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Uncertain Opportunities:

Chinese Investors Establishing Investments in New Zealand

Paul Comrie-Thomson

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA UNIVERSITY OF WELLINGTON
NEW ZEALAND CONTEMPORARY CHINA RESEARCH CENTRE

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ABSTRACT

Despite the signing of a comprehensive free trade agreement between New Zealand and China and significantly deepening trade relations, there exists a discernable lag in the investment relationship between the two countries. This paper identifies that the operation and interaction of the two legal instruments governing the conditions of entry of Chinese foreign direct investment (FDI) into New Zealand – the New Zealand–China Free Trade Agreement (NZCFTA) and the New Zealand Overseas Investment Act 2005 – partially explain this disparity. These legal instruments offer an interesting illustration of the way in which international investment agreements (IIAs) interact with domestic law, managing the contention between investor rights and host state public interests. However, it is clear that the rights and obligations created by these legal instruments are not well understood by Chinese investors and New Zealand commentators alike, as illustrated by the recent Crafar farms saga. This paper seeks to clarify those rights and obligations, arguing that greater transparency and predictability in the operation of the legal instruments is necessary in order to encourage higher levels of Chinese FDI in New Zealand. This is particularly important in the New Zealand–China relationship as Chinese investors are still relative newcomers in the establishment of overseas investments and face in New Zealand a culturally different regulatory scheme from that operating in China.

ABOUT THE AUTHOR

Paul Comrie-Thomson was a Victoria Summer Scholar at the China Centre during the summer of 2012-13.

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I Introduction

In 2008, New Zealand became the first OECD country to sign a free trade agreement (FTA) with China. The New Zealand–China Free Trade Agreement (NZCFTA) is a comprehensive agreement directed at liberalizing and facilitating investment flows and trade in goods and services between the two states, while promoting cooperation in a number of other areas.[1] New Zealand's economic relations with China have deepened since the signing of the NZCFTA, particularly in trade. China is now New Zealand's second-largest trading partner, overtaking the United States at the end of 2008 shortly after the NZCFTA was signed. However, New Zealand's investment relationship with China remains considerably smaller, bilateral foreign direct investment (FDI) having not seen the same growth as trade in the wake of the Agreement.

The New Zealand Government considers itself to have an open and welcoming attitude toward inward FDI and attracting FDI is a central part of the country's growth strategy. Therefore, it is concerning that there exists this discernable lag in inward FDI from China relative to the growing relationship in trade. The New Zealand Government's China strategy, "Opening Doors To China", notes that while China invested approximately US$60 billion internationally in 2010/2011, Chinese investment in New Zealand in that period was only $1.87 billion.[2] There are a number of different reasons offered to explain this investment lag: (1) that Chinese investors are unaware of opportunities in New Zealand; (2) that the size of the deals in New Zealand are deemed inadequate for large-scale Chinese investors; (3) that other overseas investment destinations offer significant incentives, such as tax breaks, where New Zealand does not; and (4) that there are strict controls on the flow of outward Chinese investment.[3] Furthermore, Young has identified that in the face of new economic relations, both the public and the business community take time to adapt before behind-the-border economic integration can really take hold.[4]

This paper offers a complementary explanation; that the rights and obligations contained within the legal instruments managing the conditions of entry of Chinese investment into New Zealand – the New Zealand Overseas Investment Act 2005 (the Act) and the NZCFTA itself – are ambiguous and thus somewhat incompatible with the objectives set out in

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[1] Ministry of Foreign Affairs and Trade (MFAT) "The Agreement" (2 July 2010) New Zealand China Free Trade Agreement <www.chinafta.govt.nz/1- The-agreement/index.php>.

[2] New Zealand Trade and Enterprise (NZTE) and Ministry of Foreign Affairs and Trade (MFAT) *Opening Doors To China: New Zealand's 2015 Vision* (February 2012) at 25.

[3] NZTE and MFAT, above n 2, at 25.

[4] Jason Young "Investing in the Economic Integration of China and New Zealand" 22 (China Papers, New Zealand Contemporary China Research Centre, 2012) at 4.

the investment chapter of the NZCFTA[5] and the objectives of international investment agreements (IIAs)[6] generally. Consequently, the lack of transparency and predictability in the operation and interaction of these legal instruments undermines the facilitation of higher FDI inflows. This is particularly notable in the New Zealand–China relationship because in contrast with many of New Zealand's traditional international economic partners, Chinese investors are still relative newcomers in the establishment of overseas investments and face in New Zealand a culturally different regulatory scheme from that operating in China.

Part II of the paper sets up a framework for understanding the objectives underpinning the signing of IIAs generally, with a focus on the pre-establishment phase.[7] Part III explains the pre-establishment rights and obligations in both the NZCFTA and the Overseas Investment Act. Part IV then analyses how the pre-establishment rights and obligations achieve, or do not achieve the objectives identified in Part II. Finally, Part V concludes by indicating how the ambiguity in the operation of these instruments offers an explanation for the relatively low levels of investment despite the signing of the NZCFTA. Measures are then suggested that might help to better achieve the objectives sought by the NZCFTA and IIAs generally, thus increasing the levels of inward FDI.

II International Investment Agreement Objectives

An IIA is an agreement regulating the flow of investments between two or more sovereign states. Such agreements create obligations that extend beyond the minimum standard of protection that must be granted to aliens and their property by a host state under customary international law, thus

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[5] Chapter 11, Article 136 states that:

The objectives of this Chapter are to:

a. encourage and promote the flow of investment between the Parties and cooperation between the Parties on investment-related matters on a mutually beneficial basis;
b. establish a framework of rules conducive to increasing investment flows between the Parties and to ensure the protection and security of investments of the other Party within each Party's territory; and
c. promote cooperation between a Party and investors of the other Party who have investments in the territory of the former Party, on a mutually beneficial basis.

[6] IIAs include both the more traditional and prevalent bilateral investment treaties (BITs), as well as the recent practice of including investment provisions similar to BITs within preferential trade agreements (PTAs).

