
The Parliament of the Commonwealth of Australia

Report 118

Treaties tabled on 23 March and 11 May 2011

Resolution MEPC.189(60), Adopted on 26 March 2010 Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973

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

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of recommendations

2 Resolution MEPC.189(60), Adopted on 26 March 2010: Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973

Recommendation 1

The Committee supports *Resolution MEPC.189(60), Adopted on 26 March 2010: Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973* and recommends that binding treaty action be taken.

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

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.

Introduction

Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of two treaty actions tabled on 23 March and 11 May 2011.
- 1.2 These treaty actions are proposed for ratification and are examined in the order of tabling:
 - **Tabled 23 March 2011**
 - ⇒ *Resolution MEPC.189(60), Adopted on 26 March 2010 Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (London, 17 July 2009)*
 - **Tabled 11 May 2011**
 - ⇒ *Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement (Wellington, 16 February 2011)*
- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.
- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not be entailed.
- 1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and

any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

- 1.6 A *Regulation Impact Statement* (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. A RIS has been tabled with the *Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement* (Wellington, 16 February 2011).
- 1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:

<www.aph.gov.au/house/committee/jsct>

Conduct of the Committee's review

- 1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling and in the national press on 11 May and 8 June 2011. Submissions were invited by 10 June 2011, with extensions available on request.
- 1.10 Invitations were made to all State Premiers, Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.
- 1.11 Submissions received and their authors are listed at Appendix A.
- 1.12 The Committee examined the witnesses on each treaty at public hearings held in Canberra on 20 June 2011 and on 4 July 2011.

- 1.13 Transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:

■ **23 March 2011**

<<http://www.aph.gov.au/house/committee/jsct/23march2011/hearings/index.htm>>

■ **11 May 2011**

<<http://www.aph.gov.au/house/committee/jsct/11may2011/hearings/index.htm>>

- 1.14 A list of witnesses who appeared at the public hearings is at Appendix B.

Resolution MEPC.189(60), Adopted on 26 March 2010: Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973

Introduction

- 2.1 On 23 March 2011, the *Resolution MPEC.189(60) Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973* (MARPOL) was tabled in the Commonwealth Parliament.
- 2.2 MARPOL is a multilateral treaty instrument intended to regulate marine pollution. The amendments under consideration add a new Chapter 9 to MARPOL that relates to the use and transport of heavy oils in the Antarctic seas.¹
- 2.3 The Antarctic Sea south of latitude 60 degrees is categorised as a ‘special protection area’ for the purposes of the MARPOL.² A ‘special protection area’ is a sea area for which special mandatory methods for the prevention

1 *National Interest Analysis* (NIA) [2011] ATNIA 7, *Resolution MPEC.189(60) Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, done at London on 26 March 2010, [2011] ATNIF 3, para. 1.

2 For the purposes of Annexes I, II and V. See NIA, para. 13.

of sea pollution is required because of the nature of the sea traffic and the oceanographic and ecological condition of the sea.³

- 2.4 The new Chapter will prohibit, except in certain circumstances, the bulk transportation and use as fuel of heavy oils, bitumen and tar and their emulsions in the region (referred to hereafter as HFOs).⁴
- 2.5 The exemptions to the prohibition on carriage of HFOs include vessels engaged in securing the safety of ships or in a search and rescue operation,⁵ and ships owned and operated by governments, such as naval vessels, auxiliaries and research vessels.⁶
- 2.6 According to the *National Interest Analysis* (NIA), in the extreme weather conditions of the Antarctic region, oil decomposition is very slow and so spillage of HFOs poses a serious environmental hazard.⁷

The cost of HFO spills is ten times the cost for lighter crudes or diesel fuel clean-ups. This is because the persistence of HFOs presents the greatest challenge during clean-up and the cost increases exponentially as the grade of oil increases. Sophisticated clean-up strategies are required for spills of more persistent oils, which to date has involved application of oil dispersants, and mechanical and manual recoveries. Responses to spills of persistent oils that are near shorelines can result in prolonged and laborious shoreline clean-up responses.⁸

