

## THE 'NATIONAL INTEREST' AND THE SCREENING OF FOREIGN DIRECT INVESTMENT IN AUSTRALIA

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### Abstract

Australia provides a liberal regulatory regime in the encouragement of foreign direct investment (FDI). One measure that continues to be used in the screening of inward FDI is that of the 'national interest' criterion. It allows the Australian treasurer the right to veto any project deemed to be 'contrary to the national interest'. This criterion is not defined, open to interpretation and thus potential political influence. This paper rejects the calls for the removal of the criterion, suggesting it is legitimate lever used by government to regulate economic behaviour, however suggestions are made for the establishment of guidelines and detailed 'judgements' to aid in its interpretation allowing for greater transparency in its application.

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## THE 'NATIONAL INTEREST' AND THE SCREENING OF FOREIGN DIRECT INVESTMENT (FDI) IN AUSTRALIA

In late 2004 the Swiss based foreign mining multinational Xstrata made a bid to take-over and control the Australian mining company Western Mining Corporation (WMC). In a reaction against the potential take-over the federal government was called upon by interested parties to prevent the Xstrata take-over of WMC by invoking the clause in the *Foreign Acquisitions and Takeover Act 1975* (the Act 1975) rejecting the potential take-over on the grounds that the foreign bid for an Australian company was 'contrary to nationalist interest' (Chessell, 2005; Koustoukis, 2004). This was reminiscent of another highly publicised foreign take-over bid in 2001 by Dutch/UK multinational Shell for Australian mining and exploration giant Woodside Petroleum. In the former case the federal government through the Australian treasurer who has ultimate responsibility in the approval of foreign investments allowed the bid to stand, in the latter case the bid was rejected despite protestations in the media that such decisions reflected badly on Australia's free market credentials (Gaylord, 2001; Nahan, 2001; Tenenbaum, 2001). The Australian Government has argued that Australia operates a liberal foreign investment regime welcoming foreign investment into the country and rarely invoking the 'national interest' criterion to reject foreign investments (Costello, 2001).

Such protestations have not prevented calls for both clarification as to the meaning of the 'nationalist interest' criterion and what it entails (McCutcheon, 2001) and for its removal from legislation (Financial Times, 2005). In light of the Xstrata take-over bid of WMC the Financial Times of London in an editorial called on the Australian government to scrap the Foreign Investment Review Board (FIRB) and remove the 'national interest' criterion - a "protectionist relic" that does not fit in with the Australian government's free market principles (Financial Times, 2005). The newspaper argued that screening of foreign investments was common among countries but few countries "operate regimes that are more opaque, unaccountable or open to political and bureaucratic manipulation". The Australian government's ability to block deals or impose conditions prior to granting approval of a take-over of an Australian company based on the "national interest" amounts to "a criterion so vague as to justify almost anything" (Financial Times, 2005). A point justifiably made considering the following 'definition' on the 'national interest' offered by the Department of Foreign Affairs and Trade (DFAT) in Australia. The 'national interest' encompasses a multi-dimensional approach incorporating, geo-political and strategic interests, economic and trade interests and multi-national interests in relation to Australia's standing and responsibilities in the international community (Edwards, 2002). Such a statement is so broad and general that it becomes quite meaningless. The Financial Times editorial called upon the government to legislate to remove such 'perverse and inefficient' regulations (Financial Times, 2005).

In light of such recent media commentary this paper will explain and analyse Australia's foreign investment regime and more specifically the 'national interest' criterion. The background to the criterion being established will be discussed including its enshrinement in legislation that can be traced back to a nationalist sentiment permeating Australia in the 1960s and 70s that sought to prevent the foreign take-over of Australia and its resources. The criterion although rarely invoked in screening foreign investment (FIRB, 2004) can be used by the government of the day in a non-transparent manner to reject a foreign take-over of an Australian company. The author argues against the removal of the criterion from the legislation arguing it is a legitimate regulatory lever the government can use in its monitoring of the economy. He does however offer suggestions for the reforming of the criterion and the decision making process involved in its application. These are the establishment of guidelines and 'judgements' to aid in its interpretation which can offer guidance through regulations and precedence to potential investors making for a more transparent process in the application of the criterion.

