

Submission to the Senate Economics Reference Committee on the Foreign Investment Review Framework

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We are pleased to provide this submission to the Committee following the evidence provided by ASPI's Executive Director, Peter Jennings, at the hearing held in Canberra on 15 December 2015 and in addition to the material presented to the Committee in ASPI's *Strategic Insight, No. 101: Chinese investment in the Port of Darwin: A strategic risk for Australia?*, published on 9 December 2015. ASPI does not take corporate positions on any issue and indeed we have published a wide range of views on the Port of Darwin matter. The material presented in this submission reflects the shared view of the three authors, Paul Barnes, Anthony Bergin and Peter Jennings.

Our submission covers the following areas:

- The case for reform in balancing foreign investment and national security.
- Proposed new arrangements for the structure of the Foreign Investment Review Board (FIRB) and processes to manage the involvement of wider Commonwealth, State and Territory interests.
- Matters relating to Defence's handling of the Port of Darwin.
- A supporting attachment detailing current approaches to foreign investment in Australia, the United States, the United Kingdom, Canada and China. (This includes a table comparing key policy elements between these countries.)

The case for reform in balancing foreign investment and national security

Our assessment is that the mishandling of the lease arrangements for critical parts of the Port of Darwin and other recent matters involving the FIRB show the need for fundamental reforms of the way Australia assesses foreign investment proposals. Evidence presented to the Economic Reference Committee hearings on 15 December 2015 highlight deficiencies in processes and procedures, most prominently:

- Loopholes in legislation which mean in some circumstances that State and Territory owned assets are not subject to FIRB assessments.
- A lack of clarity around the applicability of current legislation.

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- An absence of clear processes to determine what is expected of Commonwealth Departments and Agencies consulted by the FIRB, *how* they should be consulted and what information should be sought and shared.
- No clarity around the responsibility of Agencies to make assessments on broad national security implications. (This goes to Defence's position that, in relation to the Port of Darwin, its assessment was based solely on the Department's requirements for port access rather than on the broader national security implications of the 99 year lease.)
- No criteria to assess what constitutes adequate due diligence in reviewing potential foreign owners.
- No link between FIRB and the Commonwealth's policy approach to critical infrastructure.
- An absence of policy guidance around how to deal with the specific case of Chinese-sourced foreign investment, even though it is clear that the Chinese state has a unique relationship with State Owned Enterprises as well as so-called private Chinese businesses.
- Inadequate connections between the Commonwealth's FIRB processes and like arrangements in allied or partner countries.

New arrangements for FIRB structure and processes

We fully agree with the submission to the Committee from the ANZ Banking Group that foreign investment remains important in developing the Australian economy and that Australia should be a competitive destination for investors. The overwhelming majority of foreign investments do not threaten Australia's security interests. The challenge is to protect national security, which must be our first priority, while maintaining an open investment climate.²

Our view is that the current legislative and regulatory framework to manage foreign investment is inadequate in a number of respects. Current arrangements do not give sufficient consideration to the national security implications of foreign direct investment, especially as it relates to critical infrastructure.

The processes for assessing investment proposals are ad-hoc, lack transparency and rigor and do not give government sufficient oversight of critical cases. As is very apparent from recent experience the result is that decisions to proceed – or not to proceed – with specific foreign investment requests are poorly explained to the

² It should be noted that when it comes to trade, as a WTO member Australia is permitted to take action which we consider necessary for the protection of our essential security interest or in pursuance of our UN Charter obligations for maintaining peace and security. Security exceptions are provided in recent free trade agreements Australia has negotiated with a number of states, including the US and China. In the China-Australia Free Trade Agreement, for example, "Nothing in this Agreement shall require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private." (Art 16.1)

public and give rise to confusion about how government has exercised decision-making powers.

Our proposed new arrangements for FIRB structure and processes will strengthen public confidence about government decisions. They will also give the government itself greater confidence that options presented to it are based on rigorous and thorough assessment, balancing economic and national security considerations.

We support the Treasurer's current review of the adequacy of foreign investment review processes and the recent appointment of Mr David Irvine and Mr David Peever to the FIRB. These are welcome steps. On the latter appointments we would note that no part-time advisory positions, no matter how capable the individuals concerned, can compensate for inadequate processes that ultimately bring matters to the FIRB for consideration. We hope our recommendations for deeper reform of the FIRB and of wider supporting government arrangements will assist the Committee in its deliberations and help to inform government policy thinking.

Recommendation 1: Establish a statutory basis for the FIRB and separate the Board from the Treasury Department.

As set out in our attachment, the current FIRB structure involves a part-time board of advisors supported by a small secretariat within Treasury. This may have been an adequate structure in past years when FIRB applications were substantially fewer than is currently the case. Our view is that the current structure cannot meet contemporary demands for timely evaluation of applications and is operating on the basis of ad-hoc approaches to making approvals.

A statutory FIRB structure would require developing an Act that could usefully set out precise obligations and expectations of the Board; establish appropriate working definitions for key terms like 'national security' and 'critical infrastructure'; establish the FIRB's powers and authorities with regard to the States and Territories and other Commonwealth Departments and Agencies. A statutory body would also provide greater accountability to the Parliament by virtue of being required to provide an annual report.

Recommendation 2: FIRB should report to the National Security Committee of Cabinet, through the Treasurer.

Currently the Treasurer has sole responsibility to make determinations on FIRB recommendations. This puts the Treasurer into a difficult position of, from time to time, having to make decisions on national security matters without the Treasury currently having the expertise to advise on these areas. Under the current regime where Defence advice on FIRB matters appears to be based on making determinations around a narrow set of criteria relating to the security of facilities, there is no clear basis on which to make decisions about the national security impact of foreign investment. The NSC remains the single most important clearing house for

national security matters, making it the natural Cabinet Committee to which a new FIRB should report.

We anticipate that only a small number of FIRB decisions would be considered directly by the NSC. These would be the most complex cases, while the vast majority could be decided at officials' level under appropriate delegation from Ministers. However the NSC should set out its expectations for how the national security aspects of Foreign Investment proposals should be addressed and develop guidance for cases that should be brought to the Cabinet.

We argue that this creates a better position for the Treasurer, who would still have overall carriage of the FIRB, but be able to draw on the NSC's wider National Security remit to make informed decisions on behalf of the government.

Recommendation 3: FIRB must have adequate staffing, including individuals with professional expertise to make policy recommendations on national security matters.

As would be clear to the Committee following the 15 December 2015 hearings, the current FIRB Secretariat makes no claim to be able to assess national security matters. The orientation of FIRB and the current processes supporting it is to work as expeditiously as possible to facilitate foreign investment. To the extent that there is an inherent tension in getting a balance between free market principles and national security considerations, the current arrangements are biased to deliver market outcomes. The current FIRB relies on Defence and the intelligence agencies to advise on the national security impacts of investment, but as we have seen precisely how this remit is exercised by the other agencies is ambiguous.

The best way to deal with this situation is to strengthen the FIRB's internal capabilities to advise on national security matters. This will still require drawing on other departments and agencies to provide intelligence and other assessments, but it will at least make it possible for the FIRB to ask informed questions and seek the right information of these agencies.

To offer a sense of scale, a statutorily independent FIRB could function with a workforce of twenty to thirty APS staff, of which perhaps ten people might have professional expertise in traditional Treasury domains and ten be seconded from other agencies to work on defence, intelligence, critical infrastructure and national security assessment (with the remainder providing administrative support). This would involve a modest cost, which the Commonwealth could cap by directing that there was no net increase to current expenditure, with agencies being asked to absorb the cost of providing seconded staff.

Recommendation 4: FIRB must have defined assessment procedures to show that appropriate due-diligence has been performed on assessments.

We think this recommendation is necessary to lend greater confidence to final assessments. In the case of the Port of Darwin, for example, it seems that Treasury investigation of the company in question was limited, to say the least. It cannot help public confidence in the quality of decision-making if, for example, Treasury's position – as put at the 15 December 2015 hearings – is simply that it is necessary to 'look past' the nature of Chinese state and Communist Party relations with Chinese business.

The evidence provided to the 15 December 2015 hearings does not make it clear precisely what due diligence was performed in relation to the Port of Darwin, but it is clear that it did *not* involve consulting with international intelligence partners; or translating publicly available Chinese language information about the company, or Commonwealth agencies seeking that information from the company or from the Northern Territory Government.

We accept that it may be necessary to keep aspects of due-diligence procedures classified. This does not mean to say that the absence of such processes is an appropriate security measure.