- 2.7 The NIA cites a number of recent examples of discharges of HFOs in Antarctic seas. For example, spills of HFOs have occurred from cruise vessels the *Explorer* in 2007, and the *Ciudad de Ushuaia* in 2008.⁹ Ships carrying HFOs continue to sail in the region.¹⁰

3 Resolution MEPC.117(52), *Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973*, Annex 2, Article 11.

4 NIA, para. 14.

5 Resolution MPEEC.189(60) *Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, Chapter 9, Regulation 43, Article 1.

6 NIA, para. 16.

7 NIA, para. 8.

8 NIA, para. 8.

9 NIA, para. 7.

10 NIA, para. 7.

Impact on Australia

- 2.8 Australia has demonstrated leadership in many areas of marine environment protection as successive governments have recognised the importance of embracing internationally consistent measures and standards in the maritime industry. Australia's focus on marine environment protection is, in part, due to its heavy reliance on the international maritime industry to underpin its international trade.¹¹
- 2.9 The Amendment will provide Australia with the legislative authority to enforce the ban on the carriage of HFOs in the Australian Antarctic Territory. This will require amendments to Australia's *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.¹²
- 2.10 The Australian Maritime Safety Authority (AMSA) will enforce the new measure through its usual processes of port inspections, including monitoring of the oil record book required to be kept on board vessels, and liaising with international partners to ensure that ships registered in other countries are complying with the new standards.¹³
- 2.11 According to AMSA, if the revised Annex I of MARPOL was not implemented in Australia, there would be a risk that the level of environmental protection in Australia would fall short of internationally adopted standards. That may encourage ships carrying HFOs to operate unregulated in the Antarctic Area, which could have significant financial and environmental long-term effects for Australia. Rejection of the amendments would also undermine Australia's standing and influence in the international community regarding the protection of Antarctica's environment.¹⁴

Impact on the Australian Antarctic Division

- 2.12 The Australian Antarctic Division, which is part of the Department of Sustainability, Environment, Water, Population and Communities,

11 NIA, para. 10.

12 NIA, para. 15.

13 NIA, paras 12, 15, & Mr Paul Nelson, Australian Maritime Safety Authority (AMSA), Manager, Marine Environment Standards, Marine Environment Division, *Committee Hansard*, 20 June 2011, p. 3.

14 NIA, para. 12.

administers the Australian Antarctic Territory, and is the major Australian presence in the Antarctic.¹⁵

- 2.13 The Division strongly supports the measures introduced under the Resolution. Nevertheless, implementation of the Resolution will have some operational and budgetary implications for its work.¹⁶
- 2.14 The research vessel chartered by the Division, the *RSV Aurora Australis*, already uses light fuel, and is therefore compliant. Also, Australia's stations in the Antarctic are compliant. However, the Division also contracts Russian flagged vessels to provide logistic support, involving supply and waste removal for its Australian Arctic Program. These vessels are large, specialised, ice-strengthened cargo vessels which operate on intermediate fuel oil, which will be banned under the amending Resolution.¹⁷
- 2.15 However, the Division advised the Committee that the fleet of ice-strengthened cargo vessels is nearing 30 years old, which is the usual end of a ship's life. The Divisions expects to see a change over in this fleet to modern, compliant vessels in the next five years.¹⁸
- 2.16 The Division is currently commissioning scoping studies to assess its medium to long-term shipping needs. The consultation report notes that any new vessels will be engineered to comply with the Resolution.¹⁹
- 2.17 In the short term, the NIA consultation report notes the risk that Australia may damage its reputation as a lead nation under MARPOL if it continues to contract available non-compliant Russian ships.²⁰

Submission relating to Port Phillip Bay

- 2.18 The Committee received a submission which proposed that the area covered by the Amendment should be extended to 38 degrees south latitude, which is the northern point of Western Port, Victoria. The