## **FOREIGN INVESTMENT REGIME IN AUSTRALIA**

Foreign Investment in Australia is regulated under the Act (1975). Foreign investment proposals resulting in a substantial equity (single foreigner holding of more than 15%, or a group of foreigners holding more than 40%) in an Australian company need prior government approval and notification before they can go ahead with an investment (FIRB, 2004). In the majority of industries proposals of a small nature are exempt from government notification whereas large proposals (over \$50 million dollars) need to be notified to government and are generally approved unless deemed to be 'contrary to the national interest' (FIRB, 2004). The Act (1975) deems foreign investments be those of individuals or corporations not ordinarily resident in Australia.

The Government determines what is 'contrary to the national interest' by having regard to the 'widely held community concerns of Australia' (FIRB, 2004). The onus of proof that the foreign investment proposal is 'contrary to the national interest' rests with the Australian government and not the investor. The Foreign Investment Review Board (FIRB) set up under the Act (1975) acts as a guardian in this matter (with regards to community concerns) advising the Australian treasurer. In most cases the foreign investments proposals are approved. In 2003-2004 out of a total of 4447 proposals only 64 were rejected all of them real estate deals. The total combined value of the deals approved was \$102 billion (FIRB, 2004). Since 1998, 98% of finalised proposals have been approved (FIRB, 2004).

Where a proposal is of a sensitive nature and deemed to 'threaten' the 'national interest' the FIRB after taking into consideration a broad range of submissions and advice from the interested parties will advise and recommend to the treasurer whether or not to accept the investment proposal. The FIRB will consider what it believes to be the consistency of the proposal with regards to existing government policy and law (FIRB, 2004). The Act (1975) however fails to provide the FIRB with any benchmark, criteria or guidelines against which it can measure the 'national interest'. Nor is the FIRB obliged to reveal, neither how it arrived at a decision nor what is its recommendation to the Treasurer.

Under the Act (1975) the ultimate decision regarding a foreign investment proposal rests with the treasurer. In taking the 'national interest' into consideration the treasurer has no criteria or parameters set out in the Act (1975) upon which to base a judgement, nor is there a stated policy that is used to guide his decision. As a result the subjective nature of the decision making process, opens up the government to accusations that it in making a judgement it can be beholden to political influence by specific interest groups (Financial Times, 2005; Jones, 2001; Tooth, 2001). In announcing a decision based on the invocation of the 'contrary to the national interest' criterion the treasurer is not compelled to provide justification nor clarification in terms of the reasons for his decision. Resulting in accusations of political expediency whilst at the same time failing tests of transparency and openness expected of democratically elected governments (Kasper, 1998).

## **FOREIGN DIRECT INVESTMENT RESTRICTIONS**

Restrictions imposed by governments on foreign direct investments can vary significantly. In essence there are three types of restrictions (Golub, 2003). Restrictions imposed on equity participation in joint ventures or total investment prohibition in certain sectors or industries of the economy are commonly used. In Australia the Act (1975) is complemented by other Acts of Parliament that impose restrictions in real estate, banking, civil aviation, airports and shipping, broadcasting, newspapers and telecommunications sectors of the economy. Obligatory screening and approval procedures required for certain types of investment such as the 'national interest' criterion are also used to restrict FDI. Finally operational restrictions may be imposed on a FDI proposal. These may take the form of employment restrictions on home country nationals, or the imposition of conditions on Board of Directors' membership (Golub, 2003). The Act (1975) gives the Australian treasurer the power to approve FDI proposals with conditions attached even though

they may be contrary to the national interest. The imposition of such conditions helps lessen the potential negative consequences for the 'national interest'.

In comparison to Australia other developed economies of the OECD have few or no discriminatory screening impediments to inward FDI. In a comparative study carried out by Golub (2003) of FDI restrictions imposed by OECD countries between 1980 and 2000 Australia despite some improvement in easing inward FDI restrictions still was below the OECD average. In rating countries on a scale between least restrictive (0) and most restrictive (1): Australia in 1980 scored 0.46 (0.38 OECD average) and in 2000 0.27 (0.18). Golub (2003) found that Australia ranked in the bottom quarter of OECD countries with the most restrictions on FDI and that her restrictions on inward FDI were dominated by discriminatory screening requirements in comparison to other OECD countries. These discriminatory screening requirements are reflective of the protection afforded to certain sectors of the economy and the 'national interest' criterion. The imposition of these screening requirements can be traced back to the historical, economic and social developments that resulted in a nationalist sentiment enveloping the Australian political landscape in the 1960s and 70s colouring its attitude to foreign investment. From time to time such sentiments continue to be heard in the public domain with calls for the protection of Australian companies from foreign take-over in order to prevent the 'selling of the farm' (Reuters, 2001).

