving sensitive land, in addition to the criteria above:

- The person must intend to reside in New Zealand, or the deciding authority must find that the investment will or is likely to “benefit New Zealand,” and if the transaction involves non-urban land, the benefit will be or is likely to be “substantial and identifiable.”²¹⁶
- If the transaction involves farmland, the land must have been offered to New Zealanders on the open market.²¹⁷

The “benefit to New Zealand” analysis requires the Ministers to consider a range of additional factors, including job opportunities, intro-

210. *Id.* § 7(2). Similar definitions apply to partnerships and trusts.

211. This extends to persons controlling a person and persons acting in concert. *Id.* § 8.

212. *Id.* § 11. Failure to obtain consent is an offense, *id.* § 42, and an investment made without consent may be cancelled by a party to the transaction who does not need consent or by a court on application of the regulator. *Id.* § 29(1)(c).

213. *Id.* §§ 30–37. Business decisions are made by the Minister of Finance. Sensitive land decisions are made by the Minister of Finance and the Minister for Land Information. *Legislation, Ministers & Delegated Powers*, LAND INFO. NEW ZEALAND, <http://www.linz.govt.nz/overseas-investment/about-oio/legislation-delegations> (last visited Nov. 3, 2013).

214. Overseas Investment Act 2005 §25(1)(c).

215. *Id.* § 18.

216. *Id.* § 16(1)(e).

217. *Id.* § 16(1)(f); Overseas Investment Regulations 2005, SR 2005/220, regs 4–11.

duction of new technology, export impacts, productivity impact, impact on development investment, impact on processing primary products, likelihood of resulting improved relations with another country, impact on New Zealand's image, impact on important infrastructure, involvement of New Zealand, impact on government policy and strategy, protection of historic heritage, wildlife, and indigenous fauna, and whether foreshore, seabed, or riverbed has been offered to the crown.²¹⁸

In New Zealand, no separate regime applies to SWFs or SOEs. Some of the more contentious decisions made under the New Zealand regime in recent years are listed below. As with other Western screening regimes, the rejection of applications is rare.²¹⁹

Date	Transaction
2008	Proposed acquisition by Canadian Pension Plan Investment Board of a 40% investment in Auckland International Airport Limited for NZ\$1.75 billion. ²²⁰ The proposal led to significant political debate as to whether SWF investment of this kind should be permitted in this kind of infrastructure asset. The debate resulted in the inclusion of the strategic infrastructure test in the Regulations. The transaction was rejected by the Minister on the basis that there were no substantial and identifiable benefits to New Zealand. ²²¹
2009–2012	Acquisition by Haier (Chinese SOE) of 100% of Fisher & Paykel Appliances, a white goods manufacturer, for NZ\$740 million. Haier had initially acquired a 20% investment in 2009 as part of a distressed capital raising. Approved. ²²²

218. Overseas Investment Act 2005 §17(2); Overseas Investment Regulations SR 2005/220, reg 28. A detailed business plan must be submitted with the application addressing the benefit test.

219. Between 2006 and 2010 the Overseas Investment Office refused fourteen out of the 738 applications made. Peter Enderwick, *Inward FDI in New Zealand and Its Policy Context*, VALE COLUMBIA CTR. ON SUSTAINABLE INT'L INV., 4 (July 17, 2012), http://www.vcc.columbia.edu/files/vale/documents/NZ_IFDI_17_July_2012_-_FINAL.pdf.

220. The summary of this transaction is taken from Heatley & Howell, *supra* note 5, at 41–46.

221. *Overseas Investment Act 2005: Reasons for Decisions by Relevant Ministers*, OVERSEAS INV. OFFICE, 6 (April 11, 2008), <http://www.linz.govt.nz/docs/miscellaneous/min-decisions.pdf> (N.Z.). This decision was made despite the fact that the investment was approved by Auckland International Airports' shareholders and would have resulted in private gains accruing to New Zealand investors. *Id.*

222. *Decision Summary Case: 201220035*, OVERSEAS INV. OFFICE (Oct. 30, 2012), <http://www.linz.govt.nz/sites/default/files/docs/overseas-investment/decisions/2012-10/c201220035.pdf> (N.Z.).

