QUESTION ON NOTICE

Inquiry into foreign investment proposals – 7 August 2020
Topic: foreign investment

The Committee

Question 1

Please provide an explanation of the legal basis upon which Australia can impose and enforce conditions on a foreign entity that are not similarly applied to Australian-owned entities, specifically with regard to WTO national treatment obligations, or similar provisions in free trade agreements.

Answer

The national treatment obligation in the investment chapter of Australia's free trade agreements, where it applies, is focused on non-discrimination. It essentially requires Australia to accord relevant investors/investments treatment no less favourable than it accords to national investors/investments in like circumstances. Australia has a similar obligation in relation to specific listed sectors under the WTO General Agreement on Trade in Services (GATS).

However, as is the case with our other international trade and investment obligations, the national treatment obligation is subject to a range of reservations, exceptions, and carve-outs. For example, in Australia's free trade agreements, the national treatment obligation does not apply to any measure as set out by Australia in its schedules of non-conforming measures. These schedules include entries relevant to Australia's foreign investment screening regime. Our GATS commitments are subject to a similar reservation for Australia's foreign investment screening regime.

Senate Economics References Committee
Inquiry into foreign investment proposals 2020-2021

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Question 2

What kind of constraints on the ability to screen foreign investment applications have been introduced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership?

Background: In a publicly-released New Zealand Cabinet paper proposing a review of the New Zealand Overseas Investment Act 2005 (second tranche), the following statement was made:

The pace of this first tranche of changes was driven by the timing of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). After CPTPP enters into force we will be constrained in our ability to screen new types of sensitive land or other assets. Therefore, to date we have concentrated on those changes that must be in place ahead of CPTPP entering into force.[1]

Answer

Australia's international trade and investment obligations, including the national treatment obligation, are subject to a range of reservations, exceptions and carve-outs. One such reservation is for non-conforming measures as set out in Article 9.12 of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP).

According to Article 9.12 the national treatment obligation in CPTPP does not apply to any measure as set out by a Party in its own Annex I Schedule of existing non-conforming measures. However, this reservation is qualified by a 'standstill and ratchet' mechanism which essentially provides coverage for changes to existing non-conforming measures (which in Australia's case includes the entry for our foreign investment screening regime) so long as they do not make the measure less consistent with the national treatment obligation, compared to the situation immediately before the amendment.

It is important to note that, apart from the Annex I Schedule of existing non-conforming measures, a range of other reservations, exceptions and carve-outs under the CPTPP are relevant to Australia's foreign investment screening regime. This includes, for example, entries in Australia's Annex II Schedule of non-conforming measures in relation to proposed investments in urban land and agricultural land, which are not subject to the standstill and ratchet mechanism described above.

[1] See: Review of the Overseas Investment Act 2005: Terms of Reference.

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Question 3

The Committee received the following evidence from a Treasury official at a public hearing on 7 August 2020:

Mr Deitz: It has not been raised with us at this time. I refer you back to my previous answer around the status of this act as a non-conforming measure under our free trade agreements. That has the effect of standing still these arrangements. Again, I would suggest that these questions are also questions that the department of foreign affairs and the Attorney-General's Department would be appropriate areas to consult on the extent to which a positive test might have implications for those agreements but also on the kinds of matters that that particular Western Australian department referred to, whether or not they would constitute performance requirements and how those would play out under the same kinds of agreements. They are our experts on those matters, and we would defer to them.

a) Please explain the implications of 'standing still' in this statement.
b) In light of the trade agreements to which Australia is party, is the Australian government able to make changes to the foreign investment national interest test, the scope of conditions that might be imposed, or to enforce voluntary undertakings, under the Foreign Acquisitions and Takeovers Act?
c) If so, what changes can be made and to what extent? For instance, could the Australian government make the national interest test a positive test without contravening trade agreements? Could the Australian government decide to enforce what have previously been labelled 'voluntary undertakings'?
d) How, and to what extent, is Australia limited by trade agreements or international trade rules in making changes to the foreign investment regime?

Answer

The national treatment obligation in Australia's free trade agreements, where it applies, does not apply to any measure as set out by Australia in its Annex I schedules of existing non-conforming measures. However, this reservation is qualified by a 'standstill and ratchet' mechanism which essentially provides coverage for changes to existing non-conforming

measures so long as they do not make the measure less consistent with the national treatment obligation, compared to the situation immediately before the amendment.*

One of the entries in Australia's Annex I schedules of existing non-conforming measures in free trade agreements is for Australia's foreign investment screening regime which is subject to the standstill and ratchet mechanism described above. However, it is important to note that, apart from this non-conforming measure, a range of other reservations, exceptions and carve-outs are relevant to Australia's foreign investment screening regime.

Determining whether a particular proposed change to Australia's foreign investment screening regime would be consistent with Australia's international trade and investment obligations would involve the provision of legal advice on a case-by-case basis in light of all of the relevant facts and circumstances.

* The *Indonesia-Australia Comprehensive Economic Partnership Agreement* contains a 'standstill' mechanism without a 'ratchet' – i.e. the relevant comparator is the situation as it existed at the date Australia's Annex I Schedule entered into force.