## **HISTORY OF FDI INTO AUSTRALIA**

Foreign direct investment has been and continues to be viewed as an integral part in the economic development of the country. The inflow of foreign capital has aided the industrial development of the country (Bryan & Rafferty, 1998; Thorburn, Langdale, & Houghton, 2002), playing a significant role in the development of rural, mining, housing and manufacturing industries as well as providing the foreign capital borrowings to finance the public infrastructure of the colonies (Arndt, 1977; Kasper, 1998).

Foreign Direct Investment assumes an investment is made to acquire a lasting interest in an enterprise operating outside the home economy of the investor. The investor's purpose is to gain an effective voice in the management of the enterprise. It consists of a package of resources (capabilities, assets, technology, intermediate products) that are transferred internally within the firm from the parent to the subsidiary (Dunning, 1993). Controversy arises between the forces pushing for the liberalisation of international markets allowing for the free flow of capital with its controlling interest and those who seek to restrict capital flows not only due to concerns about the economic adverse effects of open capital markets but often to argue the nationalist concerns and loss of sovereignty that countries face at the hands of large multinational companies (MNCs) (Golub, 2003).

Historically governments in Australia both Liberal and Labour have in the main encouraged inward FDI. In their desire to promote on going economic growth and the modern industrial transformation of Australia both sides of politics laid out the "welcome mat" and continue to do so (Capling, 1997). However support for foreign investment historically has not been unequivocal.

In the mid 1960s and early 1970s the rising levels of foreign direct investment in the manufacturing and primary sectors of the Australian economy especially mineral exploration resulted in a growing political and social concern that was preoccupied with the threat posed to Australian sovereignty by foreign MNCs (Bryan, 1991; Capling, 1997; Fitzpatrick & Wheelwright, 1965; Parry, 1972). This transcended both sides of politics (Capling, 1997). The Deputy Prime Minister at the time and Leader of the Country Party John McEwen was unequivocal in his attitude to foreign investment. "We want US business herewith all its magnificent skills of management at all levels. But we don't want to be taken over. We will *not* be taken over." (Bell, 1960)

Such economic nationalist sentiment with regards to foreign investment has permeated the Australian social, economic and political landscape throughout the 20<sup>th</sup> century. The sense of

wariness and trepidation by Australians to things foreign can be argued to be attributable to two factors. Firstly, to what Capling and Galligan (1992) termed *protective statism*. That is policies of high tariffs and protection, a centralised wage fixation system developed through industrial arbitration and a restrictive racist immigration policy known as the 'White Australia Policy'- a policy that sought to protect Australian 'white' wages from 'cheap' Asian labour. Secondly, the physical distance and isolation of Australia resulted in an insular inward looking community. The 'tyranny of distance' as coined by Blainey (1966) helped define the Australian character. This juxtaposition of economic and social factors resulted in the provision of a social pact between labour and capital which would guarantee industrial development and economic equity whilst at the same time excluding the 'alien' or foreign entity which could potentially frustrate the economic development and the identity of Australia (Capling, 1997).

It was in this climate that the Liberal Prime Minister John Gorton (1976-71), a staunch nationalist determined that Australia had the right to prevent foreign takeovers which were considered to be 'contrary to the national interest' (Arndt, 1977). Gorton enshrined in the Australian political discourse the notion of the 'national interest' and in doing so sends signals to the international investment community that not all foreign investment is to be seen in a positive light and nor is it to be considered to be 'inherently beneficial to the nation's welfare'(Anderson, 1983).

The 'national interest' is formalised into legislation by Gorton's successor William McMahon, in the Companies (Foreign Takeover) Act of 1972. The Act (1972) was set up to review all takeovers where control passed from resident Australian hands to a foreign interest giving the treasurer the right to grant approval for the takeover where the transfer was deemed to be 'not contrary to the national interest'(Anderson, 1983).