[7] "Pre-establishment" refers to the phase in which an investor or investment seeks entry into the domestic territory of the home state. "Post-establishment", by contrast, refers to the phase after which an investor or investment has been granted entry and is operating within the territory of the host country.

providing "supplementary and complimentary protection" to foreign investors.[8] Generally, when entering into an IIA, parties seek three key objectives: investment protection, investment promotion and liberalization.[9] In terms of investment protection, investors from developed states require a stable international legal framework when investing in developing states in order to guarantee investment security.[10] Conversely, developing states seeking foreign capital and technological expertise tend to enter into such agreements to promote inward foreign investment. The basic reasoning underlying this relationship, is that "clear and enforceable rules … reduces risks that the investor would otherwise face and … such reductions in risk, all things being equal, encourage investment".[11] IIAs also promote liberalization, although ordinarily this is not explicitly outlined as an objective. Liberalization in this context seeks to facilitate the international flow of investments and involves states dismantling regulatory barriers that might impede foreign investments.

A Protection

Investment protection is a fundamental objective underpinning IIAs, achieved principally by establishing rules governing the treatment of an investor and/or investment by a host state.[12] Such provisions tend to include substantive protections against, for example, uncompensated expropriation, currency exchange controls, or war and civil disturbances, while establishing legal mechanisms for enforcing those protections.[13] The protective elements of an IIA generally apply once an investment has been established, hence this objective is not so concerned with the pre-establishment phase. However, where investor-state dispute settlement (ISDS) provisions within the IIA are extended to the pre-establishment phase of an investment, this creates real protection around the *right* to invest,[14] and thus protects an investor who expends transaction costs[15]

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[8] Surya P Subedi *International Investment Law: Reconciling Policy and Principle* (2nd ed, Hart Publishing, 2012) at 55-56.
[9] Jeswald W Salacuse and Nicholas P Sullivan "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 Harv Int'l LJ 67 at 76-79.
[10] Most of the literature focuses on agreements between developed and developing countries. However, there are numerous IIAs between developed countries and between developing countries respectively. In general, such agreements still seek the same three fundamental objectives even though the significance attached to each might differ depending on the relationship.
[11] Salacuse and Sullivan, above n 9, at 77; Bernard Hoekman and Richard Newfarmer "Preferential Trade Agreements, Investment Disciplines and Investment Flows" (2005) 39(5) JWT 949 at 950.
[12] Salacuse and Sullivan, above n 9, at 79.
[13] Kenneth J Vandevelde "The Political Economy of a Bilateral Investment Treaty" (1998) 92 Am J Int'l L 621 at 632.
[14] For example, in the 2006 Canada-Peru BIT.
[15] Transaction costs can be understood as those costs that arise in the process of actualizing and enforcing an investment. A distinction can be made between *ex ante* transaction costs, and *ex post* transaction costs. *Ex ante* costs are the costs involved with setting up an investment, whereas *ex post* costs, are those costs

only to have entry of an investment declined where consent should have been granted in line with those rights extended under the IIA.

B Promotion

Foreign investment is often a crucial component in a state's economic development. Thus investment promotion – that is, creating and maintaining a favourable investment climate in order to attract foreign investment – is a central objective in the signing of IIAs, particularly for developing states.[16] As outlined above, the idea is that the existence of clear and enforceable rules reduces the level of risk associated with investment in the host state, and in turn, this reduction in risk promotes investment.[17] Consequently, there is an indirect promotional gain in the extension of an enforceable right to invest insofar as this reduces the risks around the establishment of an investment.

However, it is important to note that IIAs are certainly not the only, or even the primary influence on investment decisions made by foreign investors. Variables such as political stability, local economic conditions and government policies are more important in determining foreign investment decisions.[18] In other words, an IIA "cannot substitute for an inadequate investment climate".[19] Indeed, it is argued that capital-exporting states are unlikely to sign IIAs containing the desired protective provisions with capital-importing states whose investment regimes are not already sufficiently amenable to foreign investment. Rather, the IIA serves to lock in such favourable treatment as an international law obligation, in effect stabilizing the favourable investment climate as it exists when the IIA is signed. This then promotes investment by ensuring clarity and enforceability of rules, thus reducing the estimation of risk, especially when associated with a long-term investment.[20]

The inclusion of "transparency" provisions that, for instance, require the parties to publicise domestic laws and regulations relating to investment or establish mechanisms advertising to one party's investors investment opportunities in the territory of the other party, can also be beneficial in terms of investment promotion. Such commitments serve to strengthen

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involved in enforcing rights associated with that investment once established. As this paper is focused on pre-establishment, references to transaction costs can be taken to refer to *ex ante* transaction costs. See: Cheryl W Gray and William W Jarosz "Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe" (1995) 33 Colum J Transnat'l L 1 at 15.

[16] Hoekman and Newfarmer, above n 11, at 949; United Nations Conference on Trade and Development (UNCTAD) *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward* (2008) at 38-39.

[17] Salacuse and Sullivan, above n 9, at 95.

[18] Salacuse and Sullivan, above n 9, at 96.

[19] Hoekman and Newfarmer, above n 11, at 964.

[20] Kenneth J Vandevelde "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 Colum J Transnat'l L 501 at 523.

transparency by addressing lack of information, a form of market failure.[21] While generally absent from traditional BITs, such provisions are increasingly being included in preferential trade agreements (PTAs).[22]

C *Liberalization*

The ideal of liberalization holds that unimpeded by regulatory barriers, the market will allocate capital in the most economically efficient way. As such, IIAs present themselves as instruments of investment liberalization in the sense that such agreements restrict a party's regulatory discretion with respect to the treatment of investors and investments of the other party to the agreement, especially where rights are extended to the pre-establishment phase.[23] The key liberalizing provisions in an IIA are the non-discrimination provisions: specifically, national treatment (NT) and most-favoured-nation (MFN) treatment; and the scope of these non-discrimination provisions is fundamental in determining the extent of liberalization that can be achieved.

1 *National treatment*

The United Nations Conference on Trade and Development (UNCTAD) have defined NT as "a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances".[24] NT is therefore a treaty-based, relative standard, with the basis of comparison the treatment afforded to a domestic investor operating in the host country in like circumstances. In line with the liberalization objective, an NT provision seeks the efficient operation of the states' economies by eliminating distortions in competition.[25] While NT in most IIAs applies only post-establishment, increasingly NT is being extended to the pre-establishment phase, which further achieves equality of competitive conditions. NT, particularly where extended to the pre-establishment phase, is therefore an important tool for liberalization. However, because in its purest form the standard eliminates the ability of states to discriminate whatsoever between national and non-national firms in the establishment of investments, it is unsurprising that no IIA has yet granted NT without significant qualifications.