15 Australian Antarctic Division < <http://www.antarctica.gov.au/about-us> > viewed 26 July 2011.

16 NIA, Consultation attachment, paras. 27, 28.

17 NIA, Consultation attachment, paras. 29, 30.

18 Mr Bryson, Australian Antarctic Division, *Committee Hansard*, Canberra, 20 June 2011, p. 5.

19 NIA, Consultation attachment, para. 33.

20 NIA, Consultation attachment, para. 34.

submission's intent was to extend protection to the roosting and foraging sites of the Phillip Island penguins.²¹

- 2.19 In response, AMSA argued that the different physical environment near the Australian continent meant that any HFO spill would not present the same degree of threat as in Antarctica, and that Australia has the capacity to deal with such a situation:

...the selection of 60 degrees is recognition that the situation is in the Antarctic, where the extreme weather condition, extreme cold, is a unique situation when you have a spill involving heavy fuel oil.

...responding to spills of heavily fuel oil in Australia waters is obviously... not something we would choose to do, but if there is an oil spill near Australia involving heavy fuel oil, we do not have the same problems that we do in the Antarctic. We can get to it, we have a national response plan in place that we can respond to incidents around the Australian coast. So [it is] a very different situation anywhere near Australia.²²

Conclusion

- 2.20 The Committee recognises the importance of the proposed amendments and supports their incorporation into the existing Treaty.
- 2.21 However, the Committee is concerned that a large proportion of vessels operating in Antarctic waters will be exempt from the prohibition on the basis that they are operated by governments. AMSA should monitor the number of exempt ships carrying HFOs in the region to see whether the provisions of the exemption need tightening.
- 2.22 While the Committee notes that the Australian Antarctic Division is one of the few institutions significantly affected, it also notes that the Division fully supports the amendments so as to provide greater protection to the Antarctic environment.

21 *Submission 2*, Maurice Schinkel, p. 1.

22 Mr Paul Nelson, Australian Maritime Safety Authority, Manager, Marine Environment Standards, Marine Environment Division, *Committee Hansard*, 20 June 2011, p. 2.

Recommendation 1

The Committee supports *Resolution MEPC.189(60), Adopted on 26 March 201: Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973* and recommends that binding treaty action be taken.

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.



Dissenting Report—Hon Dr Sharman Stone MP and Mr John Forrest MP

As members of the Joint Standing Committee on Treaties, we cannot support the *Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)*. This treaty was tabled on 11 May 2011.

Australia and New Zealand currently screen each other's private investment proposals using different dollar thresholds and considering different domestic interest criteria. The new protocol is intended to address non-government proposed investment disparities that currently exist between New Zealand and Australia. The aim is to give New Zealanders the same treatment as our most preferred trading partner, the United States of America.

New Zealand investors would see the threshold for the scrutiny of their proposals raised from 15 per cent of \$AU231 million for general investment, \$AU5 million for heritage properties and \$AU50 million for commercial properties, to the one trigger of 15 per cent of an \$AU1,005 million asset for any investment by a New Zealand corporation or businesses.

Australians, on the other hand would only see the investment screening threshold raised from 25 per cent of \$NZ100 million to 25 per cent of \$NZ477 million, and the New Zealand Overseas Investment Authority (NZ OIA) would retain its current "sensitive assets" criteria. The dollar threshold disparities have been argued on the basis that New Zealand has a smaller economy.

Both these amounts are to be indexed via each country's GDP price deflator. (The original 2005 threshold triggering Australian screening as determined with the USA was \$800million.)

While it presumes to be doing more, the new ANZCERTA Investment Protocol is only focussing on changing the dollar thresholds that trigger screening in either country. It is not addressing the different percentages of investment triggering

scrutiny, or the levels of proposed investment triggering screening. Nor does it consider the different definitions of so called “sensitive assets” in New Zealand (which include rural land over 5 hectares and any water frontage property) or Australia’s “prescribed sensitive areas” (which include media, telecommunications, transport, defence related industries and uranium).

