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Evolution of Australia's Foreign Investment Review and Its Impact on Government Investors

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Abstract: Through a number of legislative reforms, most notably the Foreign Acquisitions and Takeovers Act of 1975 and its ensuing revisions, Australia's foreign investment policy has changed. The goal of the approach is to preserve national security while luring in international investment. The Foreign Investment Review Board (FIRB), which assesses foreign investments using a "national interest test," is a crucial component of this structure. With an emphasis on Chinese investments, this article investigates how these policies have affected state-owned businesses in particular. It examines potential changes to Australia's foreign investment laws in the future and draws attention to the difficulties presented by the FIRB review procedure.

Keywords: foreign investment review board (FIRB); national interest test; foreign direct investment (FDI)

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1. Introduction

The Australian government has always encouraged foreign investment, therefore preserving a welcoming and transparent market. Australia frequently uses a "national interest test" to analyse assets that need screening, with the exception of national security assessments. As a result, the Treasurer decides whether or not the suggested investment is against the interests of the nation [1]. The new national security assessments assess whether an investment might compromise national security in the context of the greater national interest. This entails assessing the impact of the investment on Australia's strategic and security interests, as advised by national security agencies [2].

This article examines Australia's foreign investment evaluation process and especially mentions the Foreign Investment evaluation Board (FIRB). This article discusses the steady evolution of Australia's foreign investment assessment process with respect to government investors and the extent to which it obstructs foreign investment by government organizations. There are five parts to this essay: The first section examines how foreign investment has affected the Australian economy. The paper's second portion examines the current level of foreign investment in Australia's economy, highlighting the most interested industries. The study's last portion addresses how the FIRB and FIR processes work. The article's fourth part outlines the fines imposed on Chinese investors. The fifth section assesses the impact of the Review Mechanism on foreign investment and forecasts possible changes to the procedure in the future.

2. Background

Australia changed the Foreign Acquisitions and Takeovers Act of 1975 in 2021, which resulted in significant changes to the FDI framework. These modifications brought to a new procedure for examining foreign investments for security issues and maybe even examining those that have previously been accepted and allowed into the nation [3]. With effect from March 29, 2020, these changes removed the temporary zero-dollar cap on foreign investment that was put in place as a result of the COVID-19 pandemic. Before this, the Foreign Acquisitions and Takeovers Act of 1975 required screening of all foreign investments, regardless of their value [4]. If foreign investors want to make any kind of investment in Australia, they need to get the Australian Treasurer's clearance via FIRB. Furthermore, the anti-money laundering regulations filter a large number of private foreign investments, so practically speaking, the threshold value is $0. Up to that point, screening was limited to foreign private investments above AUD 275 million, or AUD 1,192 million if the investing nation is an Australia trade partner [5].

A significant portion of Australian legislation governing its system for approving foreign investments is included in the Foreign Acquisitions and Takeovers Act 1975 (FATA 1975) and its related regulations. This regulation was created in the early 1970s in reaction to the increasing number of foreign investors purchasing local businesses and the growth of offshore investments [6]. The Foreign Investment Policy, which is overseen by the Australian Treasurer and carried out by the FIRB, serves as the foundation for law regulation. There is a dearth of study on the FIRB, and the majority of the studies that have been done thus far just described the procedure and the politics involved [7]. The Chinese government views the FIRB process as an essential part of the Australian FIRM, even if it also sees it as a roadblock to Chinese investment in Australia. Despite these efforts, these accords did not improve the situation for Chinese investors. As a result, it is likely that the FIRB procedure will remain a major barrier to Chinese investment. Consequently, it is essential that prospective Chinese investors familiarize themselves with the FIRM and the FIRB appraisal process [8].

Positive policies were established in Australia and China to address these needs. China's "Go Global Policy" gradually loosened the requirements for approving outbound investments, while the Australian government often maintained a liberal and unrestrictive stance on foreign investment [8].

3. Australian Foreign Investment Review Mechanism (Firm)

Australia's Australia continues to have some government influence over some areas of its foreign investment regulations. The Foreign Investment Review Board (FIRB), which has been in charge of monitoring the "national interest" assessments for suggested investments since the 1970s [9], is one important example. The government maintains an open and equitable environment for international investment. It seeks to draw in international capital while ensuring that it doesn't conflict with national interests [10]. The task of evaluating the financial benefits of foreign investment for the general public, investors, and businesses falls to the Financial and Inherent Risk Board (FIRB). It also considers any potential political and security issues that may arise from foreign ownership of Australian property [11]. The Treasurer of Australia may really make the choice in the event that an extra-regional foreign investment proposal goes against Australia's national interest. The Treasurer (or a delegate) makes this choice after taking into account the analysis and suggestions provided by the FIRB and the FIRB secretariat. Frequently, the Treasurer adopts the FIRB's advice in assessing the potential negative impact of a proposed foreign investment on Australia's national interest. Even if they are only suggestions, the Treasurer often follows through on them [12].