2 *Most-favoured-nation treatment*

MFN is a principle whereby the granting party extends to the beneficiary party and foreign investors of that party, treatment that is no less favourable than treatment accorded to any third state and foreign investors of any third state in like circumstances.[26] In that sense, it is a very similar formula to NT but concerns treatment afforded to investors of third states rather than domestic investors. However, compared with NT, MFN is very much a secondary standard and not a liberalizing standard in itself. Rather,

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[21] Vandevelde, above n 20, at 513-514.
[22] UNCTAD, above n 16, at 45-46.
[23] UNCTAD, above n 16, at 45.
[24] United Nations Conference on Trade and Development (UNCTAD) *National Treatment* (1999) at 1.
[25] UNCTAD, above n 24, at 3.
[26] United Nations Conference on Trade and Development (UNCTAD) *Most-Favoured-Nation Treatment* (2010) at 13.

MFN serves to ensure that liberalization measures granted to any third state in future agreements will also apply to the party to whom MFN treatment has been extended in an earlier agreement. Naturally, MFN also applies where preferential treatment has been extended in practice to the investor of a third party. Thus the objective underpinning an MFN clause is to guarantee equality in competitive conditions extended to investors from different states, in a constant, self-adapting form.[27] As with NT, MFN is a relative, treaty-based standard, the scope of which depends on the particular agreement.

3 Rights of entry and establishment

Under customary international law, every state has the sovereign right to regulate the entry and establishment of FDI within its own territory. That right can be restricted only by international agreement and occurs where NT and MFN provisions in an IIA are extended to the pre-establishment phase. The practical consequence of the extended scope of these provisions is that foreign investors are protected against wasting transaction costs associated with preparing to invest, as well as foregoing alternative investment opportunities where access to the host state market is prevented as a result of preferential treatment being afforded to either domestic, or other foreign investors.[28] Put another way, pre-establishment rights clarify and give certainty to the rules by which investments can be made, which reduce investors' estimations of risk and thus encourage greater investment flows.

Host states may, however, find it desirable to retain control over conditions of entry and establishment for a number of reasons. These might include national security, public health and safety, and the pursuit of national economic policies.[29] Regulation of a right of admission and establishment can be achieved by way of a discretionary "screening" mechanism. Such a mechanism involves a case-by-case assessment of proposed foreign investments by an administrative agency, against a set of criteria to determine whether or not a proposed investment is consistent with the policies of the host state.[30] While such laws are often utilized by host states who employ broadly restrictive regimes governing foreign investments, screening may also be used by states welcoming of foreign investment, "as the sole technique of regulation, unaccompanied by any statutory requirements concerning permissible limits of foreign ownership and/or control, … aimed only at ensuring official scrutiny and approval of proposed investments".[31]

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[27] Subedi, above n 8, at 67-68.
[28] Ignacio Gómez-Palacio and Peter Muchlinksi "Admission and Establishment" in P Muchlinski (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) 55 at 231.
[29] United Nations Conference on Trade and Development (UNCTAD) *Admission and Establishment* (2002) at 11.
[30] Muthucumaraswamy Sornarajah *The International Law On Foreign Investment* (2nd Ed, Cambridge University Press, Cambridge, 2004) at 117.
[31] Gómez-Palacio and Muchlinksi, above n 28, at 237-238.

There are a number of different identifiable approaches to the regulation of the entry and establishment of foreign investments in IIAs.[32] Gómez-Palacio and Muchlinksi have identified two principal models that have emerged: the "controlled-entry" model and the "full liberalization" model.[33] The "controlled entry" model does not extend positive rights to foreign investors. Rather, the approach upholds a state's right to regulate conditions of entry, maintaining the state's sovereignty in sacrifice of greater economic efficiency. As a state following this model has made no legal commitment to any degree of liberalization concerning conditions of entry, that state is free to amend its laws and regulations relating to admission and establishment in line with domestic policy.

The "full liberalization" model, by contrast, grants both NT and MFN in the pre-establishment phase. As a consequence, the decision to invest by a foreign investor of the beneficiary state is more purely informed by economic rationales, as this model removes any regulatory barriers that would prohibit entry, or that would restrict entry to investors and/or investments that fulfil certain conditions with the effect of reducing the value of the investment.[34] However, there are a number of reasons why such a degree of liberalization may not be beneficial, and where a degree of regulatory discretion may actually be advantageous. For example, following this model may prevent the host state from promoting domestic entrepreneurial activity, thus hindering the development of what could ultimately evolve into highly competitive domestic industries. Alternatively, it may be desirable to ensure that foreign firms are committed to the host country and that the investment will contribute positively, or at least not detrimentally affect the host country economy.[35] While not as widespread as the controlled entry model, the full liberalization model has been favoured in a number of recent FTAs and in the United States and Canada BITs generally.[36]

As a final point, it must be noted that no state follows an "absolutist approach" to investment liberalization. Such an approach would require "foreign investors … not be subject to legal or regulatory constraints in undertaking investments in the country concerned".[37] As such, even IIAs abiding by the full liberalization model tend to include exemptions for "non-conforming measures". For example, the US Model BIT 2004 outlines that NT and MFN do not apply to any non-conforming measure set out in annexes of the governing agreement. These annexes then set out a negative list; that is, a list of either generic or specific exemptions from NT and MFN treatment. However, while pre-establishment liberalization is therefore qualified, these lists still set a benchmark of liberalization beneath which

[32] UNCTAD have identified five major models. See: UNCTAD, above n 29, at 3.
[33] Gómez-Palacio and Muchlinksi, above n 28, at 239-240.
[34] Gómez-Palacio and Muchlinski, above n 28, at 242-243.
[35] Gómez-Palacio and Muchlinski, above n 28, at 253.
[36] Gómez-Palacio and Muchlinski, above n 28, at 243-244; Vandevelde, above n 13, at 635.
[37] Salacuse & Sullivan, above n 9, at 91.

the granting state may not fall.[38]

III Pre-establishment rights and obligations under the New Zealand–China Free Trade Agreement and the Overseas Investment Act 2005

A The New Zealand–China Free Trade Agreement

New Zealand has long been a strong advocate of a liberal international trade and investment regime and the NZCFTA is very much in line with New Zealand's economic strategy. Encouraged by: (1) a series of negative experiences, including the ascension of Britain to the European Economic Community and the signing of the North American Free Trade Agreement (NAFTA); (2) a positive experience in Closer Economic Relations (CER) with Australia; and (3) the stalling of the Doha round of the World Trade Organisation (WTO); and in line with its liberal reputation, New Zealand has actively pursued regional integration in the Asia–Pacific, including fostering a strong economic relationship with China, culminating in the NZCFTA.[39]

China, on the other hand, has traditionally harboured a critical view towards international economic integration, particularly towards international legal protections of foreign investment. Consequently, the kind of international investment agreements China commonly entered into were of limited scope.[40] However, from the late-1990s, alongside the country's rise as a major economic power, China began to enter into more internationally orthodox IIAs. Undoubtedly, this was influenced by China's increasing role as a capital-exporter. Since 2000, levels of Chinese outward FDI have accelerated hugely as a consequence of the Chinese Government's "Go Global" strategy. Most of this increased outward FDI has been directed towards other developing states however and outward FDI flows from China into developed states remain relatively small.[41] The State has clearly realized the benefits of entering into more comprehensive agreements that protect its own investors investing abroad, in addition to promoting inward investment flows.