The legislation was strengthened under the Whitlam Labour Government (1972-75). The government had as a major objective the promotion of Australian equity, control of its resources and industries, and the pursuit of maximum Australian ownership compatible with Australia's long term capital requirements (Anderson, 1983). Through the Act (1975) the government sought to impose restrictions on foreign ownership in the mineral sector, especially uranium mining and set up the Foreign Investment Review Board (FIRB) to veto proposed investments not deemed to be in the 'national interest'. The Liberal Fraser government (1975-1983) did not make a huge difference in policies regarding FDI (Arndt, 1977). A lot of the regulations legislated for in the Act (1975) by the Whitlam government remained, in spite of the general perception that the Liberal Government was more sympathetic to private enterprise and foreign capital. Despite its free market sympathies the Fraser Liberal Government did not revert to a pre-1972 'open door' policy on FDI (Arndt, 1977). Through the FIRB it would still seek to control foreign investment adhering to the 'not contrary to the national interest' criterion.

The last 20 years has seen successive Australian governments of both political persuasions liberalise and deregulate the Australian economy. Under the Hawke/Keating Labour governments Australia witnessed a significant liberalisation in its economy. The Australian economy went through a process of deregulation, and liberalisation in the 1980s including the easing of restrictions that had been imposed on foreign investors. Among the measures taken were the floating of the Australian dollar in 1983, allowing entry of foreign banks into Australia in 1985, the reduction of tariffs through GATT and WTO negotiations and the dismantling of a some of the provisions of the Act (1975) (financial thresholds for prior approval of investments were raised and some restrictions on protected sectors were eased) (FIRB, 2004). The present Howard Liberal government since coming to power in 1996 has pursued a more economic rationalist agenda continuing and extending the previous government's, liberalisation, deregulation and privatisation agenda of the economy while at the same time championing the merits of foreign capital for Australia's economic development. The present government has pursued a number of Free Trade Agreements in its ten years in office including the most notable being a Free Trade Agreement between Australia and The United States (AUSFTA) coming into force in 2004. This agreement has resulted in the further easing of some of the foreign investment restrictions imposed by the Act (1975). The threshold for proposal notification and approval for foreign investments into Australia

has been increased from the \$50 million threshold under the Act (1975) to \$850 million dollars for U.S. investors under AUSFTA (2004). During the AUSFTA negotiations calls were also made for the removal of the 'national interest' criterion. In their submission to US trade representative Zoellick, the AUSFTA Business Group representing American business interests expressed their concern regarding the maintenance of the 'national interest' criterion in the proposed free trade agreement;

Dear Ambassador

We are writing... to express our serious concern regarding Australian proposals ... from the investment chapter of the U.S.-Australia Free Trade Agreement (FTA)... to retain Australian laws allowing investment screening for Australian 'national interests'" (AUSFTA Business Group, 2004).

Despite such protestations the 'national interest' criterion was not removed from the AUSFTA (2004) and still gives the right to the Australia government to reject a proposal that is deemed to be contrary to the 'national interest'.

## **DETERMINING THE 'NATIONAL INTEREST'?**

The 'national interest' is a very complex concept to define (Roskin, 1994). Evans and Grant (1991) consider issues of national interest to be related not only to issues of economics and trade but also to issues of geopolitics and strategy. Two Australian government white papers despite being titled "In the National Interest" (DFAT, 1997) and "Advancing the National Interest" (DFAT, 2002) shed little light in establishing guidelines as to what exactly determines the national interest. The former provides broad sweeping statements about Australia's core national interests being security, jobs and a good standard of living while the latter discusses the national interest in terms of security needs and the fight against international terrorism post September 11, 2001.

From a political perspective the national interest reinforces the notion that the state as an entity needs to survive and maintain itself in a multi-state world of complimentary and competing interests (Evans & Grant, 1991; Roskin, 1994). The concept of 'national interest' incorporates notions of geopolitical, strategic and national security interests in the maintenance and perpetual existence of the state (Evans & Grant, 1991; 1994). Arguing from the Italian unification perspective but applicable to states in general Machiavelli suggested that any state behaviour was considered moral and in the national interest in achieving the goal of unification (Roskin, 1994). Similarly notions of *raison d'etat* established in the 17<sup>th</sup> Century justified behaviour which was not necessarily transparent but was of paramount importance for the existence and survival of the State (Roskin, 1994).