We note that the Government's statement, *Australia's Foreign Investment Policy*, (originally released in June 2010 and re-issued in June 2015) asserts an aversion to 'hard and fast rules' in favour of a 'case by case' approach. We think it is important to retain flexibility in how the FIRB assesses cases, but flexibility shouldn't be equated to a lack of systematic processes to review applications. A 'case by case' approach should still be based on discoverable and thorough-going processes involving detailed analysis. As such we think that significant effort should be devoted to developing better quality analytical tools to support FIRB assessments.

A useful model to inform FIRB planning is the US Treasury Department's Office of Investment Security paper titled *Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States*. This public document sets out the processes CFIUS uses to analyse national security risk and lists national security factors that will be taken into consideration in making assessments.³

³ US Treasury Department, Office of Investment Security; *Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States*. (8 December 2008) (<https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUSGuidance.pdf>.)

Recommendation 5: A whole of Government Deputy Secretary level management committee is established to support the FIRB's processes

It is surprising that a Deputy Secretary Committee of this nature doesn't already exist. These structures are commonly used when it becomes necessary to introduce a higher priority, closer focus and urgency to emerging policy issues. A whole of government committee bringing together Deputy Secretaries will act as a forcing function to ensure that separate departments and agencies put the right priority on key issues.

A regular meeting of Deputy Secretaries will be able to surface emerging problems; agree on matters that need to be brought to Ministers' attention; ensure the right questions are asked and the right research is done, and; agree practical measures to ensure thorough and consistent treatment of foreign investment applications.

We do not seek to prescribe how this group should function because we are confident – based on our knowledge of how similar groups have operated on matters like defence export approvals and counter-proliferation – that its establishment will significantly lift the performance of Commonwealth agencies in supporting FIRB.

It should be noted that a whole of Government Deputy Secretary Committee focussed on FIRB matters closely parallels the structure used by the United States to manage foreign investment. The Committee on Foreign Investment in the United States (CFIUS) is an interdepartmental grouping of agencies, represented by the heads of each agency and responsible to the President for reviewing potential investments. A parallel Australian grouping would establish a basis for closer cooperation with the US on investment matters, drawing on the combined capabilities of our intelligence agencies and ensuring an alignment of approach with our closest ally.

Our assumption is that a Deputy Secretary Committee would need to become a permanent feature of FIRB processes.

Recommendation 6: Better define critical infrastructure and bring this more sharply into the FIRB's focus.

At present it seems that the key triggers for FIRB's involvement in assessing Foreign Investment applications are arbitrarily established dollar values for certain investment categories. For example FIRB would have had the authority to approve the sale of the Darwin Port Operator had that business unit in the Port of Darwin been valued at over \$252 million dollars. FIRB approval was not required below that dollar value. From a strategic perspective the assessed dollar value of an element of critical infrastructure may not be the most relevant factor in considering the national security value of a potential foreign investment. There is, after all, only one Port of Darwin regardless of its commercial valuation.

We suggest that the role of critical infrastructure needs to be given more prominent treatment in FIRB consideration. 'Infrastructure' shouldn't be thought of as only physical assets, but also production systems and networks. This includes such areas as maritime ports and airports, communications systems, power generation, distribution and transmission, hospitals and medical facilities, critical industrial capabilities used to support the Australian Defence Force, and essential Government infrastructure.

As set out in our supporting attachment, many countries limit foreign investment in critical infrastructure sectors such as transport, telecommunications, energy, and defence either through blanket exemptions or contractual procedures.

There should be strong policy and organisational connections established between FIRB processes and the development of Critical Infrastructure policy, much of which is led by the Attorney General's Department. This approach would more closely align Australian processes with those of the United States among other countries.

Recommendation 7: The new FIRB structure should develop a classified paper for Government consideration on managing Chinese foreign direct investment.

Over the course of the Port of Darwin issue we have been surprised by some public comments, including from researchers and from Australian officials about the nature of foreign direct investment from China. Writing in *The Australian* on 19 November 2015, researcher Dr Linda Jakobson said:

Each enterprise in China — everyone, for that matter, in an authoritarian one-party state — is expected to bear in mind the party-state's interests. Stating that the existence of an armed militia within the enterprise and ownership by a person with connections to the Communist Party are criteria for not allowing investment into Australia means Australia should not allow any investment from China. The existence of armed militias and connections to the party are integral to the way society functions in China.

Committee members will also recall Duncan Lewis during the 15 December 2015 hearings:

The fact that Landbridge or in fact any other Chinese commercial entity may have connections with the Chinese government or may have individuals on their boards or in their management structures who have been part of the Chinese government is hardly remarkable, and I suspect if you had a look at many Australian firms you would find very much the same kind of thing.

Our view is that the integral nature of relations between Chinese business and the Chinese state and Communist Party is, in fact, quite different to the normal operation of private business in Australia.

Among our largest trading partners, China is alone in its level of state ownership and control of companies. Whether the Chinese government controls a particular Chinese company isn't a simple question as many Chinese publicly listed companies are at least partly owned by the state. As we have seen from recent cases, privately-owned Chinese companies will have connections with the Communist Party that, at best, raise ambiguities about the Chinese State's influence with their private sector.

We also note recent reports indicating that Chinese espionage activities continue to focus heavily on Australia. The Committee discussed one such incident relating to the Bureau of Meteorology.

We do not take the view that no Chinese foreign direct investment should be allowed into Australia – on the contrary: appropriate investment should be welcomed. But we can't afford to be naïve about the relationship between business, Party and State in China. Our view is that the Australian Government should have an informed understanding of the matter, which can help shape approaches to Chinese foreign direct investment proposals. As such we should make clear to China that we welcome foreign investment so long as such investments don't compromise our national security.

It would therefore be appropriate for the new FIRB system to develop a classified paper for Cabinet consideration on how best to manage Chinese foreign direct investment, particularly as it relates to critical infrastructure.

Recommendation 8: Establish a dialogue on Foreign Investment matters involving the 'Five eyes' countries, that is Australia's closest allies: the US, UK, New Zealand and Canada.

We note that many countries are faced with similar challenges in terms of welcoming foreign investment at the same time as needing to protect critical infrastructure. There would be significant value in sharing best practice strategies on handling foreign investment proposals among our closest intelligence partners, and in establishing links between the FIRB-like structures in the so-called 'five eyes' countries.

Defence's handling of the Port of Darwin issue.

The Port of Darwin matter has now been thoroughly canvassed. Based on evidence provided to the Committee on 15 December 2015 we know that Defence was aware of the possible privatisation of the Port from early 2014 and was aware of the bidders for the lease from May 2015. We also know that the issue of foreign direct investment in the context of the Port of Darwin was discussed at the NSC on 6 October 2015, a week before the AUSMIN Ministerial Dialogue held in Boston on 12 October. Over this time frame we find it remarkable that the Secretary of Defence can characterise the failure to raise the issue of the lease with the United States as an 'oversight.'

This, however, is all history. There are two points which should be clarified in considering Defence's handling of matters relating to the Port of Darwin into the future. The first is to develop a clearer sense of the role of the 'deed of licence', Defence negotiated on the Port with the Northern Territory Government. On 15 December Secretary Richardson advised the Committee:

The deed of licence is the most extensive deed of licence that we have with any port in Australia, precisely because the port of Darwin, as others have indicated, is strategically important. Precisely because of that, we exercised great care with the deed of licence.

However at the Defence Portfolio Senate Estimates Committee hearings on 21 October 2015, the Chief of Navy, Vice Admiral Barrett said that 'That deed of licence runs until 2040 should we choose to exercise all our options to extend.'

It seems that the maximum duration of Defence's assured access to the Port is for 24 years and that is so only *if it is possible* to exercise options to extend the deed. This stands in contrast to the 99 year lease of key sections of the Port.

The Committee may wish to seek assurances that the deed of licence provides sufficient protection for Australia's long term strategic interests.

Finally, the Committee may wish to seek assurance that appropriate measures have been put in place to manage effective consultations between Australia and the United States relating to the planned enhanced defence cooperation, in particular with the US Marine Corps, operating out of the Port of Darwin. At the October 2015 Estimates Committee hearings, Defence Minister Payne indicated that discussions at the AUSMIN meeting a few weeks earlier:

... reinforced our very strong agreement to pursue enhanced naval cooperation. That will include additional combined training and exercises between our two navies. The capacity for combined activities and interoperability is very important to both of us. ... It is our view that the closer and earlier the discussions with the United States as part of that process, the more effective our interoperability can be.

We strongly endorse this approach, noting that it will inevitably lead to greater United States and Australian Defence Force demands on the Port of Darwin. We think it would be valuable for the Committee to explore how this strategic objective can be assured, through close consultation with our ally, in the context of the 99 year lease of the Port of Darwin. A genuinely consultative approach with the United States will also assist any future engagement with the US over the use of other Australian port facilities including Fremantle in Western Australia.