Interestingly, the investment relationship between New Zealand and China is a somewhat anomalous one in contrast to the traditional investment relationships under which an IIA is developed. Commonly, when IIAs are concluded between a developing and a developed country, the developing country is the capital-importer and the developed is the capital-exporter. The situation in the NZCFTA is quite different. Here, the

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[38] Gómez-Palacio & Muchlinski, above n 28, at 242-243.
[39] Young, above n 4, at 7.
[40] For example, the Investment Protection and Promotion Agreement (IPPA), signed in 1989 between New Zealand and China.
[41] Stephan W Schill "Tearing Down the Great Wall – the New Generation Investment Treaties of the People's Republic of China" (2007) Paper 1928 (bepress Legal Series, Max Planck Institute for International Law, 2007 at 2 and 6-7; Ken Davies "While global FDI falls, China's outward FDI doubles" in Karl P Sauvant and others (eds) *Inward and Outward FDI Country Profiles* (eBook ed, Vale Columbia Center On Sustainable International Investment, New York, 2011) 241 at 241-242.

developing country, China, is the net capital exporter, while the developed, New Zealand, is the net capital importer. The total stock of Chinese investment in New Zealand as of year-end March 2011, was NZ$1.8 billion, whereas the total stock of New Zealand investment in China at the same point was NZ$769 million.[42] In this sense, the positions and objectives are reversed, or, at the very least, this creates an investment relationship that is more consistent with the notion of reciprocity that governs IIAs between developed states.

In terms of pre-establishment rights, the NZCFTA is a hybrid model, operating between the controlled entry and full liberalization models identified above. Article 138, the NT provision, provides:

> Each party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by its own investors.

By contrast, Article 139, the MFN treatment provision, provides:

> Each Party shall accord to investors, investments and activities associated with such investments by investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by the investors of any third country with respect to *admission*, *expansion*, management, conduct, operation, maintenance, use, enjoyment, and disposal.[43]

Notably, "admission" and "expansion" – the relevant pre-establishment rights – are extended to MFN treatment, but no pre-establishment rights are accorded in respect of NT. This means that the rights to entry granted under the NZCFTA are closer to the controlled-entry model than to the full liberalization model. As described above, this is because NT is the key liberalizing measure.[44] The MFN treatment provision merely imposes a practical obligation upon the parties to not extend preferential treatment to any investor from a third state,[45] while ensuring any further liberalization

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[42] Young, above n 4, at 12.

[43] Emphasis added.

[44] UNCTAD, above n 26, at 102-103.

[45] That is, however, unless that investor is covered under an agreement existing before the NZCFTA came into force. Article 139.3 outlines that "the Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any free trade agreement or multilateral international agreement *in force or signed prior to the date of entry into force of this Agreement*" (emphasis added), for example, the New Zealand-Australia Closer Economic Relations Agreement 1983. Furthermore, any measures taken as part of further economic integration between parties subject to these existing agreements are exempt from MFN under the NZCFTA (Article 139.4). Thus, changes can be made to deepen these pre-existing agreements without the obligation of extending

measures contained in future agreements with third parties will be automatically extended to the relevant beneficiary party under the NZCFTA.[46]

Ostensibly, this formulation of pre-establishment rights was at the behest of China. New Zealand pursues a policy of non-discrimination towards investor nationality with regard to FDI,[47] and in its National Interest Analysis of the NZCFTA, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) made it clear that the New Zealand negotiators sought stronger reciprocal treatment on entry and establishment rights. The report notes that New Zealand "sought to gain immediate commitments on market access in order to provide additional benefits to New Zealand investors setting up business in China, or expanding their operation there", and that "[w]hile the FTA does not include any initial market access improvements", the MFN treatment provision would ensure any future liberalization in this area would be extended to New Zealand investors.[48] Furthermore, in a report analysing China's approval processes, the United States Chamber of Commerce has identified that China's entry scheme fosters and facilitates the favouring of domestic competitors over foreign investors.[49] Similarly, China has also instituted preferential policies in favour of FDI in certain sectors. Such manipulation of the competitive environment is inconsistent with NT, thus the approach taken in respect of pre-establishment rights in the NZCFTA seems more consistent with China's approach than with New Zealand's predominantly non-discriminatory policies toward FDI.

Ultimately, New Zealand has since signed the New Zealand–Malaysia Free Trade Agreement (NZMFTA) and the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA), both of which include NT pre-establishment rights. Article 10.4 of the NZMFTA, for example, provides:

> Each Party shall accord to investors of the other Party and to covered investments in relation to *establishment, acquisition, expansion*, management, conduct, operation, liquidation, sale, transfer, or other disposition of investments, treatment no less favourable than it accords, in like circumstances, to its own investors and their investments.[50]

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the deepened preferential treatment to China. It is also necessary to note that application of MFN may not be simple. The words "in like circumstances" may allow differential treatment where the proposed investment and circumstances surrounding the investment are sufficiently distinguishable. See: Salacuse & Sullivan, above n 9, at 93-94; UNCTAD, above n 24, at 33.

[46] Article 139.5 provides an exception for future measures that extend to a third country, preferential treatment in respect of: (a) fisheries; and (b) maritime matters.

[47] Ministry of Commerce, China & Ministry of Foreign Affairs and Trade, New Zealand *A Joint Study Report on a Free Trade Agreement Between China and New Zealand* at 47.

[48] Ministry of Foreign Affairs and Trade (MFAT) *New Zealand–China Free Trade Agreement (and Associated Instruments): National Interest Analysis* at 3.3.4.