An alternative understanding of the 'national interest' is offered by Professor of Linguistics at Berkeley George Lakoff. In his analysis and discussion of the State's use of metaphors in going to war Lakoff (1991) suggests that a state seeks to conceptualise itself in the image of person that engages in social relations within a world community. It thus lives in a neighbourhood, surrounded by neighbours who are both friends and enemies.

The state's well-being is measured according to its wealth. Its general well-being is understood in economic terms: i.e. its economic health. Any threat to the economic health of the state is thus seen as problematic and detrimental to the general well-being of people who live in the state (Lakoff 1991).

In using this State-as-Person metaphor the implicit logic according to Lakoff (1991) is that like it is in the interest of every person to be as strong and healthy as possible, a rational state seeks to maximize wealth, health and strength (the latter more often than not through military means). This metaphor highlights the ways in which states act as an individual 'as one' thus hiding their internal structures. Difference whether based on social class, ethnic composition, religious adherence,

political parties, the environment, worker/capital rivalry and influence whether that originates from vested interests, lobbyists, the elite, the military or powerful corporations are hidden in this metaphor. The State as person is thus 'one' showing no signs of internal difference (Lakoff 1991).

Lakoff (1991) argues that the use of such a metaphor has implication for the "national interest." It is in a person's interest to be healthy and strong. The State-as-Person metaphor translates this into a "national interest" of economic health and strength. But what is in the "national interest" may or may not be in the interest of many ordinary citizens, groups, or institutions, which may have conflicting and differing interests. The state's 'national interest' cannot represent everyone or acknowledge the internal difference.

The "national interest" as a metaphorical concept, according to Lakoff (1991) is defined and determined in affluent countries like the US by politicians and policy makers (Lakoff 1991). In the main they are influenced more by the rich than the poor, more by large corporations than small ones, and more by developers than ecological activists (Lakoff 1991).

The State-as-Person metaphor has implications for the 'national interest' in the Australian context. The Act (1975) provides no definition of the 'national interest' thus allowing the treasurer of the day to rely upon advice given to him by the FIRB or rely on his own interpretation to determine whether a foreign investment proposal is in the national interest. Such a process is highly subjective and can put the treasurer in a situation of having to make decisions that can be privy to political influence by a few to the detriment of the many.

It is a contention espoused by Clive Hamilton, Director of the Australia Institute. He argues that the FIRB decisions lack independence, and are based on an improper assessment of what is the 'national interest'. Used as a political device by governments that find themselves in trouble, he argues the FIRB adopts a narrow economic rationalist approach in deciding what is of national significance. According to Hamilton it is a 'very slippery term'... but really the phrase is just a bit of political double speak (Tooth, 2001). Other have argued that as the process exists at present it gives *carte blanche* to the government of the day to interpret 'national interest' how it chooses to without having to justify its decision. Ultimately it's a political process cloaked in secrecy and open to influence that leaves the final decision to the treasurer of the day (Tooth, 2001).

## **THE 'NATIONAL INTEREST' AS AN IMPEDIMENT TO FDI IN AUSTRALIA**

It is argued that the secrecy that surrounds FIRB recommendations and decisions regarding the 'national interest' criterion allows the process to be open to potential political abuse which may have a deleterious effect upon MNC's foreign investment intentions (Bora, 1995; Kasper, 1998; Nahan, 2001).

The last major invocation of the "national interest" criterion which aroused significant social and political discussion was in 2001 when the treasurer prevented Dutch/UK multinational giant Shell from taking over domestic national mining company Woodside Petroleum which controlled and continues to control the North West Shelf (NWS) liquefied natural gas (LNG) project in Western Australia. Despite predictions that the rejection of the takeover would send negative messages to foreign investors and the markets (Nahan, 2001; Tenenbaum, 2001) the reality was that there was little effect on on the value of the dollar in the financial markets (Maiden, 2005).

The evidence regarding the imposition of screening requirements having a negative impact on foreign direct investment in Australia does not reflect the reality. There has been continued growth in the value of foreign investments into Australia from \$86 billion in 2002-03 to \$102 billion in 2003-04 and the reduction of rejections from 80 to 64 over the same period (FIRB, 2004). The inflow of foreign capital into Australia continues unabated with Australia being the third largest recipient of foreign direct investment (FDI) among OECD countries in the 1990s (OECD, 2003).