Attachment 1: Comparison of Foreign Investment Review Processes in Australia, the United States, the United Kingdom, Canada and the People's Republic of China

Zoe Hawkins, James Mugg, Mercedes Page & Alice Slevison⁴

Australia

The Australian government 'welcomes foreign investment' and avoids blanket bans on certain investment types in an effort to maintain a 'flexible approach'.⁵ However, Australia reviews investment on a case-by-case basis to ensure that no investment is made contrary to the national interest.

Process

Australia's foreign investment review process has been recently updated with the 'Foreign Investment Reform Package' and is now governed by the following three acts and their associated regulations:

1. The Foreign Acquisitions and Takeovers Legislation Amendment Act 2015 (FATA)⁶
2. The Foreign Acquisitions and Takeovers Fees Imposition Act 2015⁷
3. Register of Foreign Ownership of Agricultural Land Act 2015⁸

Potential investments are identified for government assessment on the basis of monetary thresholds. The target industry and character of the investor determine the value above which investments must be evaluated by the Foreign Investment Review Board (FIRB). The thresholds are indexed annually on 1st January in accordance with the GDP implicit price deflator.⁹

Different sectors are subject to different notification criteria. For example, general business acquisitions must be screened if the investment or business in question is valued above \$252 million, whilst those in agribusiness require attention if over only \$55 million.¹⁰

⁴ The authors are Interns at ASPI.

⁵ The Treasurer, 'Australia's Foreign Investment Policy', December 2015, p. 1, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

⁶ Australian Government, *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*, <https://www.comlaw.gov.au/Details/C2015A00150>.

⁷ Australian Government, *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*, <https://www.comlaw.gov.au/Details/C2015A00152>.

⁸ Australian Government, *Register of Foreign Ownership of Agricultural Land Act 2015*, <https://www.comlaw.gov.au/Details/C2015A00151>.

⁹ Australian Government, Foreign Investment Review Board, 'Monetary Thresholds', <https://firb.gov.au/exemption-thresholds/monetary-thresholds/>.

¹⁰ *Ibid.*

FIRB also reflects Australia's commitment to Free Trade Agreements (FTA) by offering higher review thresholds to investors from FTA partner countries. As such, private investors from FTA partner countries can invest in businesses valued up to \$1,094 million without screening, while other applicants are assessed for any investment over \$252 million. Any investment from a foreign government is subject to screening, regardless of its value.¹¹

Under the new Fees Imposition Act, foreign investments that meet the aforementioned threshold criteria must register their proposal with FIRB for evaluation and pay an associated application fee. The size of the fee is determined by the size of the potential investment and target sector.¹² This reform is intended to relocate the administration costs of the review process away from the Australian taxpayer and onto the foreign investor.¹³

As part of the recent reforms, harsher punishments have also been introduced for investors who fail to comply with the FIRB conditions on investment in residential real estate.¹⁴ Foreign investors who self-disclose their breach of the regulations will receive lesser penalties. However, those apprehended for non-compliance by the Australian Tax Office (ATO) will be subject to a new strict infringement notices, civil penalty orders and even criminal prosecution.¹⁵ The ATO has sophisticated enforcement capabilities through its data matching program that integrates information from FIRB, immigration, AUSTRAC, bank, and state/territory land title data.¹⁶

Any foreign investment that is not covered by the FATA may be made without undergoing government review of the implications for the national interest.¹⁷

Critical Industries

The FIRB identifies several sectors for which foreign investment above a certain threshold merits government review. Agribusiness, agricultural land, commercial land, residential land, business acquisitions, mining and production tenements, and media are all allocated specific investment conditions and thresholds.¹⁸ This acts as

¹¹ *Ibid.*

¹² Australian Government, Foreign Investment Review Board, 'Fees', <https://firb.gov.au/applications/fees/>.

¹³ The Treasurer, 'Stronger Foreign Investment Regime Comes into Force', December 1st 2015, <http://sjm.ministers.treasury.gov.au/media-release/016-2015/>.

¹⁴ Australian Government, Foreign Investment Review Board, 'Compliance', <https://firb.gov.au/real-estate/compliance/>.

¹⁵ Australian Government, Foreign Investment Review Board, 'Residential real estate – penalties and offences for non compliance', released November 2015, <https://firb.gov.au/resources/guidance/gn11/>.

¹⁶ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Residential Real Estate', p. 1, https://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf.

¹⁷ Bath, 'Foreign Investment, the National Interest and National Security', 7.

¹⁸ Australian Government, Foreign Investment Review Board, 'Monetary Thresholds', <https://firb.gov.au/exemption-thresholds/monetary-thresholds/>. <http://firb.gov.au/exemption-thresholds/monetary-thresholds/>.

a tacit acknowledgement of their status as a critical investment area in the eyes of the Australian Government.

On top of these broad areas of interest, special considerations apply to 'sensitive businesses', which are deemed to include: 'media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities'.¹⁹

Significantly, any investment in Australian media enterprises that constitutes 5% ownership or more of an entity warrants review, regardless of the value of the investment or the investor's profile.²⁰ This is the only sector that features no exemptions or leniency for FTA partners.

Foreign investment in land is also deemed critically linked to Australia's national interest. FIRB's screening requirements establish a lower report threshold for 'sensitive land', which is explained to include 'mines and critical infrastructure (for example, an airport or port)'.²¹ However, this condition only applies to private investors whom are not beneficiaries of a higher FTA status threshold.

The recent introduction of the *Register of Foreign Ownership of Agricultural Land Act 2015* has underlined the importance the government is placing on monitoring foreign acquisition of farm land. As part of the same reforms, the FIRB has lowered the screening threshold for the purchase of agricultural land to \$15 million, and that of agribusiness to \$55 million.²²

When outlining the above reforms, Treasurer Scott Morrison emphasised that the Government would also be prioritising collaboration between federal and state governments to 'ensure that sales of critical infrastructure to foreign investors are properly scrutinised'.²³ This assertion is most likely informed by recent criticism of the Northern Territory Government for leasing part of the Darwin Port to a Chinese company.²⁴

Additional pre-existing legislation also imposes conditions on foreign investment into specific sectors.²⁵ Investment in the banking sector is also governed by the *Banking Act 1959* and the *Financial Sector (Shareholdings) Act 1998*, while ship ownership is

¹⁹ Ibid (see first footnote).

²⁰ Ibid (see second footnote).

²¹ Ibid (see fourth footnote).

²² The Treasurer, 'Stronger Foreign Investment Regime Comes into Force', December 1st 2015, <http://sjm.ministers.treasury.gov.au/media-release/016-2015/>.

²³ Ibid.

²⁴ Angus Grigg, 'Port of Darwin is a strategic defence port' says Port of Darwin CEO', *Australian Financial Review*, November 25th 2015, <http://www.afr.com/news/politics/national/port-of-darwin-is-a-strategic-defence-port-says-port-of-darwin-ceo-20151124-gl6rp7>.

²⁵ The Treasurer, 'Australia's Foreign Investment Policy', released December 2015, p. 6, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

covered by the *Shipping Registration Act 1981*. Similarly, foreign investment in some airlines and airports is restricted to 49% ownership under the *Air Navigation Act 1920*, the *Qantas Sale Act 1992* and the *Airports Act 1996*.

Decision-Making

The FATA gives responsibility to the Treasurer to determine the acceptability of foreign investments. The authority to approve a proposal, attach conditions to its implementation or deny it rests entirely with the Treasurer (or his/her delegate), and applicants do not have the right to appeal any determination.²⁶

The FIRB is a non-statutory advisory body that provides the Treasurer with recommendations. It examines potential investments and advises the Treasurer of potential implications for the national interest.²⁷

A secretariat within the Treasury supports the advisory efforts of the FIRB to the Treasurer. This body is in charge of applying the framework to day-to-day business, agricultural land and commercial land proposals.²⁸

In line with recent reforms, the ATO has inherited responsibility for assessing foreign investment in residential real estate and managing a new register of foreign investment in agricultural land.²⁹

Australia's relevant national security agencies also offer advice on whether any investment proposals may potentially undermine national security.³⁰

Transparency

The FIRB regulations establish dollar-value thresholds that govern what triggers a review of investment. The FIRB itself is also subject to the Australian Government's 'Regulator Performance Framework', which uses six key performance indicators to assess the effectiveness and efficiency of the FIRB. This review is conducted annually through 'externally validated self-assessment'.³¹

During recent reforms, focus has been directed at increasing the transparency and awareness of foreign ownership and investment in Australia through the establishment of 'a comprehensive land register'. There are plans to extend this

²⁶Australian Government, Parliament of Australia, 'Australia's Foreign Investment Policy', http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/AustForeignInvest.