[49] US Chamber of Commerce *China's Approval Process for Inbound Direct Investment: Impact on Market Access National Treatment and Transparency* (November 2012) at 53.

Thus, by virtue of the MFN treatment provision in the NZCFTA, those pre-establishment NT rights – "establishment", "acquisition" and "expansion" – now apply in respect of Chinese investors, investing or seeking to invest in New Zealand. While such an extension would seem therefore to abide by the full liberalization model, it must be noted that under Article 141 in the NZCFTA and Article 10.11 in the NZMFTA, New Zealand's obligations under NT and MFN are subject to an exception for existing non-conforming measures, defined by MFAT as "existing laws and regulations that are not in conformance with the FTA".[51] Of most significance is operation of the Overseas Investment Act 2005 and Overseas Investment Regulations 2005, which together see New Zealand retain significant control over conditions of entry with regard to certain investments.[52] Specifically, the Act requires screening of foreign investments involving NZ$100 million or more in value or involving sensitive land. Thus, although New Zealand's international arrangements may abide by the full liberalization model, pre-establishment rights remain considerably qualified by this domestic screening mechanism.

Additionally, although pre-establishment rights have been extended both with respect of MFN treatment and NT, the right to submit a dispute for international arbitration under the investor-state dispute settlement (ISDS) provisions contained both within the NZCFTA and the NZMFTA, does not extend to the pre-establishment phase. MFAT specifically noted in the NZCFTA National Interest Analysis:[53]

> [I]nvestor-state arbitration applies only to disputes "directly concerning investments" made in the territory of the other party (i.e. *actual investments which have been made*). As a consequence, decisions related to the screening of investment into New Zealand under the Overseas Investment Act 2005 are not subject to such arbitration.

The NZMFTA follows the same formulation, with MFAT specifying, "actions relating to decisions on potential investments into New Zealand under the Overseas Investment Act 2005 are not subject to investor-state arbitration".[54] Consequently, as far as the enforcement of pre-establishment rights is concerned, investors are confined to challenging screening decisions made under the Act through the New Zealand courts in judicial

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[50] Emphasis added.

[51] Ministry of Foreign Affairs and Trade "Investment" (16 July 2010) New Zealand China Free Trade Agreement <www.chinafta.govt.nz/1-The-agreement/1-Key-outcomes/3-Investment/index.php>.

[52] See: MFAT, above n 48, at 4.11 and 4.17; Ministry of Foreign Affairs and Trade (MFAT) *New Zealand–Malaysia Free Trade Agreement (and Associated Instruments): National Interest Analysis* at s 4.10.

[53] MFAT, above n 48, at 4.11, emphasis added; See also: New Zealand–China Free Trade Agreement Bill (210–1) and the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (select committee report) at 71.

[54] MFAT, above n 52, at 4.10.1.

review.

B The Overseas Investment Act 2005

As highlighted above, fundamentally the Overseas Investment Act operates as a screening mechanism where an entity with a foreign controlling interest of 25 per cent or more, proposes an investment involving either: (1) assets worth NZ$100 million or more; or (2) sensitive land. Part 2 of the Act – the consent and conditions regime – operates as follows. Section 10 outlines that foreign investment requires consent under the Act, either where it concerns "sensitive land", as defined in s 12, or "significant business assets", as defined in s 13. Section 16 outlines the criteria for consent for overseas investment in sensitive land, and s 18 outlines the criteria where the overseas investment is in significant business assets. The relevant Minister must grant consent if the criteria in either s 16 or s 18 are satisfied, and similarly, the application must be declined if those criteria are not satisfied.[55]

Both ss 16 and 18 require the investor to satisfy the "investor test", which includes a determination of the investor's: (1) business experience and acumen; (2) financial commitment; and (3) good character. It also requires that the investor is not an ineligible individual under the Immigration Act 2009.[56] What constitutes business experience and acumen is not defined in the Act, but Overseas Investment Office (OIO) guidelines outline that it requires that the investor exhibit "practical knowledge and abilities *relevant* to the overseas investment".[57] The OIO guidelines also outline that a demonstrated financial commitment must be with reference to the specific investment proposal in question and must be more than mere access to capital. The investor is required to give "specific evidence that a particular part of the capital has been set aside for the investment, or that the particular capital required has been called up".[58] Finally, a test for determining good character is outlined in s 19(1) of the Act. This test requires that the relevant ministers take account of: (1) "offences or contraventions by law", either by the individual investor, "or by any person in which the individual has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not)";[59] and (2) "any other matter than reflects adversely on the person's fitness to have the particular overseas investment".[60] The OIO guidelines clarify that this refers not only to criminal convictions, but also more generally, that "character" concerns both "moral factors" and "reputation", and thus allegations of immoral behaviour and/or other activities or behaviour adversely affecting an individuals reputation, may be taken into account.[61]

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[55] Section 14.

[56] Land Information New Zealand (LINZ) *Investor Test Criteria* (Overseas Investment Office, July 2011) at 1.

[57] LINZ, above n 56, at 1-2. See the document for a list of specific examples of evidence required by the Overseas Investment Office (OIO), and what this evidence should demonstrate.

[58] LINZ, above n 56, at 2.

[59] Section 19(1)(a).

[60] Section 19(1)(b).

An application concerning significant business assets requires satisfaction of the "investor test" only.[62] By contrast, an application for sensitive land,[63] requires foreign investors not intending to reside indefinitely in New Zealand to satisfy not only the "investor test", but also to show that the proposed investment will, or is likely to benefit New Zealand. Moreover, where "the relevant land includes non-urban land that exceeds five hectares … the relevant Ministers or the regulator must determine that the benefit will or is likely to be "substantial and identifiable"".[64] Benefit to New Zealand is determined with reference to the comprehensive list of economic and conservational factors listed in s 17.[65] Additionally, as determined in *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand (Tiroa E)*, whether or not the investment will, or is likely to benefit New Zealand is assessed with regard to a "with or without" counterfactual test; that is, the relevant Minister must determine what the state of the sensitive land would be with or without the overseas investment in question.[66]

IV The Pre-Establishment Scheme and the Objectives of International Investment Agreements

Investment promotion is a key objective explicitly outlined in the NZCFTA.[67] From New Zealand's perspective particularly, FDI is a crucial driver of