The lack of a negative reaction towards Australia by foreign investors despite 'tough' screening requirements may result from the reality and awareness that Australian governments from both sides of the political spectrum have continually over the last 20 years liberalised and opened the economy to FDI. The general trend has seen a move towards greater liberalisation and the encouragement of FDI (Golub, 2003). Governments have viewed the benefits of FDI in terms of employment, capital development, knowledge and training as far outweighing any potential costs and are therefore keen to continue to promote it (Costello, 2001). However even governments that espouse a liberal free market economic system, have a role to play in protecting the rights of its citizens as a result of imperfections in the free market system. The 'national interest' criterion is one of these levers at the government's disposal in helping regulate and potentially preventing the consequences that may arise due to the failings of the market system.

## **THE ROLE OF THE STATE**

Calls for the removal of the 'national interest' criterion (Bora, 1995; Financial Times, 2005; Kasper, 1998; McCutcheon, 2001; Nahan, 2001; Uren, 2001) are based on the notion that such a criterion is anathema to the functioning of the free market and contrary to the economic principles pursued the present Howard Liberal Government.

Such calls for the removal of the criterion fail to acknowledge the role of the state as a regulator (Musgrave & Musgrave, 1989) and the right of government to impose conditions and rules on how the different stakeholders within its borders interact. Ultimately governments in democracies are accountable to their citizens for the rules and regulations they seek to impose.

Rules are established and enforced by government even in liberal free market economies for a number of reasons including the need to resolve conflicting interests that may arise among the different stakeholders in that society and the need to maintain competition within the free market capitalist system (Anderson, 1989). The market system is imperfect, participants do not have perfect knowledge and without a regulator monopoly power will arise (Musgrave & Musgrave, 1989). As pointed out by Adams and Brock (1989:4);

“the competitive nature of the market is not an immutable artefact of nature...[it] is susceptible to destruction from within by private interest who chafe at the discipline, who refuse to submit to its control and who aspire to arrogate its planning and functions unto themselves”.

The imperfect market can result in the establishment of 'externalities' or 'spill-over' effects (Musgrave & Musgrave, 1989) generally not captured by the functioning of the price mechanism within the market system. The consequences of these 'spill-over' effects to other stakeholders in an economy are a fundamental aspect of government's role as regulator seeking to alleviate potential hardship brought about by the working of an imperfect market system.

The 'national interest' criterion enables the Australian government to ameliorate the conditions of the imperfect market by considering the potential externalities that may eventuate as a result of a foreign takeover of an Australian company. In his decision to reject the take-over bid by Shell of Woodside Petroleum in 2001 the Treasurer argued that Woodside would look after the national interest more so than would Shell (Costello, 2001).

David Cox the Labour MP from South Australia in his analysis of the Shell take-over bid clarified the potential consequences (externalities) of allowing market forces to determine the ownership of Woodside Petroleum. He argued that Shell had a number of alternative similar LNG developments in different parts of the world including Malaysia, Oman, Brunei and the Sakhalin Islands in Russia (Kingston, 2001). These projects are in direct competition to the N-W Shelf project (which Shell was looking to takeover) in the Asia Pacific LNG markets (Kingston, 2001). The N-W Shelf project according to Cox is one of the higher cost operations among these operations. If Shell was to

control N-W Shelf and the alternative operations in the region, Shell may be reluctant to develop the N-W Shelf and may not be very enthusiastic in committing capital to Australian exploration in comparison to an independent Woodside (Kingston, 2001). Similar arguments were put by the Treasurer in his rejection of the take-over bid (Costello, 2001). The 'spill-over' effects of such a potential decision by Shell (not to develop the N-W Shelf in preference to another project) would have major ramifications on the economy. Cox pointed out that at stake was a world scale project that produced exports then worth \$3.6 billion in 1999, government revenue in excise, royalties and company tax of \$1.6 billion and accounted for 1.1% of Australia's GDP, employing 80, 000 people directly and indirectly (Kingston, 2001). The risk to the Australian national interest was clearly evident and real according to Cox (Kingston, 2001).