²⁷ The Treasurer, 'Australia's Foreign Investment Policy', December 2015, p. 2, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

²⁸ Ibid.

²⁹ Ibid.

³⁰ The Treasurer, 'Australia's Foreign Investment Policy', December 2015, p. 8, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

³¹ Australian Government, Foreign Investment Review Board, 'Regulator Performance Framework', <https://firb.gov.au/about/regulator-performance-framework/>.

effort into the establishment of a water entitlements register within the next 12 months.³²

However, there is less clarity around how the government undertakes its decision to approve or deny an investment, as this is explicitly left to the discretion of the Treasurer. As such, although a foreign investor is provided with a determination within 30 days, it is unclear whether the FIRB is required to provide any supporting explanation for a potential rejection.³³

Terminology

There is no statutory definition of Australia's 'national interest' under the FATA. Instead, the legislation confers upon the Treasurer the discretion to determine whether investments are contrary to the national interest, on a case-by-case basis.³⁴ The FATA offers no guidance or framework for how the Treasurer should consider the impacts of foreign investments on the national interest.³⁵

A recently published 'Foreign Investment Reforms Factsheet: Foreign Investment in Australia', outlines key factors that the Treasurer considers when determining an investment's impact on the national interest.³⁶ National interest factors are said to include: 'national security, competition, other Australian Government policies (including tax), impact on the economy and the community, and the investor's character'. These considerations are discussed in greater detail in the new 'Australia's Foreign Investment Policy'.³⁷ This is in addition to the FIRB's acknowledgement of 'sensitive business' and 'sensitive land.'

While the FIRB does not specifically define critical national infrastructure (CNI), other government strategies outline specific definitions. The 'Critical Infrastructure Resilience Strategy' defines CNI as:

Those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or

³² Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Reform Overview', p. 2, https://firb.gov.au/files/2015/09/FIRB_fact_sheet_reform_overview.pdf.

³³ Australian Government, Foreign Investment Review Board, 'Extending the Statutory Decision Period', released November 2015, https://firb.gov.au/files/2015/11/41_GN_FIRB_Nov_15.pdf.

³⁴ The Treasurer, 'Australia's Foreign Investment Policy', released December 2015, p. 7, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

³⁵ Bath, 'Foreign Investment, the National Interest and National Security', 12-13.

³⁶ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Foreign Investment in Australia', p. 2, https://firb.gov.au/files/2015/09/FIRB_fact_sheet_Foreign_investment_overview.pdf.

³⁷ The Treasurer, 'Australia's Foreign Investment Policy', released December 2015, p. 8, http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.

economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security.³⁸

Notable Cases

In November 2015, Treasurer Morrison vetoed the sale of S. Kidman and Co. Limited to Chinese investors.³⁹ The estate constitutes 1.3% of Australia's total land area and 2.5% of its agricultural land. Based on FIRB recommendations, the Treasurer deemed it contrary to the national interest to sell this asset to a foreign investor.

In March 2015, then Treasurer Joe Hockey announced the forced sale of the \$39 million mansion, Ville de Mare, which was then owned by China's 15th richest man, Xu Jiayin.⁴⁰ The property had been acquired in contravention to FIRB regulations, which require all foreign nationals to obtain approval before purchasing residential real estate and limits the purchase of existing properties to temporary residents. Despite being purchased through an Australian company, FIRB maintained that its position as a 'shelf company' for a Hong Kong-based real estate group rendered the ownership a violation of the regulations. As such, the foreign investor was given 90 days to sell the waterfront property.

Key Statements

'Australia's Foreign Investment policy' (December 2015)⁴¹

FIRB Factsheet: 'Foreign Investment in Australia'⁴²

FIRB Factsheet: 'Reform Overview'⁴³

FIRB Factsheet: 'Legislative Overview'⁴⁴

³⁸ Australian Government, 'Critical Infrastructure Resilience Strategy', 2010, p. 8,

http://www.emergency.qld.gov.au/publications/pdf/Critical_Infrastructure_Resilience_Strategy.pdf.

³⁹ The Treasurer, 'Statement on decision to prevent sale of S. Kidman & Co. Limited', released November 19th 2015, <http://sjm.ministers.treasury.gov.au/media-release/011-2015/>.

⁴⁰ The Treasurer, 'Treasurer orders foreign investor to sell illegally purchased \$29 million Sydney mansion', released March 3rd 2015, <http://jbh.ministers.treasury.gov.au/media-release/011-2015/>.

⁴¹ The Treasurer, 'Australia's Foreign Investment Policy', released December 2015.

(http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf.)

⁴² Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Foreign Investment in Australia'.

(https://firb.gov.au/files/2015/09/FIRB_fact_sheet_Foreign_investment_overview.pdf.)

⁴³ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Reform Overview'. (https://firb.gov.au/files/2015/09/FIRB_fact_sheet_reform_overview.pdf.)

⁴⁴ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Legislative Overview'. (https://firb.gov.au/files/2015/09/FIRB_fact_sheet_legislation_overview.pdf.)

FIRB Factsheet: 'Agriculture'⁴⁵

FIRB Factsheet: 'Business Investment'⁴⁶

FIRB Factsheet: 'Residential Real Estate'⁴⁷

⁴⁵ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Agriculture'. (https://firb.gov.au/files/2015/09/FIRB_fact_sheet_agriculture.pdf.)

⁴⁶ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Business Investment'. (https://firb.gov.au/files/2015/09/FIRB_fact_sheet_business.pdf.)

⁴⁷ Australian Government, Foreign Investment Review Board, 'Foreign Investment Reforms Factsheet: Residential Real Estate'. (https://firb.gov.au/files/2015/09/FIRB_fact_sheet_residential.pdf.)

The United States

The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee in service to the President, tasked with monitoring foreign investment. Where transactions could result in foreign control of US companies or assets, parties to the transaction are obligated to voluntarily file a notice with the CFIUS for review. If there are concerns that a transaction will have negative national security implications, the CFIUS can negotiate to mitigate concerns, or can recommend to the President that the transaction is blocked. In cases where parties do not file notice with CFIUS, the transaction can still be investigated and is subject to Presidential intervention at any time, including compulsory divestment.

Process

CFIUS operates by reviewing voluntarily-filed notices by parties to a proposed foreign investment transaction. Parties can consult with CFIUS staff prior to filing a formal notification in order to identify any potential issues. CFIUS staff have 30 days to review the proposed transaction, and can request additional information if needed. In cases where a matter of concern is raised, CFIUS can opt to conduct an additional investigation of up to 45 days and is authorised to negotiate measures to mitigate national security concerns. If CFIUS determines that there is still a possible risk to national security at the end of the 45 days, it will make a recommendation to the President, who has 15 days to decide whether to use their powers to prohibit or suspend the transaction.⁴⁸ A maximum of 90 days can pass between filing notice and a final decision by the President.

Filing notice with CFIUS is a voluntary action but if parties do not notify CFIUS of transactions, the power of the President to intervene has no time limit. If the transaction is later found to have national security implications, the foreign party can be ordered by the President to divest, as happened to the Chinese-owned Ralls Corporation in 2012.

Critical Industries

The Foreign Investment and National Security Act (FINSAs) details which transactions are subject to review. There are no specific industries named, instead leaving it to CFIUS to consider each transaction on a case-by-case basis. Transactions are subject to CFIUS if they fall under the criteria of 'covered transactions,' as laid out in the legislation. Covered transactions are defined as follows:

⁴⁸ US Government, Committee on Foreign Investment in the United States, '*CFIUS Legislation*', updated December 1 2010. (<https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-legislation.aspx>.)

Covered transaction: Any transaction proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.

“Greenfield” investment: Greenfield, or start-up investment, is not covered.

Asset acquisition: Not a covered transaction if the assets acquired by a foreign person do not constitute a “U.S. business.”

Long-term lease: May be a covered transaction only if a foreign lessee makes substantially all business decisions concerning operation of a leased U.S. business, as if it were the owner.

Lending transaction: Not a covered transaction unless the foreign person acquires financial or governance rights characteristic of an equity investment, but not of a loan. Imminent default giving a foreign person actual control of collateral that constitutes a U.S. business is a covered transaction – but lenders in the ordinary course may qualify for an exception.

