

Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement

Background

- 3.1 The *Australia New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA) was Australia's first bilateral free trade agreement.¹ Australia's economic relationship with New Zealand is conducted within the framework of ANZCERTA. It covers all trans-Tasman trade in goods and services, and is the principal instrument for the elimination of trade barriers between the two nations.²
- 3.2 According to the Department of Foreign Affairs and Trade (DFAT), ANZCERTA has been recognised in the World Trade Organisation as among the most comprehensive and effective free trade agreements.³
- 3.3 The objectives of ANZCERTA are to:
- strengthen the broader relationship between Australia and New Zealand;

1 *Australia New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA), done at Canberra, 28 March 1983.

2 Department of Foreign Affairs and Trade <http://www.dfat.gov.au/fta/anzcerta/anzcerta_history.html> viewed 4 March 2011.

3 *ANZCERTA: Its Genesis and the Present*, Attachment to the *National Interest Analysis* (NIA) [2011] ATNIA 10, *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, done at Wellington on 16 February 2011, [2011] ATNIF 6, p. 1.

- develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
 - eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
 - develop trade between New Zealand and Australia under conditions of fair competition.⁴
- 3.4 Since 1 July 1990, all goods meeting ANZCERTA Rules of Origin criteria have been traded across the Tasman free of duty and quantitative import restrictions.⁵
- 3.5 The Trade in Services Protocol, which was included in ANZCERTA from January 1989, also allowed most services to be traded free of restriction across the Tasman.⁶
- 3.6 According to DFAT, since ANZCERTA came into force, bilateral trade between the two countries has increased at an average of around 8 per cent annually.⁷ In 2009-10, trans-Tasman goods and services trade was valued at around \$21.0 billion.⁸
- 3.7 Australian merchandise exports to New Zealand in that year were valued at \$8.0 billion, and included the following significant categories:
- medicines and veterinary medicines (\$361 million);
 - computer parts and accessories (\$276 million);
 - refined petroleum (\$257 million);
 - passenger vehicles (\$240 million); and
 - printed matter (\$213 million).⁹

4 *National Interest Analysis (NIA) [2011] ATNIA 10, Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, done at Wellington on 16 February 2011, [2011] ATNIF 6, para. 4.

5 NIA, para. 7.

6 *ANZCERTA: Its Genesis and the Present*, p. 1.

7 *Political Brief, Attachment to the National Interest Analysis (NIA) [2011] ATNIA 10, Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, done at Wellington on 16 February 2011, [2011] ATNIF 6, para. 4.

8 *Political Brief*, para. 4. Monetary sums are expressed in Australian Dollars unless otherwise indicated.

9 *ANZCERTA: Its Genesis and the Present*, p. 1.

- 3.8 Merchandise imports from New Zealand were valued at \$7.0 billion and included the following significant categories:
- crude petroleum (\$1,387 million);
 - gold (\$504 million);
 - alcoholic beverages (\$310 million);
 - foods (\$248 million); and
 - paper and paperboard (\$231 million).¹⁰
- 3.9 Two-way trade in services amounted to \$5.9 billion in 2009-10.¹¹
- 3.10 Australia is New Zealand's largest trading partner. In contrast, New Zealand is Australia's eighth largest trading partner.¹²

Treatment of Foreign Investment

- 3.11 Foreign investment occurs when a person in one economy invests in an enterprise in another economy.¹³
- 3.12 The Protocol on Investment to ANZCERTA defines an investment as:
- ... every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.¹⁴
- 3.13 Foreign investment is generally considered by Governments to be beneficial. The Australian Government:
- ...welcomes foreign investment. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.
- Foreign investment brings many benefits. It supports existing jobs and creates new jobs, it encourages innovation, it introduces new

10 ANZCERTA: *Its Genesis and the Present*, p. 1.

11 ANZCERTA: *Its Genesis and the Present*, p. 1.

12 *Political Brief*, para. 4.

13 Organisation for Economic Co-operation and Development, *OECD Benchmark Definition of Foreign Direct Investment, Third Edition*, 1996, p. 7.

14 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, done at Wellington on 16 February 2011, [2011] ATNIF 6, Article 1.

technologies and skills, it brings access to overseas markets and it promotes competition amongst our industries.¹⁵

- 3.14 Both Australia and New Zealand currently screen foreign investment against national interest criteria.¹⁶
- 3.15 In Australia, foreign investment is regulated by the *Foreign Acquisitions and Takeovers Act 1975*. The Act established the Foreign Investment Review Board (FIRB) to review certain types of foreign investment and make recommendations to the Treasurer or Deputy Treasurer, who is responsible for making a decision about whether the investment is in Australia's 'national interest.'¹⁷
- 3.16 The types of foreign investment subject to review are:
- all investments by foreign governments and their related entities;
 - foreign persons acquiring a 15 per cent or more share of an Australian entity worth at least \$231 million, or acquiring an offshore entity whose Australian subsidiaries are worth at least \$231 million;
 - foreign persons acquiring a five per cent or more share in an entity in the media sector, regardless of value;
 - foreign persons acquiring real estate, including private housing regardless of value, and commercial real estate worth \$50 million or more.¹⁸
- 3.17 There is no definition of 'national interest' for the assessment process. DFAT advised that an investment is assumed to be in the national interest unless it raises some concerns that cannot be addressed through the imposition of conditions on the investment.¹⁹ The FIRB indicates that:

The Government reviews foreign investment proposals against the national interest case-by-case. We prefer this flexible approach to hard and fast rules. Rigid laws that prohibit a class of investments

15 Foreign Investment Review Board (FIRB), *Foreign Investment Review Framework*, January 2011 <[http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_\(English\).pdf](http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_(English).pdf)> viewed 20 July 2011.

16 NIA, para. 5.

17 FIRB, *Foreign Investment Review Framework*, January 2011 <[http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_\(English\).pdf](http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_(English).pdf)> viewed 20 July 2011.

18 FIRB, *Foreign Investment Review Framework*, January 2011 <[http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_\(English\).pdf](http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_(English).pdf)> viewed 20 July 2011.

19 Ms McGrath, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 11 May 2011, p. 2.

too often also stop valuable investments. The case-by-case approach maximises investment flows, while protecting Australia's interests... But, if we ultimately determine that a proposal is contrary to the national interest, we will not approve it.²⁰

- 3.18 New Zealand's foreign investment screening regime is principally contained in the *Overseas Investment Act 2005 (NZ)*. Applications to invest in New Zealand are assessed by the Overseas Investment Office (OIO). The OIO screens foreign proposals to acquire 'sensitive New Zealand assets'. These include business assets valued at more than \$NZ100 million. The New Zealand regime does not apply to portfolio investment below 25 per cent, internal corporate reorganisations and offshore takeovers. However, New Zealand screens all proposed foreign acquisition of 'sensitive land' and fishing quotas.²¹
- 3.19 The definition of sensitive land is complex, but in general covers farmland, islands, the beds of lakes, lands of conservation value, and shorelines.²²
- 3.20 Two-way accumulated trans-Tasman investment now stands at over \$110 billion.²³ New Zealand is the third largest market for Australian investment abroad, with Australia the largest investor in New Zealand.²⁴
- 3.21 Over half of Australia's total investment in New Zealand is foreign direct investment, reflecting the high level of economic integration.²⁵ Recent investment activity from Australia has involved investment in New Zealand's transport and banking sectors.²⁶

20 FIRB, *Foreign Investment Review Framework*, January 2011
<[http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_\(English\).pdf](http://www.firb.gov.au/content/_downloads/Australias_Foreign_Investment_Policy_(English).pdf)> viewed 20 July 2011.

21 Overseas Investment Office (New Zealand), <<http://www.lin.govt.nz/overseas-investment>> viewed 20 July 2011.

22 For a full definition of sensitive land, see Schedule 1 of the *Overseas Investment Act 2005 (NZ)*.

23 *Political Brief*, para. 4.

24 *ANZCERTA: Its Genesis and the Present*, p. 2.

25 *ANZCERTA: Its Genesis and the Present*, p. 2.

26 *ANZCERTA: Its Genesis and the Present*, p. 2.

The Protocol on Investment

3.22 The Protocol on Investment to ANZCERTA is a proposed addition to the Agreement extending its application to trans-Tasman investment.²⁷

3.23 The Protocol on Investment proposed to be included in ANZCERTA is based on the Investment Protocol in the Australia – United States Free Trade Agreement.²⁸ According to the National Interest Analysis (NIA):

The Investment Protocol is in the national interest because it would:

- reduce red tape faced by Australian investors by removing or reducing existing investment barriers;
- reduce red tape for New Zealand investors by bringing the treatment of New Zealand investors under Australia's foreign investment regime in line with that granted to United States (US) investors under the Australia United States Free Trade Agreement (AUSFTA); and
- maintain Australia's capacity to screen major New Zealand investment proposals and investments in prescribed sensitive sectors that are most likely to raise potential national interest concerns to ensure that they do not proceed in a way that would be inconsistent with Australia's national interest.²⁹

3.24 The AUSFTA Investment Protocol establishes a threshold below which investments will not be subject to screening. The investment screening threshold is \$1,005 million for enterprises outside of sensitive categories.³⁰

3.25 Ratification of the ANZCERTA Protocol on Investment would result in New Zealand investors receiving preferential treatment equivalent to that provided to US investors in Australia (that is, a \$1,005 million threshold). In exchange, the New Zealand threshold for Australian investors will be indexed up from \$NZ100 million to \$NZ477 million. According to DFAT, the different screening thresholds committed to by Australia and New Zealand reflect the relative size of the Australian and New Zealand economies.³¹

27 *Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)*, done at Canberra, 28 March 1983.