[61] LINZ, above n 56, pp 2-3. The OIO rejected a bid by the Hong Kong-based Natural Dairy and its New Zealand-based sister company, UBNZ Asset Holdings to buy a set of New Zealand farms – the Crafar farms – on the basis that its directors and frontwoman May Wang, failed the "good character" test.
[62] Section 18.
[63] "Sensitive land" involves land of a particular size and/or characteristic, as defined in s 12 and Schedule 1 of the Act.
[64] Land Information New Zealand (LINZ) *Sensitive Land* (Overseas Investment Office, July 2011) at 3. While "substantial and identifiable benefit" is not defined in the Act, the OIO recognises that "the fact that section 16(1)(e)(ii) refers simply to a "benefit" whereas section 16(1)(e)(iii) refers to "substantial and identifiable benefit" suggests a degree of differentiation. Thus the degree of benefit required to be established under section 16(1)(e)(iii) will need to be greater than the benefit under section 16(1)(e)(ii)". See: Land Information New Zealand (LINZ) *Benefit to New Zealand factors* (Overseas Investment Office, June 2009) at 2.
[65] Note, s 17(g) of the Act points to factors set out in regulations. The relevant regulations are found in r 28 of the Overseas Investment Regulations 2005. Factors not listed in s 17 of the Act and r 28 of the Regulations are not relevant in determining benefits to New Zealand. Note also, s 16(e)(ii) requires that the assessment of benefits must be positive. Investments deemed to be neutral must be declined.
[66] *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information New Zealand* [2012] NZHC 147 at [35].
[67] Article 136.

economic growth as the country's private domestic savings are inadequate to cover its investment needs and this informs New Zealand's international economic strategy in terms of investment. The achievement of promotional gains relies on both the clarity and enforceability of legal rights and obligations, and the operation and interaction of the NZCFTA and the Overseas Investment Act raise concerns in respect of both elements.

In terms of the NZCFTA, both the text of the investment chapter and the way in which the FTA's operation is informed by New Zealand's subsequent IIAs, are not well understood. Indeed, the rights regarding the admissibility of pre-establishment disputes to the nominated international arbitral tribunals were a source of some confusion in the recent, successful bid by the Chinese-owned Milk New Zealand Holdings Ltd, (a subsidiary of Shanghai Pengxin Group Co Ltd (Shanghai Pengxin)), to buy the Crafar farms. The Crafar farms are a set of 16 New Zealand farms previously owned by the Crafar family. On the advice of the OIO, the relevant Ministers agreed that the relevant criteria under the Overseas Investment Act and the Overseas Investment Regulations had been met and they approved Shanghai Pengxin's application on 27 January 2012.[68] The Ministers' decision was subsequently judicially reviewed on application by a rival bidder. After the decision had been announced, some New Zealand commentary illustrated misunderstandings regarding the rights of admissibility of disputes extended to affected Chinese investors where pre-establishment obligations have not been met. Professor Jane Kelsey, for example, claimed that if the Ministers had declined Shanghai Pengxin's application to purchase the farms, the New Zealand Government "could have faced an international law suit for breaching its free trade agreement with China".[69] However, as has been shown, the right to submit a dispute for international arbitration under the ISDS provisions contained within the NZCFTA does not extend to the pre-establishment phase. Thus, had Shanghai Pengxin's application been declined, the company would not have had the right to challenge that decision under the NZCFTA in an international arbitral tribunal.

The operation of the Overseas Investment Act also lacks certainty. The Act allows ministers significant discretion in the weight to be given to each of the factors in s 17. Section 17(1)(c) provides that ministers may "determine the relative importance to be given to each relevant factor". Furthermore, in 2010, the Government introduced two new tests into r 28 of the Overseas Investment Regulations 2005:[70] an "economic interests" test[71] and a "mitigating factors" test,[72] both of which allowed more discretion in what the OECD has referred to as "an already complex and non-transparent

[68] Jonathan Coleman and Maurice Williamson "Ministers approve Crafar farms bid" (press release, 27 January 2012).
[69] Professor Jane Kelsey "China Could Have Sued Under FTA if Crafar Farm Sale Declined" (press release, 30 January 2012).
[70] Bill English "New investment rules strike the right balance" (press release, 27 September 2010).
[71] Regulation 28(i).
[72] Regulation 28(j).

regime".[73] Assessments under the Act consequently have the potential to allow the Government to pursue different policies within the existing framework, which could allow very different decisions where different ministers emphasize and play down different factors. This naturally reduces transparency in the decision-making process and consequently frustrates investor certainty concerning the way in which the criteria will be applied to a proposed investment.

The increase in transaction costs deriving from the lack of certainty and non-transparent nature of the Act can be seen in Shanghai Pengxin's application to acquire the Crafar farms. The application notes:[74]

> The Applicant has acted entirely in good faith and has used all its best endeavours, *including extensive use of consultants within New Zealand, to satisfy the requirements of the Act.*

This accords with the typical experience of overseas investors dealing with the Act. New Zealand law firm Chapman Tripp have noted that such investors are "generally surprised at the level of detail and effort required to get an application over the line".[75]

Similarly, the negative effect on promotional gains engendered by this uncertainty can be seen in the judicial review of the Ministers' approval of Shanghai Pengxin's application. In *Tiroa E*, Miller J determined that the OIO had been applying an incorrect counterfactual for determining whether an overseas investment would, or would likely, benefit New Zealand. Whereas the OIO had been assessing the likely benefits "before or after" the proposed investment was made, Miller J clarified that the Act contemplated a counterfactual that assessed the benefits that would accrue "with or without" the overseas investment.[76] In a letter from the Minister of Foreign Affairs to the Minister for Land Information, it was revealed that the challenge and Miller J's decision in *Tiroa E*, had caused "significant confusion in the minds of potential investors as to

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[73] Organisation for Economic Co-operation and Development (OECD) *OECD Economic Surveys: New Zealand 2011* (2011) at 125. The review that led to this extension in discretion was actually aimed at *increasing* transparency and predictability for foreign investors and some changes were made to reduce the number of applications requiring screening and to increase the speed with which applications were processed. However, the increase in ministerial discretion and retention of the s 17 test where sensitive land is involved means that, in fact, the screening mechanism has "become increasingly opaque and need[s] to be simplified to increase certainty, clarity and consistency". See: at 125.

[74] Land Information New Zealand (LINZ) *Decision required under the Overseas Investment Act 2005: Milk New Zealand Holding Limited* (Overseas Investment Office, 1090 / 201110035, 19 January 2012) 62, emphasis added.