Incremental acquisition: After CFIUS concludes action on a covered transaction, the foreign person’s acquisition of additional interest in a U.S. business is not a new covered transaction.⁴⁹

Decision-Making

CFIUS operates under the office of the President and is an inter-agency committee, comprising the heads of sixteen federal agencies including but not limited to the Departments of Treasury, Justice, Homeland Security, Commerce, Defense, State and Energy. It was established in 1975 in response to OPEC nations’ increasing investment in the US, and was tasked with coordinating US policy on foreign investment.

Transparency

Due to the national security focus, the process is mostly opaque. Even pre-filing consultations with CFIUS are confidential. FINSA requires that CFIUS give confidential briefings to members of congress at the conclusion of the investigation process, if requested.⁵⁰

Terminology

CFIUS is explicitly tasked with identifying national security threats. In 1988, a bid to purchase a US computer chip company by Japanese firm, Fujitsu, was a factor in

⁴⁹ *Ibid.*

⁵⁰ US Government, Committee on Foreign Investment in the United States, ‘CFIUS Reform: The Foreign Investment & National Security Act of 2007 (FINSA)’, 14 November 2008, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Summary-FINSA.pdf>.

prompting Congress to pass the Exon-Florio amendment to the Defense Production Act of 1950. The objective was to review foreign investment in sensitive US industries. The amendment granted the President the authority to block a foreign acquisition when 'national security' is negatively impacted. This is subject to two conditions: first, that the President has credible evidence that the transaction negatively impacts on national security and, second, that the impact cannot be mitigated by existing law enforcement measures. CFIUS was tasked by the Reagan administration to advise the President on when to exercise the power granted by Exon-Florio.⁵¹

The most recent amendment to the process was the introduction of FINSA in 2007. This occurred after controversy in 2006 over the planned acquisition of multiple major US ports by Dubai Ports World. Opponents of the acquisition in Congress argued that it would increase the risk of a terrorist attack on the United States. FINSA requires CFIUS to investigate the national security impacts of any and all foreign acquisitions of 'critical infrastructure.'⁵²

Notable Cases

In 1987, the Japanese company, Fujitsu Ltd., made a bid to purchase US computer chip company, Fairchild Semiconductor Co., which was owned at the time by Schlumberger Ltd., a French company. Japan and the US were going through a period of strained trade relations, and Fairchild Semiconductor was a major supplier of computer chips for the military. The transaction was not opposed by President Reagan at the time, but it was cancelled by Fujitsu and Schlumberger and Fairchild Semiconductor was purchased by a US corporation. The event was a catalyst in the creation of clear guidelines for blocking foreign takeovers of US companies linked to national security, including the Exon-Florio amendment.⁵³

In 1990, President George H.W. Bush exercised power under Exon-Florio to direct the China National Aero-Technology Import and Export Corporation (CATIC) to divest from its acquisition of MAMCO Manufacturing. MAMCO manufactured parts for aircraft and therefore provided access to technology that China would otherwise only have access to under an export license.⁵⁴

In early 2006, Dubai Ports World (DP World) made a bid to acquire control of six major commercial port operations from British-owned P&O Company. The foreign sale of such a critical asset was publicly debated as a security risk in the post-9/11

⁵¹ Masters, Jonathan, 'Foreign Investment and US National Security,' *Council on Foreign Relations*, September 27 2013, <http://www.cfr.org/foreign-direct-investment/foreign-investment-us-national-security/p31477>.

⁵² Jackson, James K. 'The Committee on Foreign Investment in the United States (CFIUS), *Congressional Research Service*, March 6 2014, <https://www.fas.org/sqp/crs/natsec/RL33388.pdf>.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

era. The ports operations were sold by DP World in December 2006 to a US asset management company. The controversy was a major factor in the design of FINSA.

In February 2011, CFIUS made a recommendation to President Obama that he block the proposed acquisition of US technology firm, 3Leaf, by Chinese telecom Huawei. Huawei voluntarily divested before the President issued any order.⁵⁵

In September 2012, President Obama ordered Chinese-owned Ralls Corporation to divest its interests in Oregon wind farms. The site was located near restricted US Navy airspace where drones were being tested, and the order was based on national security concerns. Ralls had purchased the sites in February 2012 without notifying CFIUS and was thus indefinitely subject to Exon-Florio.⁵⁶ Ralls Corporation filed suit against CFIUS and the Obama administration, saying that its rights had been violated and that it had not provided evidence for the decision. A US court in 2014 ruled that the administration had failed to provide justification for its decision against Ralls, which may provide precedent for Chinese firms seeking leverage when making investments in the US.⁵⁷ A confidential settlement between Ralls and the administration was finally reached in 2015.⁵⁸

Key Statements

Summary of CFIUS regulations as of November 14, 2008⁵⁹

Full text of CFIUS regulations as of November 21, 2008⁶⁰

CFIUS Annual Report to Congress for Calendar Year 2013⁶¹

⁵⁵ 'Huawei backs away from 3Leaf acquisition,' *Reuters*, Feb 19 2011,

<http://www.reuters.com/article/2011/02/19/us-huawei-3leaf-idUSTRE71138920110219>.

⁵⁶ Masters, Jonathan, 'Foreign Investment and US National Security,' *Council on Foreign Relations*, September 27 2013,

<http://www.cfr.org/foreign-direct-investment/foreign-investment-us-national-security/p31477>.

⁵⁷ Mauldin, William and Kendall, Brent, 'Appeals Court Faults Government Order Prohibiting Ralls Corp. Wind Farm Deal,' *The Wall Street Journal*, July 15 2014,

<http://www.wsj.com/articles/appeals-court-faults-government-order-prohibiting-ralls-corp-wind-farm-deal-1405439077>.

⁵⁸ Dockery, Stephen, 'Chinese Wind Company Settles with U.S. in CFIUS Battle,' *The Wall Street Journal*, October 9 2015,

<http://blogs.wsj.com/riskandcompliance/2015/10/09/chinese-wind-company-settles-with-u-s-in-cfius-battle/>.

⁵⁹ US Government, US Department of the Treasury, 'CFIUS Reform: Final Regulations Issued on November 14, 2008', <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Summary-FinalReqs.pdf>

⁶⁰ US Government, US Department of the Treasury, 'Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule' <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS-Final-Regulations-new.pdf>

⁶¹ US Government, Committee on Foreign Investment in the United States, 'Annual Report to Congress,' Calendar Year 2013, <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/2014%20CFIUS%20Annual%20Report%20for%20Public%20Release.pdf>

The United Kingdom

The UK encourages foreign investment, which it identifies as being crucial to the country's economic prosperity. The UK treats foreign and domestic investments equally and both are subject to the same laws. As such, there are no sectors closed to inward foreign investment and the UK has no formal legal framework, screening process, or stand-alone regime for reviewing foreign investment. There are some provisions for intervention in investments on national security grounds on a case-by-case basis, which are covered by a number of UK and EU acts and regulations.

Process

There are no sectors closed to inward foreign investment in the UK, which has no specific formal legal framework, screening process, or stand-alone regime for reviewing foreign investment. Her Majesty's Government may, however, review foreign investment under certain circumstances.

The government may review foreign investment when competition issues arise as the result of a merger of two or more entities. In this situation, UK competition authorities and the European Commission are able to review the investment. This review process is possible under the *UK Enterprise Act (2002)* and EU Merger Commission regulations. Domestic investment is equally subject to this review process.

In this situation, the review of the investment goes to the Competition and Markets Authority (CMA)⁶² (formerly the Office for Fair Trading)⁶³ which may refer the transaction for a Phase 2 investigation involving an Inquiry Group of CMA panel members if there is the potential that the investment will result in anti-competitive practices. The CMA may consult with the merger/acquisition parties, and typically issues a decision within 30 days. If a merger is approved, that decision is final.

A review of a merger between two or more companies when no competition issues are present is possible when the relevant Secretary of State deems it is in the public interest. This is possible under the *UK Enterprise Act (2002)*⁶⁴ and the EU Merger Regulation (the EUMR).⁶⁵ Intervention is also allowed through Article 346 of the Treaty on the Functioning of the European Union (TFEU)⁶⁶. The public interest is defined by the UK Enterprise Act as either involving media plurality, involving national security (no definition), or involving the stability of the UK financial system.

⁶²UK Government, Competition and Markets Authority (CMA) website, <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

⁶³ UK Government, Office for Fair Trading website (archived), <https://www.gov.uk/government/organisations/office-of-fair-trading>.

⁶⁴ UK Government, *Enterprise Act (2002)*, <http://www.legislation.gov.uk/ukpga/2002/40/contents>.

⁶⁵ European Commission, 'Competition-Mergers,' http://ec.europa.eu/competition/mergers/overview_en.html.

⁶⁶ European Defence Agency, 'Article 346 of the TFEU,' <https://www.eda.europa.eu/procurement-gateway/information/codeda-regulationaba/article-346-of-the-tfeu>.

