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International trade and investment agreements

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1. International Investment Agreements (IIAs)

Australia is a very open economy. The Australian Government is committed to pursuing opportunities to increase trade and investment opportunities. One important way the government does this is by negotiating IIAs with important trading partners. IIAs is an umbrella term that covers both formal treaties, often referred to as Free Trade Agreements (**FTAs**) but which term fails to capture other important provisions, which are referred to below.

The government's strategy is to promote trade liberalisation at multilateral, regional and bilateral levels. It also seeks to promote foreign investment into Australia by providing investment protections to foreign investors.

Australia is a party to two different types of FTAs. The first are bilateral agreements. The second are multilateral agreements. Nearly all such agreements now contain much more content than the liberalisation or reduction of tariff trade barriers. They are so-called 'deep' trade agreements that, more importantly, contain non-tariff measures which go to the regulation and security measures provided to foreign investors into Australia. These measures include provisions such as the recognition of standards, and the protection of intellectual property rights and the protection of the competitive process. They also contain promises to prospective foreign investors to secure foreign investment.

In relation to the latter, those promises are of two types.

- The first type of promises are 'absolute' promises which apply regardless of what has been promised to other nation-States' investors, e.g., protections against expropriation of property, full protection and security of the property of the foreign investor, and (broadest of all) fair and equitable treatment.
- The second type of promises are 'contingent' promises which apply by reference to what has been promised to other nation-States' investors, e.g., national treatment (non-discrimination) and Most-favoured nation treatment.

In order to obtain the protections given to foreign investors, it is important to obtain advice as to the appropriate structuring of the investment so that it is clear that the relevant treaty is applicable to the investment.

It is also important to properly structure any agreement between the foreign investor and Australia (or one of its State-Owned Enterprises) so that appropriate risk-reduction measures (valid 'stabilisation' clauses in relation to changes in the law, agreement as to the applicable law, international arbitration and other provisions) are included in that agreement. This is especially important in relation to international investment contracts because many of the more recent investment treaties have not included direct Investor-State Dispute Settlement (**ISDS**) provisions that give a direct right of arbitration against a State for failure to comply with their promises in relation to protection of investments.

Australia currently has IIAs with ASEAN-Australia-New Zealand (AANZFTA), Chile (ACLFTA), China (ChAFTA), the parties to the CPTPP multilateral agreement, Hong Kong (A-HKFTA & IA), India (AI-ECTA), Indonesia (IA-CEPA), Japan (JAEPA), Korea (KAFTA), Malaysia (MAFTA), New Zealand (ANZCERTA), PACER Plus (many of the Pacific Island nations), Peru (PAFTA), RCEP (regional Asia-Pacific nations, including China), Singapore (SAFTA), Thailand (TAFTA), United Kingdom (A-UKFTA) and USA (AUSFTA). Other important IIAs are under negotiation.

While each of the IIAs signed and implemented by Australia differ in their specific content and obligations, the overall goals are often concurrent.

Foreign investment provisions are currently under close international scrutiny, with significant reforms being proposed or being investigated either at treaty level (*UNCITRAL Working Group III: Investor-State Dispute Settlement Reform*) or at the level of international investment contracts (*UNIDROIT Working Group on International Investment Contracts*). Each of these projects may significantly alter the rights and obligations of the States and foreign investors. For example, increasingly international treaties contain provisions about the

obligations of foreign investors with respect to the environment and other public policy issues. The relationship of those provisions to international contract law is being considered by UNIDROIT.

2. Comprehensive and Progressive Trans Pacific Partnership (CPTPP)

One of the most important treaties to which Australia is a party is the Comprehensive and Progressive Trans-Pacific Partnership signed on 8 March 2018 which is a regional treaty originally between Australia, Canada, Chile, Japan, Mexico, Peru, New Zealand, Singapore, South Korea and Vietnam. The CPTPP is seen as a platform that is open to others to join if they are able to meet the high standards for trade and governance set in that treaty.

The CPTPP parties currently have a combined GDP of US\$11.8 trillion and encompasses 6.6 per cent of the world population and 14.2 per cent of world trade.

On 16 July 2023, Ministers responsible for trade from CPTPP Parties and the UK signed the UK's Accession Protocol to enable the UK to join the CPTPP. Other states have made application to join the CPTPP (including China) with the potential to expand membership in the future.

The most important provisions of the CPTPP are the many important chapters that provide for the governance of markets. These include chapters on intellectual property, State-Owned Enterprises, e-commerce, telecommunications, labour, the environment, competition law and many more. The CPTPP also contains important provisions on the protection of investments by parties in member states and has ISDS arbitration provisions that allow the direct enforcement of those obligations under international arbitration (parties need not wait for diplomatic action at state level).

3. Other treaties

Energy Charter Treaty

Australia is a signatory to, but has yet to ratify, the Energy Charter Treaty. Currently, 51 European and Asian countries have signed or acceded to the Energy Charter Treaty. Australia has made certain reservations in relation to the application of the Energy Charter Treaty.

The main aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues. It is focused on encouraging investment and trade, ensuring reliable transit, and promoting efficient energy use. It contains important protections in relation to rights of investors in member states.

Australia New Zealand Closer Economic Relations Agreement

Most tariffs and quantitative import restrictions on trade in goods are prohibited under the Australia New Zealand Closer Economic Relations Agreement (ANZCER). Currently, 99 per cent of goods entering Australia from New Zealand are tariff-free.

Since 1991, both Australian and New Zealand suppliers of goods and services have had equal treatment in competition for government business. The ANZCER endorses the freedom of travel between the two countries. It also provides reciprocal agreements on social security and health treatment.

Other agreements between Australia and New Zealand include the Trade in Services Protocol, the Trans-Tasman Mutual Recognition Arrangement, the MOU on Business Law Coordination, and the Australia-New Zealand Convention.

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