Australia also screens investment in existing residential urban properties regardless of value and only allows certain purchases by non-citizens of vacant urban land or new buildings, which they must occupy, to discourage speculation. New Zealand citizen investors are given a special visa category which exempts them from these conditions, however Australian citizen investors in New Zealand are still restricted by water frontage and land over 5 hectare criteria.

The NZ OIA charges a significant application fee of some \$NZ 12,000 or so while the Foreign Investment Review Board of Australia does not charge fees for screening. The protocol does not address this anomaly.

New Zealand Treasury has calculated that the Protocol as proposed would reduce current costs for investment in business assets by around two thirds. It would appear that this will largely come from Australian businesses less frequently triggering the NZ OIA application fees, and few New Zealand investors triggering the Australian thresholds. Therefore this saving comes at a cost of less scrutiny and transparency for either country, and cannot be seen as a savings carrying a benefit of increased efficiency or effectiveness in ensuring the national interests of both countries are preserved.

While Australia accepted the conditions of the Australia – United States Free Trade Agreement for screening of non-government investment in Australia by US corporations or businesses, this was not reciprocal, nor harmonised. The USA has no formal dollar threshold triggering screening, but instead requires voluntary notification of any proposed investment which may trigger “national security” sensitivities. Failure to notify may lead to Presidential intervention.

It seems we still have not learned much about equal or reciprocal bilateral trade arrangements.

Article 8 (Senior Management and Boards of Directors) provides that neither party may restrict the nationality or residence of the senior management or board members of an enterprise of that party. Nationality or residency requirements may only be placed on a minority of board members where this would not materially impair the ability of the investor to exercise control over its investment.

We are concerned that such an arrangement could lead to a diminution of Australia’s national interests if a Board or senior management is not resident in either country and does not have Australian or New Zealand nationality, but enjoys preferential investment screening treatment.

In Summary:

The only new obligations imposed by this new protocol on Investment to the *Australia-New Zealand Closer Economic Relations Trade Agreement*, is the requirement that Australia substantially increases the threshold for screening New Zealand private sector investment proposals. Fees charged are not harmonised and special considerations are not aligned. Given the growing public disquiet about the lack of transparency and accounting for foreign investment in Australia, especially for farming land and manufacturing, now is not the time to simply raise the bar triggering less scrutiny, assessment of national interest and accountability.

We cannot give our approval to this Protocol.

The Hon Dr Sharman Stone MP
Member for Murray

Mr John Forrest MP
Member for Mallee



Additional Comments— Senator the Hon Helen Coonan

I wish to make some additional comments in relation to the *Protocol on Investment to the Australia- New Zealand Closer Economic Relations Trade Agreement*, tabled on May 11 2011.

I support the *Protocol on Investment to the Australia- New Zealand Closer Economic Relations Trade Agreement*, as it *strengthens the relationship between Australia and New Zealand*, develops closer economic relations through free trade, eliminates barriers and develops fair competition.

As a recent member of the committee I was unable to attend the hearing but have carefully considered the Hansard record of the evidence to the Committee at the public hearing on July 4 2011 where Treasury advocated the benefits of the treaty.

Treasury evidence was that it will strengthen the economic relationship between Australia and New Zealand, reducing compliance costs for investors and provide investment protections conducive to increased trans Tasman investment flows.

The evidence before the Committee indicated that:

- New Zealand enjoys favoured nation status and with this treaty will be given the same treatment as our largest investor, the United States, who is our 'most preferred trading partner'.
- Australia is the largest investor in New Zealand whereas New Zealand is the 3rd largest investor in Australia
- The 2 way investment stands at \$107 billion – total New Zealand investment in Australia is \$33.7 billion; whereas the Australian investment in New Zealand is \$73.9 billion, almost double;
- As the name of the treaty indicates - it will provide New Zealand with closer economic ties - the reciprocal benefits to Australia that might be expected are greater, given the size of our investment.