In this situation, informal consultations typically take place with the appropriate UK agencies (such as Ministry of Defence) to negotiate any issues prior to the transaction being finalised. There is no obligation to notify UK authorities about a transaction that may raise public interest issues. If the government was not consulted or the government and the parties were not able to come to an agreement, the relevant Secretary of State (SoS) can issue an intervention notice, and a review of the merger will be undertaken by the CMA. The SoS can instruct the parties to withhold sensitive information on national security grounds from the CMA review. If the SoS decides the merger is against the public interest, they can block the transaction or impose statutory undertakings on the merged parties so it does not act against the public interest (as per sections 42 and 58 of the Enterprise Act 2002).

This review process applies to both domestic and foreign investments.⁶⁷ The UK government may intervene in foreign investment of any size (there is no minimum threshold from the available information) in the areas of national security or media.

Notable Cases

The UK defines media, finance, and national security as being in the public interest (*Enterprise Act 2002*) and therefore as being critical areas. There is no mention of factors or levels taken in to consideration when reviewing investment on national security grounds.

Certain areas of national infrastructure are deemed 'critical national infrastructure' (CNI). CNI is defined as:

... those assets, services and systems that support the economic, political and social life of the UK whose importance is such that any entire or partial loss or compromise could cause large scale loss of life; have a serious impact on the national economy; have other grave social consequences for the community, or any substantial part of the community; or be of immediate concern to the national government.⁶⁸

However, investment in areas of CNI is open to foreign and domestic investors alike.

⁶⁷ The process surrounding reviews of foreign investment on national security grounds that do not include mergers or anti-competitiveness is vague and not explicit. The recently released [2015 National Security Strategy and Strategic Defence and Security Review](#) states on page 73 that in relation to foreign investment, "Where any national security concerns may arise, the Government will quickly assess the risks and mitigation to provide greater certainty for investors."

⁶⁸ UK Government, Centre for Protection of National Infrastructure, 'Critical National Infrastructure,' www.cpni.gov.uk/about/cni.

Decision-Making

The decision making authority for foreign investment review lies with the Secretary of State, from the relevant government department, and the Competition and Markets Authority.

Transparency

Initial consultation over investments raising public interest concerns are held in private. When a SoS issues a formal review on public interest grounds, the process is made public. It is not clear from the legislation whether the public is invited to make submissions for consideration.

Terminology

The UK does not use an explicit definition of 'national security' or 'national interest.' The UK does, however, define 'critical national infrastructure' or CNI (as seen above) as certain 'critical' elements of infrastructure, the loss or compromise of which would have a major, detrimental impact on the availability or integrity of essential services, leading to severe economic or social consequences or to loss of life.

Notable Cases

In 2005, the Lockheed Martin UK proposal to acquire Insys Group prompted intervention based on national security grounds.⁶⁹ Lockheed Martin had been in consultations with the Ministry of Defence and the then-Office of Fair Trading (OFT) over the merger, when it was unexpectedly served a Special Intervention notice on national security grounds. Lockheed Martin accepted statutory undertakings to resolve government concerns about the merger, and the intervention did not proceed to review by the then-Competition Commission.

Key Statements

The lack of a clear legal framework or standalone entity for reviewing foreign investment on national security grounds has been the subject of a June 2013 Parliamentary report by the Intelligence and Security Committee, *Foreign Investment in Critical National Infrastructure: The Implications for National Security*.⁷⁰

⁶⁹ Defense-Aerospace, 'Proposed Acquisition by Lockheed Martin UK of Insys Group,' September 23 2005. ([http://www.defense-aerospace.com/articles-view/release/3/63129/uk-clears-insys-acquisition-by-lockheed-\(sep-26\).html](http://www.defense-aerospace.com/articles-view/release/3/63129/uk-clears-insys-acquisition-by-lockheed-(sep-26).html).)

⁷⁰ UK Parliament, Intelligence and Security Committee, *Foreign Investment in Critical National Infrastructure: The Implications for National Security* June 2013.

Canada

The Investment Canada Act (ICA) was established in 1985 and is designed to review foreign investment in Canada, subject to specific criteria. Where an investment results in foreign control of a company worth more than a defined monetary threshold, or is injurious to national security, the investment is subject to review by the Minister of Industry. The minister's decision is based on whether the transaction will be of 'net benefit' to Canada. No definition of 'national security' is included in the ICA, leaving the interpretation to the discretion of the minister. However, national security has only once been the basis for the minister rejecting an investment.

Process

Whenever a foreign interest acquires control of a Canadian business, or establishes a new business in Canada, a notification must be filed with Industry Canada within 30 days.⁷¹ If the transaction exceeds defined monetary thresholds or has national security implications, the Minister of Industry has 45 days to decide on a response, but can unilaterally elect to take a 75 day extension of the review.

Critical Industries

Cases are subject to review based on the following criteria:

1. The foreign investor is a state-owned enterprise from a World Trade Organization (WTO) member country and the investment is made to acquire control of a non-cultural Canadian business that has gross assets, in 2014, of at least \$354 million.
2. The foreign investor is not a state-owned enterprise but is from a WTO member country, and the investment is made to acquire control of a non-cultural Canadian business that has an enterprise value, in 2014, of at least \$600 million.
3. The foreign investor is from a non-WTO country and the investment is made to acquire control of a non-cultural Canadian business with gross assets of \$5 million or more, or to acquire indirect ownership of a non-cultural Canadian business with gross assets of \$50 million or more.
4. The foreign investment is made to acquire direct control of a Canadian cultural business that has assets of at least \$5 million or the Governor in Council considers that the investment in a cultural business should be reviewed in the public interest.

⁷¹ Canadian Government, Innovation, Science and Economic Development Canada, 'Investment Canada Act,' updated March 8 2013, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00007.html.

5. The Government of Canada considers that the foreign investment may be injurious to national security.⁷²

Decision-Making

Decisions rest primarily with the Minister of Industry. The Minister of Industry has 45 days to decide on a response, but can unilaterally elect to take a 75 day extension of the review.

In cases where a national security concern is raised, the Governor-in-Council is notified and the Minister of Industry consults with the Minister of Public Safety to make a recommendation to the Governor-in-Council on whether the review should continue.

Purchases of Canadian cultural businesses are subject to review by the Minister of Canadian Heritage.⁷³

Monetary thresholds are indexed annually, and the threshold under Situation 2 is due to be raised to \$800 million in April 2017 and again to \$1 billion in April 2019.⁷⁴

Transparency

ICA contains strict confidentiality provisions, so that information provided by the parties to a transaction cannot be publicly disclosed without consent of the parties. This is intended to encourage potential investors to share all appropriate information with Industry Canada.⁷⁵

Terminology

ICA review process includes provisions for rejecting investment on the basis of national security concerns. Applications can also be rejected on the grounds that they would not be of 'net benefit' to Canada, as was the case in the 2010 BHP Billiton application to take over Potash Corporation of Saskatchewan.

Notable Cases

Only two investments have been rejected under the ICA since it was established.

In May 2008, the Government of Canada rejected a US-based company's proposed takeover of the information and geospatial businesses of MacDonald, Dettwiler and

⁷² Canadian Government, Parliament of Canada, 'The Foreign Investment Review Process in Canada,' Updated July 21 2014, <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-42-e.htm>.

⁷³ *Ibid.*

⁷⁴ Canadian Government, Innovation, Science and Economic Development Canada, 'Thresholds for Review,' updated January 15 2015, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00050.html.

⁷⁵ Canadian Government, Innovation, Science and Economic Development Canada, 'Investment Canada Act,' updated March 8 2013, https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00007.html.

Associates Ltd. The transaction was rejected on the grounds that it would not be of net benefit to Canada.⁷⁶

In October 2013, Accelero Capital Holdings, an Egyptian investment firm, had its proposal to acquire the Manitoba Telecom Services Inc. Allstream division rejected. The deal was rejected under the national security provisions of the ICA.⁷⁷

Additionally, in November 2010, Australian-based BHP Billiton withdrew its application to take over Potash Corporation of Saskatchewan after receiving notice that the takeover was likely to be rejected.

Key Statements

The Investment Canada Act⁷⁸

Regulations Amending the Investment Canada Regulations⁷⁹

Regulations Amending the National Security Review of Investments Regulations⁸⁰

Thresholds for Review⁸¹

⁷⁶ 'Govt. confirms decision to block sale of MDA space division,' *CBCnews*, May 9 2008, <http://www.cbc.ca/news/technology/govt-confirms-decision-to-block-sale-of-mda-space-division-1.698584>.