The FIRM was developed by the Australian government to be used in assessing whether foreign direct investment is beneficial for this nation. Applications for investments are only taken into consideration if they exceed certain financial criteria, which are

determined by the value of the Australian enterprise or, in the case of agribusinesses, the investment value as stated by the FIRB Policy. Thanks to the Foreign Investment Review Board (FIRM), Australia can better balance the preservation of its national interests and its need for international investment. If the FIRB finds that an agreed-upon foreign investment is against Australia's national interest, it may be refused or allowed subject to certain requirements [12]. It permits the government to take into account certain aspects of foreign ownership prior to authorizing an investment. Since the FIRM was initially implemented, the FATA 1975 and related regulations have been modified to preserve this equilibrium and take changing conditions into account [12].

4. Foreign Direct Investment (FDI)

FDI mostly occurs when a company physically invests in another nation (the foreign country) from its own country. Establishing a factory and acquiring plants, machinery, equipment, and other assets may be necessary for this. Because FDI is referred to as an indirect kind of foreign investment, it differs from other forms of foreign investment, such as portfolio investments [13]. The following discussion illustrates the advantages and disadvantages of foreign direct investment. FDI provides a means for people to participate in international investment, or, in the event that private companies are permitted to join the market, it establishes a venue for the advancement of both political and economic growth. But there are concerns that foreign direct investment (FDI) might be a dangerous kind of infiltration, jeopardizing Australia's national interest, and impeding some indigenous operations [14].

FDI has become even more important in the wake of the 2008 Global Financial Crisis and the global economy's decline. More and more countries are competing with one another on a worldwide scale to entice international investors by offering resources and physical infrastructure to improve financial stability and solvency [15]. Perhaps the best example is Australia, which became a highly developed, resource-dependent country and one of the top exporters of agricultural and basic commodities in the world thanks to its foreign investment system. Australia thus has a fundamental interest in encouraging steady, long-term FDI into and out of the country. Australia is aware that opening up FDI might contribute to economic diversification. But there is still a great deal of uncertainty about whether this development will continue and if it will benefit consumer and producer markets as well as delicate areas like services, jobs, and the environment [16]. The core of the dispute is tension over FDI regulation, both domestically and internationally. This issue stems from the challenge of finding a balance between the need to protect Australia and its citizens from the possible harm that Foreign Direct Investment (FDI) might do to the nation's politics, economy, and society [17]. On the one hand, it's critical that Australia treats international investors properly. On the other hand, protecting the nation's public interest and natural resources are also imperative. Above all, Australia must have an open and honest foreign direct investment (FDI) policy that can accommodate the interests of both state and non-state actors, not only foreign investors [18].

To tackle these issues, different regulatory strategies must be carefully synchronized. Fair, reasonable, and taking into account Australia's social, economic, and political circumstances in respect to FDI rules are necessary for FDI to remain stable. With no permanent regulations in place, the investment prospects for Australians, both domestically and in the diaspora, may result in disputes and resource waste. If there isn't a stable and adaptable climate for investments, foreign capital may be at danger, which might lead to social unrest and economic instability [19]. Better trade liberalization, reduced tariffs, deregulation and liberalization of foreign acquisition and investment, as well as worldwide industry privatization and liberalization, have all helped FDI. These modifications have led to the creation of new, even more complex investment structures and rules. FDI is also ongoing and increasing as a result of advances in technology, international communication, and foreign investment management [20].

Over the last several decades, foreign direct investment (FDI) has broadened to include the purchase of a substantial stake in a foreign company or enterprise. This might be a firm entering into a joint venture, purchasing a business abroad, building a new building, or collaborating with a local company to license technology or intellectual property. Many countries are becoming more accepting of foreign direct investment (FDI) in an attempt to boost their economies. This is often accomplished by improving communication and technology, as well as by lowering trade restrictions and fines [21]. Australia wants to lessen investor-state lawsuits, but it also wants to continue being a desirable location for international investment in order to fund national development and raise regulatory taxes [22].

5. The 2011 Australia Policy Statement

Australia has accepted many optional protocols linked to the seven major international human rights treaties, in addition to becoming a signatory to them. These agreements spell out Australia's responsibilities to protect human rights. Australia is bound by the terms of these treaties, having willingly ratified them, and must carry them out domestically. Consequently, regardless of how far Australian government laws, policies, and practices deviate from the rule of law, it is crucial to evaluate them in light of international human rights legislation.