28 *Regulation Impact Statement (RIS)*, Attachment to the NIA [2011] ATNIA 10, *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, done at Wellington on 16 February 2011, [2011] ATNIF 6, p. 2.

29 NIA, para. 5.

30 RIS, p. 2.

31 RIS, p. 6.

- 3.26 Consequently, the Protocol on Investment will reduce the range of transactions that are subject to screening by introducing higher monetary thresholds at which inward foreign investments of private investors would be screened.³²
- 3.27 The advantage of this approach will be that compliance costs in the form of application preparation expenses and fees for New Zealand investors will only be incurred on investments in Australia of \$1,005 million, and for Australian investors on investments in New Zealand of \$NZ477 million.³³
- 3.28 According to New Zealand Treasury calculations, the amendments will reduce current costs for investment in business assets by around two thirds.³⁴
- 3.29 It does not appear possible, using the available statistics, to determine how many applications for foreign investment from New Zealand would be subject to screening under the proposed threshold. However, in 2009-10, 24 applications from New Zealand were screened and approved.³⁵ These applications had a total value of \$5,831 million. Given this figure, it seems reasonable to assume that the number of investments from New Zealand that will be subject to screening under the new threshold will be very small.³⁶
- 3.30 Article 9 of the Protocol on Investment permits a number of exemptions to the new threshold based on existing restrictions that do not conform with the proposed threshold. These exemptions are listed in Annex i and Annex ii of the Protocol on Investment.³⁷
- 3.31 Exemptions that will require review and approval identified by Australia include:
- direct investment of any size in the media sector;
 - portfolio investment of more than five per cent of a media entity;
 - investments of more than \$231 million in telecommunications, transport, military or nuclear entities; and

32 RIS, p. 2.

33 RIS, p. 3.

34 RIS, pp. 7-8.

35 In 2009-10, the FIRB reviewed a total of 4,703 applications for foreign investment in Australia.

36 FIRB, *Annual Report 2009-2010*, p. 35, http://www.firb.gov.au/content/Publications/AnnualReports/2009-2010/_downloads/2009-10_FIRB_AR.pdf viewed 20 July 2011.

37 *Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement*, Article 9.

- the right by Australia to adopt or maintain measures relating to direct foreign investment in urban land (such as urban residential land).³⁸
- 3.32 There are no exemptions relating to rural properties or properties with heritage value outside of the exemptions listed above.
- 3.33 New Zealand's identified exemptions include:
 - direct investment in the dairy industry;
 - direct investment in telecommunications;
 - investment in 'protected areas', which appears to be similar to the current definition of 'sensitive land', discussed above.³⁹
- 3.34 In addition to the threshold below which investments will not be subject to screening, the Protocol on Investment will impose a range of other obligations intended to facilitate a liberalised but secure framework for trans-Tasman investment.
- 3.35 In particular, the Protocol on Investment will require:
 - an immediate commitment to equal treatment for investors of both nations (Article 5);
 - a future commitment to match any more favourable agreement with a third nation, excluding dispute resolution procedures (Article 6);
 - Parties not to impose export, domestic content or technology transfer target requirements or offer incentives (such as taxation incentives) to investors (Article 7);
 - that neither Party restrict the composition of the senior management or board members of an enterprise by nationality or residency, with such restrictions limited to a minority where this would not materially impair the ability of the investor to exercise control over its investment (Article 8); and
 - each Party is to guarantee free transfer of investor's funds and gains made on those funds in and out of the country, subject to certain exceptions (Article 10).⁴⁰

38 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, Annex i.

39 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, Annex ii.

40 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, articles as indicated in the dot points.

- 3.36 Article 9(1)(c) provides for a ‘ratchet mechanism’, so that future unilateral liberalisation by either country will automatically be bound by the agreement and cannot be rolled back.⁴¹
- 3.37 Articles 12, 13, 14 and 15 respectively require minimum standards of treatment under customary international law; equal compensation for losses resulting from natural disaster or conflict; for expropriation to be non-discriminatory and that all laws, regulations and other information relevant to investors is available to them.⁴²
- 3.38 The Committee is of the view that, overall, the Protocol on Investment to ANZCERTA will be a significant benefit to Australians investing in New Zealand, and, given the amount of New Zealand investment in Australia, is likely to remove all barriers to New Zealand investment in Australia to all but the most significant handful of investments.

Recommendation 2

The Committee supports the *Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement* and recommends that binding treaty action be taken.

Kelvin Thomson MP

Chair

41 See NIA paras. 29–30.

42 *Protocol on Investment to the Australia–New Zealand Closer Economic Relations Trade Agreement*, articles as indicated in the dot points.