⁷⁷ Dobby, Christine, 'Is Ottawa's rejection about Allstream or Egyptian tycoon Naguib Sawiris?' *The Financial Post*, October 8 2013, http://business.financialpost.com/fp-tech-desk/is-ottawas-rejection-about-allstream-or-egyptian-tycoon-naguib-sawiris?_isa=8f23-561a.

⁷⁸ Government of Canada, Innovation, Science and Economic Development Canada, 'The Investment Canada Act' <http://laws-lois.justice.gc.ca/eng/acts/I-21.8/index.html>

⁷⁹ Government of Canada, Innovation, Science and Economic Development Canada, 'Investment Canada Regulations,' <http://laws-lois.justice.gc.ca/eng/regulations/SOR-85-611/index.html>

⁸⁰ Government of Canada, Innovation, Science and Economic Development Canada, 'National Security Review of Investments Regulations' <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2009-271/index.html>

⁸¹ Government of Canada, Innovation, Science and Economic Development Canada, 'Thresholds for Review' https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00050.html

The People's Republic of China

Foreign direct investment in China is divided into three different categories: encouraged, restricted and prohibited investments. This list is jointly developed by the National Development and Reform Commission (NDRC) and the Ministry of Commerce. In 2015 they developed the 2015 “Catalogue for the Guidance of Foreign Investment Industries”.⁸² The Catalogue entered into force on April 10, 2015.⁸³

For industries listed as restricted, the Chinese Government tends to enforce restrictions such as foreign shareholding ratios, limits on the operation of the company and special approvals.⁸⁴ For industries listed as prohibited, foreign investment is forbidden. Any industry sectors not listed in the Catalogue are deemed to be permitted.

On April 10th 2015, the State Council (the Chinese Government's highest administration authority) issued the Special Administrative Measures, known as the “Negative List” which is a guide for foreign investment in China's Free Trade Zones (FTZs): Shanghai, Guangdong, Tianjin and Fujian. Similar to the 2013 FTZ “Negative List”, which applied to the original Shanghai FTZ, foreign investment projects in restricted industries under the FTZs “Negative List” are subject to governmental approvals.⁸⁵

Process

Regardless of its classification (encouraged, restricted or prohibited), a foreign investment project is required to be reviewed and approved by the relevant government authority and does not come into effect until approval has been granted by the appropriate authority.⁸⁶

Whether a foreign investment project is to be approved by the municipal, provincial or central government depends on a number of factors, such as size and

⁸² Chinese Government, 'Catalogue for the Guidance of Foreign Investment Industries,' <http://www.sdpc.gov.cn/gzdt/201503/W020150313434022733417.pdf>.

⁸³ China Briefing, 'Update: Latest Guidance Catalogue for Foreign Investment Industries,' <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>.

⁸⁴ Stibbe, 'China's new Foreign Investment Guidance Catalogue enters into force today,' <https://www.stibbe.com/en/news/2015/april/hk-jbo-china-newsletter-foreign-investment-guidance-catalogue>.

⁸⁵ King, Wood and Mallesons, 'Past, present and future of PRC's Foreign Investment Industry Catalogues,' <http://www.kwm.com/en/au/knowledge/insights/past-present-and-future-of-prcs-foreign-investment-industry-catalogues-20150527>.

⁸⁶ *Ibid.*

classification.⁸⁷ Importantly, this variability is strongly determined by the categorisation of the investment in question, as either encouraged or restricted.⁸⁸

It is mandatory that large investments are assessed at the central government level; however other projects can be approved at the local level. In addition, restrictions apply to the proportion of foreign ownership permitted in particular industry sectors.⁸⁹

Application & Enforcement

The National Development and Reform Commission (NDRC) and the Ministry of Commerce formulate a list of restricted and prohibited industries. The Foreign Investment National Security Review investigates investments that have the potential to negatively affect China's national security.

Under the Security Review System Notice, 'relevant departments under the State Council', national industrial associations, and enterprises, have the authority to propose that a national security review of an investment be undertaken by making proposals through the Ministry of Commerce.⁹⁰

Should the potential foreign investment be deemed relevant to the security review process, the Ministry of Commerce submits the proposal to the Ministerial Panel. If the Ministerial Panel considers it essential to conduct a review for security reasons, the foreign party is required to submit an application for assessment.⁹¹

The review is then undertaken by an inter-ministerial joint conference (the Ministerial Panel or Joint Commission), under the leadership of the State Council and led by the NDRC and the Ministry of Commerce in tandem with other 'relevant departments' in accordance with the 'industries and fields' involved in the transaction.⁹²

The Ministry of Commerce is authorised to terminate the transaction or take measures such as requiring a transfer of assets or equity to remove the threat to national economic security.⁹³

⁸⁷ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 10.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 25.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 21.

Critical Industries

The 2015 “Catalogue for the Guidance of Foreign Investment Industries” is composed of 38 restricted items and 36 prohibited items under 13 types of industries.⁹⁴

Critical industries include investments in important agricultural products, important energy and resources, crucial infrastructure, important transport services, key technologies and major equipment manufacturing.

Sensitive areas include:

1. Telecommunication: foreigners cannot hold majority interests in China’s telecommunications.⁹⁵
2. Critical infrastructure: foreigners cannot hold majority interests in China’s power grids.⁹⁶
3. Agriculture and fisheries: crop seeds and animal husbandry remain sensitive. Research in the area of precious plant and animal species are prohibited, as is the genetic modification and creation of new crops and animal breeds.⁹⁷ Prospecting for and the exploitation of natural resources within China’s Exclusive Economic Zone on its continental shelf requires approval from the Chinese Government. Foreign investment in the wholesale, resale and logistic distribution of cotton, grain, sugar, vegetable oil, tobacco, medicines, crude oil, and fertiliser remains sensitive.⁹⁸
4. Mining and prospecting for rare earths: the mining and prospecting for radioactive materials, molybdenum, tin, antimony, tungsten and fluorite are prohibited. The processing of petroleum and coking and the processing and production is also prohibited.⁹⁹

⁹⁴ Ernest and Young, ‘China Tax & Investment Express: China Tax Center,’ Issue No 2015011, released March 20 2015, P. 1 [http://www.ey.com/Publication/vwLUAssets/EY-CTIE-2015011-ENG/\\$FILE/EY-CTIE-2015011-ENG.pdf](http://www.ey.com/Publication/vwLUAssets/EY-CTIE-2015011-ENG/$FILE/EY-CTIE-2015011-ENG.pdf).

⁹⁵ China Briefing, ‘The New Free Trade Zones Explained, Part II: The Negative List,’ <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>

⁹⁶ China Briefing, ‘The New Free Trade Zones Explained, Part II: The Negative List,’ <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>

⁹⁷ Kind Wood Mailesons, ‘China plans sweeping foreign investment reforms,’ <http://www.kwm.com/en/knowledge/insights/china-plans-sweeping-foreign-investment-reforms-20150414>

⁹⁸ China Briefing, ‘The New Free Trade Zones Explained, Part II: The Negative List,’ <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>

⁹⁹ China Briefing, ‘Update: Latest Guidance Catalogue for Foreign Investment Industries,’ <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>.

5. Oil and gas deposits: the exploration and development of oil and gas deposits are only allowed through a contractual or equity joint venture.¹⁰⁰
6. Automobiles: Chinese investors must own over 50% of any joint venture. ¹⁰¹
7. Entertainment and media: the production of sound and video recordings, as well as the operation of theatre line companies is considered sensitive.¹⁰²
8. Legal consulting: the market for foreign law firms is very much closed in China.¹⁰³
9. Education: the Chinese Government imposes limitations on foreign investment and operation of education institutions from pre-school to tertiary education.¹⁰⁴

Transparency

The processes are largely opaque. The legal ground upon which a decision will be made if a prospective investor satisfies the regulatory criteria are not set out in the legislation, and avenues to challenge a decision are limited.¹⁰⁵

Reforms to the system have been largely directed at broadening the categories of projects that are available for foreign investment and undertaking reforms intended to improve the efficiency of the system (and reduce opportunities for corruption).¹⁰⁶

The Security Review System Notice defines first the scope of the review and then the contents of the review. Not all mergers and acquisitions of domestic companies by foreign companies are subject to review on foreign security grounds.¹⁰⁷ A review will be conducted for any acquisition proposal relating to military and defence

¹⁰⁰ China Briefing, 'The New Free Trade Zones Explained, Part II: The Negative List,' <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>

¹⁰¹ Kind Wood Mallesons, 'China plans sweeping foreign investment reforms,' <http://www.kwm.com/en/knowledge/insights/china-plans-sweeping-foreign-investment-reforms-20150414>