In its Trade Policy Statement, the Australian government announced in April 2011 that it would no longer allow foreign investment arbitration to be included in bilateral and regional trade agreements [23]. According to the Policy Statement, Australia will no longer accept treaties that give foreign companies greater legal immunity than domestic companies or that restrict the Australian government's ability to introduce legislation in response to social, environmental, and economic issues.

6. Foreign Investor

It makes logical that countries are hesitant to allow profitable foreign businesses to set up shop on their soil since this may lead to more money leaving the country than coming in. Although foreign direct investment (FDI) has the potential to develop infrastructure and strengthen the economy, it also runs the risk of undermining regional businesses and national interests [24]. As a result, countries work hard to prevent foreign competition for their own industries and to regulate Foreign Direct Investment (FDI) that goes against their policies. They defend this limitation by using their sovereign right to manage FDI via trade and investment laws, administrative rules and procedures, and other ways. Governments maintain stringent controls over the influx and outflow of foreign money, even though FDI is widely recognized beyond security concerns [25].

Australia is a capital-importing nation, with the majority of its capital flowing into resource exploitation. Furthermore, resource-related businesses have sufficient negotiating leverage to safeguard their interests without the need for further treaty guarantees [26]. One factor that might contribute to an investment's acceptance is its ability to boost the local economy. For example, approval to purchase a dairy producer in Tasmania was given to Moon Lake Investments of China since it was expected to boost jobs in the area [27]. Two further ways to calm concerns are to promise that the management of a foreign investor won't harm Australian interests or that the local company being bought will be listed on the Australian stock market [28].

7. Obstacle

Australia's challenge is to establish economic ties with other investing nations while avoiding an excessive reliance on foreign infrastructure and resources. The goal is to protect sensitive and vulnerable sectors while using foreign investment to strengthen the domestic economy [29]. One of Australia's main policy flaws is that it could expose foreign domestic courts to international investors who are unable to get investor-state contracts.

This would make sense in nations that are endowed with robust legal frameworks, but the Australian government has made no effort to discern between those that do and do not have such frameworks [30].

Even if foreign investors from Asia could be OK with using Australian courts to handle disputes, Australian investors in Asia might be at a disadvantage. This might be attributed to the region's continuous expansion as well as the potential absence of complex regulatory systems. Additionally, from an interstate perspective, other countries in the region want to create bilateral trade and investment agreements (BRTAs) in order to fortify their economic ties with Australia. However, the economy of these countries are often more protectionist [31]. By outlining the specifics of the new policy, the government and the FIRB have attempted to allay the concerns of Chinese investors. They have, however, also emphasized that worries about national security now play a significant role in determining policy [32].

8. Case Studies

Foreign investment was debated during the Uruguay Round trade discussions, which led to the establishment of the WTO. The outcome was the restricted Trade-Related Investment Measures Agreement (TRIMs Agreement). This agreement's main goal is to elucidate and clarify the GATT's rules on import and export restrictions, as well as "national treatment" for imported goods, especially as they relate to investment measures [33].

This was not feasible, however, since Australia has legitimate concerns about China's state ownership and government-led non-commercial uses that remain to this day. Due to China's failure to increase the screening threshold for state-owned enterprises (SOEs) during the ChAFTA negotiations, every direct investment made in Australia by Chinese government investors, regardless of size, is deemed to be subject to FIRB assessment. In fact, the Chinese government's investment regulations have become more stringent as a result of the 2015 modifications to the FATA 1975 [34].

In this AUSFTA example for Australia's foreign investment screening, the two risks related to the definition of non-conforming measures (NCMs) in connection to non-discrimination duties are highlighted. Four recent international investment agreements (IIAs) describe Australia's foreign investment policy as a non-conforming measure only for national treatment, not for most-favored-nation (MFN) treatment. For instance, foreign investment policy is not exempt from investor-state dispute settlement (ISDS) or state-to-state dispute resolution (SSDS) under the ACLFTA. Under the present legal system in Australia, a private foreign investor who wants to buy shares of an Australian firm must have the Treasurer's approval if the acquisition exceeds a certain level, unless it involves considerations of national security.

Australia's foreign investment policy is mentioned in eight of its most recent international investment agreements (IIAs), notably TAFTA and ACLFTA, although only briefly[44]. This is consistent with how Annex II provisions are handled. For example, the AUSFTA's Annex II non-conforming measure (NCM) for foreign investment policy only covers certain areas, such giving Indigenous Australians priority treatment and allowing foreign investment on Australian urban property [35].