[75] Chapman Tripp "Removing the muddle from the Overseas Investment Act" (10 February 2009). <http://www.chapmantripp.com/publications/Pages/Removing-the- muddle-from-the-Overseas-Investment-Act.aspx>.

[76] At [30]-[45].

whether New Zealand is a stable and certain environment for foreign investment", and that "some potential investors considering investment in New Zealand have already been deterred from pursuing their enquiries further".[77] All of this shows the very real negative effect that this sort of ambiguity in a screening mechanism can have for potential FDI.

By contrast, the certainty sought by the transparency provisions contained within the NZCFTA more successfully achieves the promotional objective. Article 146 provides, "Each Party shall publish international agreements pertaining to investment to which it is a party." To be sure, this is not as comprehensive as, for example, a provision that requires each party to publicise all domestic laws and regulations relating to foreign investment. However, the FTA does include a further provision concerning the promotion and facilitation of investment, in which both Parties "affirm their desire" to cooperate and exchange information in order to improve the climate for two-way investment, and to build linkages between agencies of each Party in order to promote bilateral investment.[78] In pursuit of these objectives, as of February 2012 New Zealand officials were working with China's Investment Promotion Agency (CIPA), to prepare "high-quality, up-to-date, Chinese-language information on the rules and regulations of investment in New Zealand".[79]

Just as the lack of certainty in the operation of the legal instruments undermines the promotional objectives of the NZCFTA, lack of enforceability also raises some concerns. As outlined in Part II of this paper, ISDS provisions extended to cover the pre-establishment phase create a real protection around the *right* to invest. Promotional gains are then achieved as potential investors are protected against wasting transaction costs and alternative investment opportunities. As has been noted however, although pre-establishment rights are extended to Chinese investors, the ISDS provisions do not apply to the pre-establishment phase, thus these rights lack legal enforceability. Therefore, at face value, the pre-establishment rights contained within the NZCFTA should not be particularly effective with regard to either protection or promotion. Certainly in a state where the domestic judicial system offers little recourse as a result of discernable prejudices against foreign investors in the judicial process, the lack of enforceable rules in an IIA might be a significant impediment to the effective protection of the right to invest.[80] However, New Zealand has a judicial system underpinned by a strong adherence to the rule of law and thus the lack of enforceability in the NZCFTA is not such an impediment to investment promotion. The ability of a foreign investor to challenge a decision made under the Overseas Investment Act that is

[77] Letter from Murray McCully (Minister of Foreign Affairs) to Maurice Williamson (Minister for Land Information) regarding Miller J's decision in *Tiroa E & Te Hape B v Chief Executive of Land Information New Zealand* (13 April 2012) (Obtained under Official Information Act 1982 Request to the Office of Hon Maurice Williamson).
[78] Article 151.
[79] NZTE and MFAT, above n 2, p 27.
[80] Salacuse & Sullivan, n 9, at 75.

inconsistent with the pre-establishment scheme should provide sufficient protection concerning the right to invest. Moreover, if the Government were to violate its pre-establishment obligations, this would undermine New Zealand's image as a welcoming destination for FDI, as well as detrimentally affecting New Zealand's economic relationship with China specifically. Accordingly, there are at least incentives underpinning the extension of those rights and consequently, the substantive guarantees are not meaningless. As such, the promotional objective is achieved to an extent, in this respect.

In terms of challenging decisions made under the Overseas Investment Act, while the overseas investor has recourse to judicial review in the New Zealand courts, decisions can be challenged only on procedural grounds,[81] which, in light of the wide discretion afforded to Ministers, could provide an inadequate means of challenging a decision.[82] Thus the significant transaction costs that may accrue in trying to comply with the requirements under the Act, and the lack of any domestic judicial recourse concerning the merits of the Ministers' decision, risks undermining investor confidence, consequently stifling foreign investment. Indeed, it has been suggested that the introduction of merit-based judicial review of decisions made under the Act would help bolster the confidence of potential foreign investors. It is argued that over time this would "standardise interpretation of the Act and permit the reversal of anomalous decisions, thus improving the predictability of its application".[83] A merit-based judicial review process in New Zealand could also engender more certainty than extension of the ISDS provisions to the pre-establishment phase. Investor-state arbitrations have produced some inconsistent awards which undermine certainty. Furthermore, there is no formal system of precedent in investor-state arbitration, and to the extent that trends can be identified, the relative dearth of arbitral decisions means that they provide minimal guidance.[84] New Zealand's domestic legal system, on the other hand, operates under the doctrine of precedent and with time would likely generate the predictability sought by potential foreign investors.

Finally, in terms of the level of liberalization achieved by the FTA – or more specifically for the purposes of this paper, the facilitation of investment inflows into New Zealand – in short, the NZCFTA is relatively ineffective. To be sure, MFN treatment is extended to the pre-establishment phase in the agreement itself, and NT is extended to pre-establishment by virtue of the

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[81] A claim in judicial review against the merits of a decision may be made out on the ground of unreasonableness, however unreasonableness is exceptionally difficult to prove and in most cases a court will not find on the grounds of unreasonableness alone. See: Crown Law Office *The Judge Over Your Shoulder* (Crown Law Office, Wellington, 2005) [54]-[57].

[82] Dave Heatley and Bronwyn Howell "Overseas Investment: is New Zealand 'Open for Business'?" (New Zealand Institute for the Study of Competition and Regulation Inc, 2010) at 36.

[83] Heatley and Howell, above n 82, at 36.

[84] See: John Savage "Investment Treaty Arbitration and Asia: Survey and Comment" (2005) 1 AIAJ 3 at 7; UNCTAD, above n 16, at 35.

NZMFTA and AANZFTA, hence New Zealand's international obligations abide by the full liberalization model outlined above. On the other hand, the exception for non-conforming measures that sees the continued application of the Overseas Investment Act, alongside New Zealand's non-discriminatory policy towards the nationality of inward foreign investors, means that the IIAs themselves do not further liberalize the investment regime. However, because the full liberalization model sets a benchmark of liberalization beneath which the granting state may not fall, reform of the existing non-conforming measures in such a way as to make them more restrictive would be inconsistent with the FTA. Not only has New Zealand committed to "endeavour to progressively remove … non-conforming measures", but the Agreement notes that MFN obligations are exempted from an amendment to non-conforming measures only "to the extent that the amendment does not increase the non-conformity of the measure".[85] This indicates that if the Overseas Investment Act were wound back to become more restrictive, New Zealand would be in contravention of its obligations in its IIAs.