- The higher threshold at which Australian investment is to be screened is said to deliver significant compliance costs savings to Australian businesses.
- Any government investment is subject to the Foreign Investment Review Board (FIRB) screening and requires approval.
- No concerns were expressed by business in the submissions received in 2006 which I note included Telstra and TelstraClear which is Telstra's subsidiary in New Zealand. The support of Treasury is based on the 'assumption that foreign investment is in the national interest'.
- In all the time that FIRB has considered the approvals the only two to be rejected out of thousands of applications in a decade was SGX and Woodside – (page 3 of the July 4 transcript).

I have also had the benefit of reading the thoughtful dissenting report of Dr Stone on this Protocol, and believe it deserves careful consideration. Her views as the representative of a rural community are of particular relevance at a time where national discussion is focussed on food security and with calls for more rather than less scrutiny of overseas investors wanting to take a stake in Australia.

A point raised by Dr Stone relating to the threshold for review for New Zealand is that it is higher than for the United States. I take the point but do not believe the difference to be of sufficient concern to warrant not supporting the Protocol.

Dr Stone also raises concerns about the disparity about the trigger point for screening which is a higher percentage and higher dollar value in New Zealand. This may be seen as a barrier to New Zealand investment but as noted above there is already greater financial investment by Australians and much lesser investment by New Zealand investors. Any concerns are offset by the fact that the new threshold for Australian investors being increased 400 per cent under the protocol. It will serve to open up opportunities across the Tasman for Australian business and result in less compliance cost.

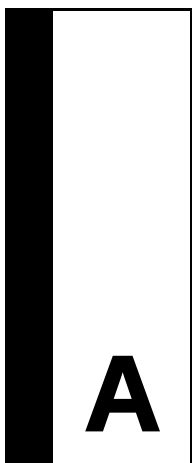
Dr Stone correctly points out there are different definitions applicable to sensitive areas. Foreign investment has made a very strong contribution to Australia's growth and development but there are sensitivities and some concerns that mean it is important to maintain a screening regime to ensure that investment is in the national interest. I am of the view that the differing definitions can be accommodated in pursuit of the greater benefits of the protocol.

However I do note Dr Stone's comment at page 5 of the July 4 Hansard that 'there is a history of 3rd party importation via NZ' to get around quarantine issues. The concern is that an investor may present as being a New Zealand entity and thereby gain access to the benefits of investment in Australia without meeting FIRB requirements. It is not clear that this apparent loophole would pose a

significant problem in terms of the scale and scope, thus far, of New Zealand investment into Australia.

On balance I am persuaded that the Protocol should be supported and concur with the recommendation to support the Protocol and recommend that the binding treaty action be taken.

Senator the Hon Helen Coonan



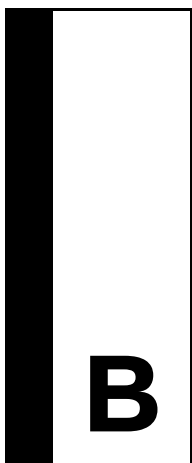
Appendix A — Submissions

Treaty tabled on 23 March 2011

- 1 Australian Patriot Movement
- 2 Mr Maurice Schinkel
- 3 Department of Infrastructure and Transport

Treaty tabled on 11 May 2011

- 1 Australian Patriot Movement



Appendix B — Witnesses

Monday, 20 June 2011 - Canberra

Australian Maritime Safety Authority

Mr Paul Nelson, Manager, Environment Protection Standards

Department of Infrastructure and Transport

Ms Poh Aye Tan, Section Head, Maritime Safety, Environment and Liner Shipping

Department of Sustainability, Environment, Water, Population and Communities

Mr Robert Bryson, Shipping Manager, Australian Antarctic Division

Monday, 4 July 2011 - Canberra

Department of Treasury

Ms Angela McGrath, Manager, International Investment & Trade Policy Unit, Foreign Investment and Trade Policy Division Markets Group

Ms Belinda Robilliard, Adviser, International Investment & Trade Policy Unit, Foreign Investment and Trade Policy Division Markets Group