Examining the justification for transferring the cases to domestic courts, one may argue that these courts are better equipped to handle investor-state disputes because of their familiarity with local laws and public policy issues. It is believed that domestic courts are more qualified to consider all of the parties' legal rights, appreciate important matters of public policy, and provide well-informed decisions. International arbitrators can reward the foreign investor too widely since they are often trained in commerce and do not fully comprehend the conditions on the ground [36]. Sometimes, this has come at the expense of the host countries due to other vices and poor investment policies. A well-known example of how ISA awards may cause significant financial loss is the Loewen case. I brought up an example where an ISA tribunal in Canada compelled a funeral facility to

declare for bankruptcy by ordering it to pay hefty punitive penalties under Chapter 11 of the North American Free Trade Agreement [37].

The 2008 attempt by Chinalco to increase its stake in the Australian mining company Rio Tinto serves as a prime example of the increased scrutiny directed against Chinese investors who have political ties. Even though the Australian government eventually allowed Chinalco to increase its ownership, it did so under strict guidelines: Chinalco was not allowed to increase its holding above 14.99% without first notifying the government and obtaining fresh approval, nor was it allowed to add a director to Rio's board. Chinalco believed that these regulations were very harsh and even dehumanizing, especially considering the significant influence of foreign investors in Australia's mining sector. BHP, an Anglo-Australian mining corporation that also desired to increase its ownership in Rio, was also benefited by the government's decision [38].

9. Implications for Chinese Investor

China Australia receives a large amount of investment from China, particularly in the natural resources industry. Australia's foreign direct investment (FDI) in China climbed to AUD 17 billion in 2010[39], albeit it is still much less than the amount reported by other nations in the area. China is rapidly increasing its investment in Australia, which has contributed significantly to the present economic boom in the nation—also known as the "boom of natural resources." China's insatiable need for natural resources means that this trend is likely to endure for the foreseeable future [40]. China may use diplomatic state-to-state processes as a way of settling disputes in addition to the ISA and domestic courts. For example, China responded politically when Australia denied its broadband program to the Chinese company Huawei, citing concerns about cyber espionage as the reason [41].

These have recently gained attention, particularly in light of the FIRB's role in the government's rejection of certain proposed investments from Chinese companies, such Huawei's offer to help build Australia's 5G network. What was previously a quiet and unimportant part of Australia's economic management is now a significant national security risk. Rather from only being an economic body, the FIRB is now mostly in charge of assessing how foreign investments may impact national security [42].

Australian FIRM restrictions have been enforced more strictly, which may provide significant obstacles for Chinese investment. To help overcome these challenges, the Chinese government may push for stricter requirements for notifiable investments in the present reform of the ChAFTA investment laws. However, there's no official indication on how long these discussions could take or whether the desired results would materialize [43].

Regarding the FTRB mechanism, Chinese investors need to take part in it. Before submitting a proposal, foreign investors are invited to communicate with the FTRB and its secretariat [44]. In order to discuss any investment offers they may have for consideration and to resolve any "national interest" issues the FTRB may have at this early stage, this enables the Chinese investors to set up a meeting with the FTRB. Foreign investors, including Chinese ones, have expressed doubts about how the "national interest" norm can account for the "impact on the community"[45].

Secondly, Chinese investors could try to ease concerns about "national interest" by partnering with local management teams, creating joint ventures with local investors, or lowering their ownership holding in the target company. Chinese investors should be aware that it's not always the best course of action to own the majority of the target firm since doing so will start the FTRB clearance process [46].

Third, Chinese investors are required to comply with Australia's foreign investment policy by submitting their FTRB applications on time and precisely, as well as by giving full and accurate details about the anticipated investment [47].

As a result, China's "Go Global" policy and the fact that Australia is an importer of money and China is an exporter of capital will determine how much Chinese FDI enters Australia [48]. Since Chinese investment in Australia is expanding beyond mining into infrastructure and agriculture, policies and regulations pertaining to foreign investments are still important to Chinese investors. Chinese investment is likely to be restricted by Australia's FIRM, especially the FTRB review process, even after the ChAFTA agreement. The four main barriers are the following: there are general concerns about investments made by Chinese state-owned firms; the "national interest" criteria is not as strict[49]; treatment of Chinese investors is not as favorable as that of other major FTA partners in several critical fields; and the flexible "national interest" criteria. As a result, Chinese investors need to be informed on Australia's foreign investment laws, engage with the FIRB proactively, and avoid making poor decisions, encountering roadblocks, or unintentionally breaking the law [50].