V Conclusion

This paper began by noting that there are three key objectives sought by parties to an IIA: protection, promotion and liberalization. As is common in such agreements, the investment chapter of the NZCFTA explicitly pursues the first two. The agreement seeks to establish rules to "ensure the protection and security of investments", and "encourage and promote the flow of investment between the Parties".[86] In terms of liberalization, the agreement itself does not profess to pursue liberalization, and does not in fact promote a fully liberalized investment relationship. However, by virtue of the MFN clause and later IIAs signed by New Zealand, the international pre-establishment rights granted to Chinese investors proposing to invest in New Zealand now abides by the full liberalization model, with both MFN and NT granted in the pre-establishment phase. Despite this, as with other states that pursue the full liberalization model, this is a qualified liberalization subject to non-conforming measures. As far as foreign investment coming into New Zealand is concerned, the most significant regulatory barrier constituting a non-conforming measure is the New Zealand Overseas Investment Act 2005. The barriers to FDI established in the Act are considered to be "relatively onerous" by OECD standards, despite the fact that measured by other indicators New Zealand is one of the more liberal OECD countries in terms of international economic relations.[87]

As this paper has illustrated, the level of predictability engendered by the NZCFTA and Overseas Investment Act is undermined by issues of clarity and enforceability in those legal instruments' operation and interaction. First, it is clear that both the text of the agreement and the way in which the agreement interacts with New Zealand's later IIAs by virtue of MFN, have the potential to cause confusion in the minds of both overseas

[85] Article 141.
[86] Article 136.
[87] OECD, above n 73, at 123-124.

investors and New Zealanders alike. Second, the operation of the Overseas Investment Act and its interaction with the NZCFTA is similarly ambiguous and unclear. In particular, the Act is complex and relatively non-transparent because of the degree of discretion it affords to decision-makers. The evidence indicates that this lack of certainty results in significantly increased transaction costs, especially for investors seeking to invest in "sensitive land". This level of discretion accompanied by the fact that a challenge in judicial review is largely restricted to procedural grounds, means that investors have little domestic recourse where the decision seems somewhat inconsistent with previous decisions made under the Act. Finally, the unenforceability of the legal rights contained within the NZCFTA has the potential to undermine investor confidence. However, this should not be overstated. There would be significant political and economic repercussions if the New Zealand Government were to violate its obligations in the FTA.

It bears repeating however, that the operation of these legal instruments is in no way the sole explanation for weak inward investment growth in New Zealand from Chinese investors. Among other things, New Zealand is a small, geographically isolated country, which does not offer the kind of large-scale investment opportunities or the significant tax incentives many developing countries offer Chinese investors. Consequently, New Zealand remains a relatively low-priority destination for Chinese investment. Indeed, outward FDI flows from China into developed states generally remain relatively low in contrast to China's FDI flows into developing counties. Further to this, MFAT explicitly noted in its National Interest Analysis that as a result of "an historically small investment relationship, modelling … assumed that change in investment and capital stock as a consequence of the FTA would be minimal". However, the report also forecasted that the commitments on MFN and NT, alongside investment protection and ISDS provisions, "should contribute to an increase in investor confidence in the investment regime between the two countries".[88] In light of the fact that Chinese FDI in New Zealand has not seen the same increases as have occurred in the trade relationship, it is arguable that the lack of clarity in the operation and interaction of the legal instruments governing that flow of investment, and to a lesser extent the unenforceability of the obligations contained within them, illustrates that the estimation of risk in the establishment of investments, for Chinese investors, remains high. Thus, it is necessary to ensure transparency and predictability in the pre-establishment phase rights and obligations, as provided by the NZCFTA and Overseas Investment Act. To do so should reduce investors' estimations of risk – specifically wasted transaction costs and alternative investment opportunities – and thus encourage greater investment flows.

As compared with investors from New Zealand's traditional international economic partners, Chinese investors are still relative newcomers to the establishment of overseas investment and face in New Zealand a culturally different regulatory scheme from that operating in China. Of fundamental importance therefore, is the creation of Chinese-language guidelines

[88] MFAT, above n 48, 6.1.3.5.

explaining rights and obligations in the operation and interaction of the Overseas Investment Act and the NZCFTA. In light of this, the commitment outlined in the New Zealand Government's China strategy to work with CIPA to produce "high-quality, up-to-date, Chinese-language information on the rules and regulations of investment in New Zealand", is promising.[89] Of further value would be extensive guidelines on New Zealand's IIA framework and the way in which the rights and obligations contained within the various IIAs interact with one another and with domestic law, in order to facilitate greater understanding both among New Zealanders and overseas investors generally.

As a case study illustrating the way in which liberalization is achieved by the extension of pre-establishment rights in an IIA, the NZCFTA demonstrates that even where an IIA abides by the full liberalization model the level of liberalization achieved in the agreement itself is limited. Specifically, there is extensive scope in the non-conforming measures allowed by the NZCFTA, in particular, the Overseas Investment Act. Thus, despite the existence of an IIA that is drafted with a more liberal framework, the New Zealand Government retains significant economic levers with which to control the entry of Chinese investments into New Zealand. The obligations in the NZCFTA merely lock in a level of liberalization in a constant, self-adapting form if and when non-conforming measures are removed. The current settings consequently achieve the goals of both economic liberalism and economic nationalism in that the Agreement facilitates and encourages liberalization while allowing the State to retain a powerful degree of control over inward FDI.

A more contentious approach to reform therefore, would involve tightening up the degree of ministerial discretion permitted under the Act. On the one hand, as the OECD has pointed out, the operation of the Overseas Investment Act is complex and non-transparent, and needs to be reined in to ensure transparency and greater certainty for foreign investors seeking to invest. On the other hand, a degree of discretion is desirable as it allows for some host state policy flexibility. Ultimately, this is one of the key controversies in globalization: balancing the benefits of granting international rights in pursuit of globalized markets against the protection of host state sovereignty. However, it would be desirable to at least pursue some guarantee of consistency in the application of the criteria in the Act in order to provide predictability for foreign investors. Certainly, any efforts taken to increase transparency and predictability in New Zealand's foreign investment regime would be a constructive step towards encouraging higher levels of foreign investment, both specifically in the China– New Zealand economic relationship, and in New Zealand's international investment relations generally.

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[89] NZTE and MFAT, above n 2, at 27.

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64(4) 463-9549 http://www.victoria.ac.nz/chinaresearchcentre