Date	Transaction
2009–2011	Acquisition by Agria Corp. (Chinese NYSE listed agricultural company) with New Hope Group (Chinese private agribusiness company) and Maori investment entity of an aggregate 51% interest in PGG Wrightson, an agricultural services company, for NZ\$250 million. Approved. ²²³
2010	Acquisition by Bright Dairy & Food Co. (Chinese SOE) of a 51% shareholding in Synlait, a dairy producer, for an undisclosed consideration. Approved. ²²⁴
2010	Proposed acquisition by Natural Dairy ²²⁵ of Crafar Farms, one of New Zealand's largest dairy farms, for an undisclosed consideration. ²²⁶ The proposal was rejected by the OIO on the basis that certain of the investors failed the character tests. ²²⁷
2012	Proposed acquisition by Milk New Zealand Holdings Ltd. ²²⁸ of Crafar Farms for an undisclosed consideration. The proposal was approved based on a Ministers' finding of substantial and identifiable benefit. ²²⁹ This decision was subject to legal challenge by a potential rival New Zealand purchaser and Maori land trust. The legal challenge failed, despite a finding that aspects of the decision required reconsideration. ²³⁰ In that respect, the comparison with the U.S. <i>Ralls</i> ²³¹ litigation is of interest.

223. *Decision Summary Case: 201110005*, OVERSEAS INV. OFFICE (Apr. 15, 2011), <http://www.lin.govt.nz/sites/default/files/docs/overseas-investment/decisions/2011-04/c201110005.pdf> (N.Z.); *Decision Summary Case: 200920070*, OVERSEAS INV. OFFICE (Nov. 16, 2009), <http://www.lin.govt.nz/sites/default/files/overseas-investment/decisions/decision-summaries/2009-11/C200920070.pdf> (N.Z.).

224. *Decision Summary Case: 201020022*, OVERSEAS INV. OFFICE (Sept. 20, 2010), <http://www.lin.govt.nz/sites/default/files/overseas-investment/decisions/decision-summaries/2010-09/c201020022.pdf> (N.Z.).

225. Bright Dairy & Food Co. is a company controlled by Chinese nationals. *Corporate Profile*, NATURAL DAIRY (NZ) HOLDINGS LTD., http://www.naturaldairy.hk/index.php?route=aboutus/aboutus&aboutus_id=1 (last visited Oct. 13, 2013) (China).

226. The farms were in administration. *Receivers Running the Ruler over Crafar Farms Bids*, NAT'L BUS. REV. (July 8, 2010), <http://www.nbr.co.nz/article/receivers-running-ruler-over-crafar-farms-bids-125824> (N.Z.). The comparison to the Australian experience with Cubbie station is apposite.

227. *Decision Summary Case: 201010030/201020032*, OVERSEAS INV. OFFICE (Dec. 22, 2010), <http://www.lin.govt.nz/sites/default/files/overseas-investment/decisions/decision-summaries/2010-12/c201010030-201020032.pdf> (N.Z.).

228. An entity controlled by a Chinese national. *Decision Summary Case: 201110035*, OVERSEAS INV. OFFICE (Apr. 16, 2012), <http://www.lin.govt.nz/sites/default/files/docs/overseas-investment/decisions/2012-04/c201110035.pdf> (N.Z.).

229. *Id.*

230. *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 (N.Z.); *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZCA

Date	Transaction
2013	Proposed acquisition by China Forest Group Corp. (Chinese SOE) of part of the forestry assets of NZ Superannuation Fund for an undisclosed consideration. The proposal was approved ²³² with the imposition of conditions requiring the appointment of New Zealand persons to the board of the acquirer and the provision of student scholarships in New Zealand.

The New Zealand regime is not without its significant policy perversities. As applied to FDI, application of the stricter economic review criteria entirely depends on whether the investee company owns sensitive land, even though that sensitive land may be peripheral to the activities of the investee.²³³ Similarly, transactions have been blocked where foreign-to-foreign transactions involve sensitive land assets that are somewhat peripheral to the business being conducted.²³⁴

That being said, there are some aspects of the New Zealand regime that are of interest to an Australian observer:

- Simply expressed legislation;
- Comprehensive identification of the economic factors to be applied in the decision-making process;
- Transparent reporting of factors considered in making a decision;
- A clearly expressed strategic policy of seeking increased FDI from China.²³⁵

VII. CONCLUDING COMMENTS

The Australian review process is structurally designed to facilitate the approval of the overwhelming majority of investment applications. Some have argued that Australia's regime imposes a measurable cost

355(N.Z.); *Tiroa E Hape and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZSC 85 (N.Z.).

231. *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 926 F. Supp. 2d 71, 91 (D.D.C. 2013).

232. *Decision Summary Case: 201220072*, OVERSEAS INV. OFFICE (Mar. 21, 2013), <http://www.lin.govt.nz/sites/default/files/docs/overseas-investment/decisions/2013-03/c201220072.pdf> (N.Z.).

233. Heatley & Howell, *supra* note 5, at 48–49 (discussing case study).

234. *Id.* at 49–51.