Many foreign companies, particularly Chinese ones, have established themselves as major players in Australia's energy infrastructure development. For instance, the Cheung-Kong Group, which is headquartered in Hong Kong, is a major stakeholder in electricity distribution and gas pipelines. The government claims that the loss of these assets might endanger national security. Former finance minister Matthias Cormann said that "the security and reliability of the electricity sector depends on gas supply [51].

Both Chinese investors and Australian partners were enraged by the decision. TPG, an Australian telecom operator that planned to build a 5G network utilizing Huawei's equipment, was especially horrified. Chairman David Teoh expressed his displeasure, saying, "It is extremely disappointing that our clear strategy to lead in 5G has been undone by factors beyond our control"[52].

But it's important to keep in mind that there isn't as much study on Australia and China's investment ties as there is on their economic relations [53]. Due to a significant deficiency in domestic savings and investment, Australia is dependent on foreign capital. As a result, the Australian government is usually in favor of international investment [54]. Australia's wealth of resources entices China, which needs them to meet its growing domestic demand. China has considerable foreign reserves and savings [55]. Investment, as opposed to commerce, enables Chinese businesses to own assets and have a say in mining firms' choices. This aids China in managing price rises and securing a steady supply of resources and energy [56].

10. The Future of Foreign Investment in Australia

In its Trade Policy Statement from 2011, the Australian Federal Government declared that it will not accept any further ISDS. Australia's civil society has been vocal in its criticism of Investor-State Arbitration (ISA). It is quite likely that foreign investment conflicts will eventually make their way into Australian courts given the lack of alternative platforms for investors to express their objections, even if the statement does not explicitly confine investment disputes to domestic courts [57]. Although this change in policy was partially anticipated in Australia, it caused alarm abroad. The revelation generated a lot of attention since ISA remains the preferred procedure for resolving investment disputes with foreign governments. Moreover, Australia is the only developed country that has rejected ISA with regard to future bilateral and regional trade agreements [3].

An other option would be to require official talks and mediation between the involved parties prior to permitting a foreign investor to initiate legal proceedings in a domestic court [17]. But instead of being a productive way to settle disputes, these discussions often act as required postponements, which might add costs and time to the process. This tactic can increase the number of cases handled before ISA tribunals or domestic courts rather than decrease disagreements [17]. A third option for Australia would be allowing private individuals to enter into agreements for international business arbitration and bias with other nations [17].

There are other options, but they are often extremely difficult for investors to acquire and implement, such as employing investor-state contracts, political risk insurance, or diplomacy [18]. It is also conceivable that investors might not have the resources or knowledge required to assess their legal options for resolving disputes with host countries. Foreign investors may pursue other remedies in the absence of ISA rather than taking their complaints against host countries to the attention of those countries' courts [57].

Treaty concessions from partner countries that Australia thinks suitable for investment may be expected, which might increase pressure on Australia to ratify ISA. For example, Australia could seek to have better access to the very lucrative Chinese or American markets via the Trans-Pacific Partnership or the China-Australia trade and investment agreement [58]. Despite political concerns and legitimate objections highlighted, it seems that the Australian government is resolved to rejecting ISA for the time being. Re-implementing ISA in its entirety may not be possible. But maintaining this position might be expensive and detrimental to Australia's interests as a nation [57].

One of the most important issues with foreign direct investment (FDI) is striking the right balance between allowing foreign money and protecting Australia from any potentially negative effects. It's challenging to make sure these regulations don't seem biased or jeopardize the investment system's equity [58]. The Australian Treasurer now has a great lot of freedom when deciding whether an investment is in the best interests of the nation, and the Foreign Investment Review Board (FIRB) may have differing opinions. Since the Treasurer is not required to follow the FIRB's recommendations or make them known to the public, prospective foreign investors are left with questions about the investment process [59].

11. Conclusion

This paper examines Australia's Foreign Investment Review Board (FIRB) and its function in the process of reviewing foreign investments. It talks about how Australia has updated its assessment procedure for foreign investments, especially for government investors, and looks at whether state-owned enterprises' international investments are affected by the review process.

Agencies such as the Australian Security Intelligence Organization have begun to allocate more resources and concentrate more on economic concerns as the distinction between security and economic issues becomes increasingly hazy [60]. Despite being a newcomer to the market, the FIRB portrays its screening process as adhering to market norms. Rather than keeping an eye on the activities of foreign businesses that are already operating in Australia, the FIRB controls market access for foreign investors [61]. Regulators minimize the scope of their discretionary authority and highlight Australia's openness to international investment, but the FIRB nonetheless gives the government a number of options for rejecting projects that are seen to be against the interests of the country. It was meant to control covertly, remaining out of the spotlight and out of sight [62].

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