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

Vivienne Bath
Professor of Chinese and International Business Law
11 October 2012
Sydney Law School, University of Sydney China Studies Centre

FDI statistics – China and Australia

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>46,878</td>
<td>72,715</td>
<td>123,985</td>
<td>6,885</td>
<td>21,160</td>
<td>65,117</td>
<td>711,802</td>
<td>365,981</td>
</tr>
<tr>
<td>Australia</td>
<td>11,031</td>
<td>31,050</td>
<td>41,317</td>
<td>13,675</td>
<td>25,409</td>
<td>19,999</td>
<td>499,663</td>
<td>385,470</td>
</tr>
</tbody>
</table>

http://unctadstat.unctad.org/TableViewer/tableView.aspx; US$ in millions
Australian legislation

- **Foreign Acquisitions and Takeovers Act 1975 (Cth) (last amended 2010)**
- **Foreign Acquisitions and Takeovers Regulations 1989; Foreign Acquisitions and Takeovers (Notices) Regulations 1975**
- **Foreign Investment Policy issued by the Foreign Investment Review Board:** most recent version January 2012, including policy statement on agriculture
- **Example:** s21A
  
  **Acquisitions of interests in Australian urban land**
  
  (2) Where the Treasurer is satisfied that:
  
  (a) a foreign person proposes to acquire an interest in Australian urban land; and
  
  (b) the proposed acquisition would be **contrary to the national interest**;
  
  the Treasurer may make an order prohibiting the proposed acquisition.

Australian foreign investment policy

- **Case-by-case review**
- **Economic impact**
- **national security** (example: China Minmetals bid to acquire Oz Minerals, which had assets in Woomera Testing Range – subsequently approved without these assets)
- **competition**, including **global competition**: CNMC/Lynas – proposal to limit to minority interest (withdrawn)
- **other government policies**: tax and environment – conditions re Australian management, ownership, environment (Cubbie Station), etc
- **impact on economy and the community**
- **character of the investor** – arms length transactions; transparency
- **foreign governments and entities** – arms length, commercial, standard of governance, commercial partners, listing
### Chinese legislation

- Chinese-Foreign Equity Joint Venture Law and implementing regulations (NPC and State Council) 中华人民共和国中外合资经营企业法 (1979, revised)
- Chinese-Foreign Cooperative Joint Venture law and implementing regulation (NPC and State Council) 中华人民共和国中外合作经营企业法
- Wholly Foreign-owned Enterprise Law and Implementing Regulations (NPC and State Council) 中华人民共和国外资企业法
- Provisions Guiding Foreign Investment Direction 指导外商投资方向规定 (State Council 2002)
- Catalogue of Industries for Guiding Foreign Investment 外商投资产业指导目录 NDRC, MOFCOM, latest 2011)
- Provisions on Foreign Investors’ Merger with and Acquisition of Domestic Enterprises 关于外国投资者并购境内企业的规定 (MOFCOM 2009)
- Numerous regulations, rules, decrees, etc.

### ASX Decision – 8 April 2011

“It is in the **national interest** for Australia to maintain the ongoing strength and stability of our financial system, and ensure it is well placed to support the Australian economy into the future... I had strong concerns that the proposed acquisition would be **contrary** to these objectives.

“....To diminish Australia’s economic and regulatory sovereignty over the ASX could only be justified if there were very substantial benefits for our nation, such as greatly enhanced opportunities for Australian businesses and investors to access capital markets. Given the size and nature of the SGX ...the opportunities that were offered under the proposal were clearly not sufficient to justify this loss of sovereignty.

“The ASX also operates infrastructure that is critically important for the orderly and stable operation of Australia’s capital markets. ... not having full regulatory sovereignty over the ASX-SGX holding company would present material risks and supervisory issues impacting on the effective regulation of the ASX’s operations, particularly its clearing and settlement functions. ...”
Approval for Minmetals’ acquisition of Album Resources 19 Dec 2010 - conditions

• Maintain the operation of the former OZ Minerals assets as a separate business with commercial objectives, including the maximisation of product prices;

• Maintain the operation of the mines using companies incorporated, headquartered and managed in Australia under a predominantly Australian management team;

• Sell all minerals produced on arms-length terms by a sales team headquartered in Australia, with reference to international observable benchmarks in line with market practice;

Minmetals

• Maintain or increase production and employment at the Century (Qld), Rosebery (Tas) and Golden Grove (Qld) mines, pursue growth of the Century and Rosebery mines, reopen the Avebury (Tas) mine and develop the Dugald River (Qld) mining project, subject to project feasibility and economic conditions;

• Comply with Australian industrial relations laws and honour employee commitments; and

• Maintain and where possible increase levels of Indigenous employment in its local operations and honour agreements with Indigenous Australian communities.
China and “national security”

- A variety of phrases used in legislation and articles relating to foreign investment
  - prohibited list “jeopardizing national security or damaging social public interest” (危害国家安全或者损害社会公共利益的)
  - Inbound investment – economic security (经济安全),
  - M&A provisions – impact on national economic security (国家经济安全因素)
  - Anti-monopoly Law – refers to national security review for foreign acquisitions involving national security (国家安全审查) and SOEs in industries related to national security
  - Disclosure of Government Information regulations:

    Article 8 The publicizing of government information by administrative organs shall not endanger the security of the State and public along with economic safety and social stability.

- 2011 – institution of Security Review system
  - All acquisitions relating in any way to defence
  - Acquisition of a controlling interest in
    - Investments in important agricultural products
    - Important energy and resources
    - Crucial infrastructure
    - Important transport services
    - Key technologies and major equipment manufacturing
    - which are related to national security (国家安全)

- Content of review:
  - Impact on national defence security (国防安全)
  - impact on stable operation of national economy (国家经济稳定运行)
  - Impact on the basic societal order and people’s living conditions (社会基本生活秩序); and
  - Impact on the R&D capacity for key technologies related to the national security(n国家安全关键技术研发能力).

China- National security and FDI

- Government policy generally reflected in the entire FDI system – creation of encouraged, restricted and prohibited lists: encouraged (new technology, etc); restricted (protected minerals, industries where protection is being phased out); prohibited (jeopardizing national security; security or utility of military installations; ecologically unsound, etc)
- 2011 – institution of Security Review system
  - All acquisitions relating in any way to defence
  - Acquisition of a controlling interest in
    - Investments in important agricultural products
    - Important energy and resources
    - Crucial infrastructure
    - Important transport services
    - Key technologies and major equipment manufacturing
    - which are related to national security (国家安全)

- Content of review:
  - Impact on national defence security (国防安全)
  - impact on stable operation of national economy (国家经济稳定运行)
  - Impact on the basic societal order and people’s living conditions (社会基本生活秩序); and
  - Impact on the R&D capacity for key technologies related to the national security(n国家安全关键技术研发能力).
Comparison

• Scope of policies: similarities
  – Defence and military installations
  – Competitive marketplace
  – National economic considerations:
    – Interests of the community
    – Triggered by ‘control’ or substantial interest
    – Sensitive sectors

• Application of policies: differences – structure and implementation
  – Australian emphasis on being a reliable supplier v China – reserving control of certain sectors
  – Aus case by case review v list-based approach plus case by case
  – Australia – not interventionist v China – approvals plus another level of approval
  – Role of public and competitors
  – Transparency in decision-making and decision-makers