¹⁰² China Briefing, 'Update: Latest Guidance Catalogue for Foreign Investment Industries,' <http://www.china-briefing.com/news/2015/03/20/breaking-news-updated-guidance-catalogue-foreign-investment-industries-released.html>

¹⁰³ Kind Wood Mallesons, 'China plans sweeping foreign investment reforms,' <http://www.kwm.com/en/knowledge/insights/china-plans-sweeping-foreign-investment-reforms-20150414>

¹⁰⁴ Kind Wood Mallesons, 'China plans sweeping foreign investment reforms,' <http://www.kwm.com/en/knowledge/insights/china-plans-sweeping-foreign-investment-reforms-20150414>

¹⁰⁵ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 11.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

enterprises, enterprises located near key or sensitive military facilities and other enterprises related to national security.¹⁰⁸

Terminology

The 2008 National Development and Reform Commission ('NDRC') states that factors that will be considered in relation to a project include:

...economic security and safety, proper development and utilisation of resources, protection of the ecological environment, optimization of major planning, safeguarding public interests, prevention of monopoly, investment access, capital project management and other factors.¹⁰⁹

The NDRC also considers other factors, such as whether the project is in the 'public interest', whether it impacts China's 'national economic security', 'national security', "national energy resource security' or 'national cultural security'.¹¹⁰

These various concepts of national security, national economic security and so on are generally not well-defined in Chinese legislation.

Notable cases

A noted example is the 2005 proposal by the Carlyle Group, a US firm, to purchase an 85 percent stake in China's Xugong Group Construction Machinery, a large machinery manufacturer. The transaction was reportedly resulting from an open auction process and was supported by the local Jiangsu Government. The transaction resulted in a storm of criticism emanating from one of Xugong's competitors that the Jiangsu Government who claimed that the local government was selling a "strategic asset".¹¹¹ The sale did not proceed despite amendments to the original proposal which would see the Carlyle Group reduce its stake to 45 per cent.¹¹² According to Chinese State Owned publication, the China Daily, the Ministry of Commerce rejected the transaction 'amid concern that foreign control of key Chinese firms could threaten the country's economic security'.¹¹³

Key Statements

Chinese Government, *Catalogue for the Guidance of Foreign Investment Industries* (2015) (Chinese language source).¹¹⁴

¹⁰⁸ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 23.

¹⁰⁹ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 11.

¹¹⁰ *Ibid.*

¹¹¹ Bath, Vivienne, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China', *Sydney Law Review* 34 no. 1 (2012): 27.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Chinese Government, 'Catalogue for the Guidance of Foreign Investment Industries,'

Foreign Investment Review Comparison Table

	Australia	US	UK	Canada	China
Processes	<p>Foreign investment in Australia is governed by a suite of legislation. Reviews of investment proposals are based on monetary thresholds that vary based on target industry and investor profile. Potential investors that fall above these thresholds are obliged to apply for review by the Foreign Investment Review Board. The FIRB is then able to determine the investment's impact on the 'national interest'. Penalties apply for failing to self-report.</p>	<p>Parties to a transaction must voluntarily file notice in advance with CFIUS. If it is found to negatively impact national security, it can be blocked. The review process takes a maximum of 90 days. If CFIUS is not notified in advance, there is no time limit on government intervention, and parties may be forced to divest by Presidential order.</p>	<p>There is no stand-alone regime or specific formal legal framework for reviewing foreign investment in the UK. Reviews on national security grounds operate on a case-by-case if they are found to be in the public interest.</p>	<p>Investment Canada Act (ICA) requires transactions to be filed with Industry Canada where they will result in foreign control of a Canadian business. They are subject to review if they exceed stated thresholds, and higher thresholds are available to WTO countries. Proposals can be rejected if determined not to be in the 'net interest' of Canada or if there is an impact on national security.</p>	<p>The National Development and Reform Commission (NDRC) and the Ministry of Commerce develop a list of restricted and prohibited industries. The Foreign Investment National Security Review investigates investments that have a bearing on China's national security.</p> <p>Note: Regardless of its classification (encouraged, restricted or prohibited) a foreign investment project must be reviewed and approved by the relevant federal, provincial or local government authority.</p>
Critical Investment Areas	<p>Australia outlines specific review policies for key industries:</p> <ul style="list-style-type: none"> • Agribusiness • Agricultural land • Commercial land • Residential real estate • Business acquisitions • Mining/production tenements • Media <p>It has review requirements for media and land acquisitions. It identifies 'sensitive businesses' as:</p> <ul style="list-style-type: none"> • Media • Telecommunications • Transport • Defence and military related industries • Encryption and secure communication technologies • Extraction of uranium/plutonium and operation of nuclear facilities 	<p>CFIUS explicitly targets national security threats. There are no stated critical industries, but critical infrastructure businesses are included as of 2007. Industries relevant to national security are demonstrated by notable cases in:</p> <ul style="list-style-type: none"> • Aerospace • Computing • Telecom • Critical Infrastructure • Operations close to military bases 	<p>The UK may intervene in the following areas:</p> <ul style="list-style-type: none"> • Media • Finance • Critical national infrastructure (specific industries not given) • Any area determined to be related to national security 	<p>Canadian Cultural businesses have strict, low thresholds. Otherwise there is no explicit definition of protected industries. Industries of interest as demonstrated by rejected proposals:</p> <ul style="list-style-type: none"> • Geospatial • Chemical and natural resources • Telecom 	<p>The 2015 "Catalogue for the Guidance of Foreign Investment Industries" lists 38 restricted items and 36 prohibited items. Sensitive industries include:</p> <ul style="list-style-type: none"> • Critical infrastructure • Telecommunications • Agriculture and fisheries • Mining and Prospecting for rare earths • Oil and gas deposits • Legal consulting, • Entertainment and Media • Education

<p>Decision Making Bodies</p>	<p>The relevant legislation confers the Treasurer with the authority to make the final decision on whether to approve or deny foreign investment proposals. This decision is informed by advice and support from the Foreign Investment Review Board, the Treasury, the Australian Tax Office and relevant national security agencies.</p>	<p>CFIUS operates under the office of the President and includes heads of several federal agencies, including but not limited to Defense; Justice; Homeland Security. The decision to block a transaction rests with the President.</p>	<p>Reviews rest with the Competition and Markets Authority (CMA) and the Secretary of State (SoS) of the relevant government department</p>	<p>Decisions rest with the minister of Industry. The minister of Industry consults with minister of Public Safety and Governor-in-Council in cases of national security concern.</p>	<p>The Ministry of Commerce will submit the proposal to the Ministerial Panel if the scope of the proposed acquisition is within the security review process. If the Ministerial Panel considers it necessary to conduct a review, it will be conducted by an inter-ministerial joint conference (the Ministerial Panel or Joint Commission), under the leadership of the State Council and led by the NDRC and the Ministry of Commerce in conjunction with unspecified other 'relevant departments'.</p>
<p>Transparency</p>	<p>There is articulated policy on what investments warrant review.</p> <p>There are also efforts to increase the transparency and monitoring of land asset ownership that results from foreign investment.</p> <p>The grounds on which a proposal is denied offers less transparency, as it is up to the discretion of the Treasurer to block an investment on the broad grounds that it is contrary to the national interest.</p>	<p>The process is mostly opaque due to national security subject matter. As of the 2007 introduction of FINSA, Congress can request confidential briefings on concluded cases.</p>	<p>For reviews on national security grounds, initial consultations between parties and government are private. The process is made public if SoS issues a formal review</p>	<p>ICA contains strict confidentiality provisions to protect potential investors and therefore encourage foreign investment.</p>	<p>The process is largely opaque. The grounds upon which a decision will be made if a prospective investor satisfies the regulatory criteria are not set out in the legislation nor the guidelines, and opportunities to challenge decisions in relation to approvals are limited.</p>
<p>Terminology</p>	<p>A definition of national interest is not outlined by the relevant legislature. The decision of what constitutes national interest is left to the discretion of the Treasurer. Several factors are considered in this process:</p> <ul style="list-style-type: none"> • National security • Competition • Other Government policies • Impact on economy/community • Investor's character. 	<p>There is an explicit focus on national security. As of 2007 'critical infrastructure' (as defined in the USA PATRIOT Act) is included in considerations of national security.</p>	<p>The UK does not define 'national security' or the 'national interest.' There is a clear definition for Critical National Infrastructure</p>	<p>ICA includes ability to reject based on undefined 'national security' provisions, but does not explicitly refer to critical infrastructure at all.</p>	<p>Ability to investigate and reject based on "economic security and safety" "public interest", "national economic security", "national security", "national energy resource security" and "national cultural security."</p>