235. N.Z. TRADE & ENTER. & MINISTRY OF FOREIGN AFFAIRS & TRADE, OPENING DOORS TO CHINA: NEW ZEALAND'S 2015 VISION, at 25 (2012), available at <http://www.mfat.govt.nz/downloads/NZinc/NZInc-%20Strategy%20-%20China.pdf> (Strategic Goal 4 is to “[i]ncrease bilateral investment to levels that reflect the growing commercial relationship with China”).

through rejection, excessive conditions imposed on transactions and investments deferred by the regime.²³⁶ Those claims seem overblown. As the case studies and statistics outlined above demonstrate, the reality is that the Australian record is strong in facilitating and encouraging FDI.

It can be argued that the structure of the Australian regime does not sit well with Australia's obligations under the OECD regime (particularly the 2009 Recommendations) in the following areas:

- The OECD Council recommends that transparency and predictability requires that there be strict time limits applied to review procedures for foreign investments. The experience with some of the Chinese SOE investments since 2008 does not suggest a high degree of correlation with this recommendation.
- The OECD Council recommends that, based on proportionality, investment decisions be narrowly focused on concerns relating to national security. The national interest criteria in Australia are certainly much broader and more opaque than that standard.
- The OECD Council recommends, based on accountability principles, that there be the possibility for foreign investors to seek review of decisions to restrict foreign investment through administrative procedures or before judicial or administrative courts. The Australian regime does not reflect such a feature.

Moving from these concerns, there are a number of areas that could be advanced by the Australian government to better advance the regulation of FDI consistent with the OECD principles.

First, it is clear that regulating FDI is an issue of global concern and involves an ongoing dialogue in globalized markets. Bodies such as the OECD and the IMF have made substantial contributions to this debate in recent years. The Australian government should renew its efforts for international consensus on these issues and, over time, move its policy settings to reflect that consensus.²³⁷ Linked to this should be increased inter-governmental dialogue by Australia, particularly with BRIC nations that have large SOE sectors, in an effort to improve understanding of the

236. In 2008, ITS Global estimated that Australia's regulatory regime costs the Australian economy at least \$5.5 billion a year through delays or deterrence of foreign investment. *Foreign Direct Investment in Australia—The Increasing Cost of Regulation*, ITS GLOBAL, 21–22 (Sept. 9, 2008), <http://www.itsglobal.net/sites/default/files/itsglobal/Research%20Report%20on%20Foreign%20Direct%20Investment%20and%20the%20Increasing%20Cost%20of%20Regulation%20in%20Australia%20%282008%29.pdf> (N.Z.); see also Kirchner, *supra* note 6, at 8–9.

237. It is interesting to note that each of the comparative regimes described above specify the relevant factors that should be considered in making decisions.

concerns on both sides.²³⁸ Rather than removing the byzantine edifice of the existing statutory regime in the short-term, the focus of government action should be to embrace OECD and IMF best practices in the practical implementation of its decision making.²³⁹ Long-term best results would entail Australia's embrace of best practice global trends, removing a national interest test and replacing it with narrower national security tests.²⁴⁰ But it should be consistent with greater global consensus around these issues.

Second, the dollar thresholds under the Act could be raised to a much higher level, as has been the recent experience in Canada.²⁴¹ This should be true of general investment as well as SWF and SOE investment. Third, there could be less reliance on conditions and more reliance on domestic regulation to regulate commercial behavior. The imposition of conditions on SOE behavior has been a particular irritant to Chinese investors.²⁴²

As to the issues surrounding strategic FDI by Chinese SOEs in Australia, the recent developments in the Australia–China relationship generally suggest that this will remain a sensitive and difficult issue for some time.²⁴³

238. See Peter Drysdale, *Australia: Time to Adapt*, E. ASIA FORUM Q., Apr.–June 2012, at 31, 32.

239. Simplifying the byzantine structure would, of course, be desirable if politically achievable. Each of the comparative regimes described above are good case studies of simpler regulation.

240. Steven Kirchner suggests that the Act and related legislation should be amended to replace the current national interest test with distinct “national security” and “national economic welfare” tests. The Federal Cabinet should rule on investment proposals raising specific national security concerns. All other foreign direct investment proposals should be considered by an independent statutory body subject to a national economic welfare test that would be binding on the government of the day and be subject to administrative and judicial review. Kirchner, *supra* note 6, at 17–18.

241. See *id.* at 18. The Canadian approach of linking a higher review threshold to WTO membership has much to commend it.

242. Larum & Qian, *supra* note 43, at 19; Kirchner, *supra* note 6, at 18; Drysdale, *supra* note 238, at 31–32.

243. Some suggestions to develop better trust include improved communication and engagement; enhanced cooperation in key investment sectors; and the conclusion of the Australia–China Free Trade Agreement. See Larum & Qian, *supra* note 43, at 18–22; see also *supra* Part VI.C (discussing the New Zealand approach).