## **MAKING THE 'NATIONAL INTEREST' MORE TRANSPARENT**

The 'national interest' although being part of the government's regulatory regime in screening FDI needs to be overhauled (Maiden, 2005). For rules to be effective they need to be known. As Kasper (1998) argues that for any society to function properly it needs to have in place a system of rules and institutions in order that it can coordinate its activities and allow for order to evolve. For this to happen effectively, societies need to have rules in place that allow for conformity enabling everyone to know where they stand. Such rules need to be general i.e. non discriminatory, knowable and certain i.e. transparent and open in order that decisions can be followed up should the need arise. This is the least that we can expect in a democratic system based on the rule of law. At present the 'national interest' criterion fails this test. Successive Australian governments have been reluctant to provide clarity or guidelines in our understanding of the 'national interest'. Three recommendations are suggested to help rectify this situation:

1. The criterion needs the establishment of guidelines to aid in its understanding and interpretation. Whether these guidelines relate to economic, environmental, strategic or social 'interests' it is the responsibility of government to enact guidelines giving foreign investors some certainty in knowing where they stand and the issues they need to adhere to in order to meet the 'national interest' criterion. Such guidelines need to incorporate and reflect the desires and aspirations of all stakeholders in society not just the elite who are able to influence government. As pointed out by Lakoff (1991) the 'national interest' in market-oriented societies tends to reflect the interest of the minority rather than the majority.
2. In order to counter claims of inappropriate influence and a lack of independence in the decision making process (Tooth, 2001) the FIRB needs to provide a detailed explanation (similar to a judgement in a court of law) as to how it arrived at its decision. In order to counter claims of an inappropriate assessment of the national interest it needs to explain its criteria in considering the 'national interest' and how it arrived at a recommendation. This then will help establish a greater transparency confirming whether a recommendation is consistent with existing government policy and law.
3. The Australian treasurer also needs to provide written detailed reasoning as to his ultimate decision to accept or reject a potential investment based on the 'national interest'. Such an explanation needs to establish the criteria used in coming to a decision and how the decision is linked or reflective of government policy or community concerns.

By providing detailed explanations for their decisions both the FIRB and treasurer help establish precedent, providing future investors who have to address the 'national interest' criterion with a basis to argue a case. Clearly each inward FDI case is individual however a history of 'judgements' based on the 'national interest' criterion provide guidance and precedence in understanding how previous decisions were arrived at, allowing for greater transparency and openness in the decision making process. Transparency helps enhance the security of the process by allowing all to know thus helping prevent the secret politicisation of the process that can occur under the present regime.

## CONCLUSION

This paper has shed light on the 'national interest' criterion used by Australian governments to screen foreign direct investments. Although rarely invoked in today's liberal economic environment successive Australian governments have sought to maintain its existence despite repeated calls for its removal from the Foreign Acquisition and Takeover Act (1975). Critics argue that the concept of the 'national interest' is so broad and all encompassing that it can actually mean anything. It is argued to be an anachronistic criterion based on an economic nationalist agenda pandering to a narrow nationalist xenophobic interpretation which is well past its use-by date and not befitting Australia's present image as a free market deregulated economy.

Its establishment in the early 70's reflected a bi-partisan wariness of things foreign that permeated the Australian political landscape in the 1960s and 70s. The deregulation of the Australian economy from the mid 1980s until the present with regards to trade and foreign investment has not resulted in the removal of the criterion. Its invocation to reject a foreign investment proposal rests ultimately with the treasurer of Australia who is reliant upon the secret advice of the FIRB. The opaqueness of the definition, the lack of any guidelines or benchmarks used to apply the criterion and the lack of a detailed justification for the decision made leaves the government of the day open to accusations that the 'national interest' criterion is a tool of political expediency which governments can potentially abuse in order to satisfy a political agenda.

One of the roles of government in any economy is that of the regulator. It establishes rules and regulations to allow for the orderly interaction and functioning of the diverse stakeholders that make up the society it governs. The 'national interest' criterion is one of those rules. The removal of the criterion would result in one less lever at the government's disposal to regulate business in the Australian economy. The market mechanism is not perfect and will not necessarily anticipate consequences or 'externalities' that may arise as a result of a foreign take-over. A consequence that may potentially have real negative effects on the Australian economy and 'national interest' as was shown in the rejected bid by Shell for Woodside Petroleum.

However this does not suggest that the 'national interest' criterion and the decision making process in its application do not warrant reform. What is required is the implementation of guidelines and the establishment of 'judgements' to aid in its interpretation. These guidelines need to reflect the interests of all the stakeholders in society not just the select few who have influence. 'Judgements' (detailed explanations) need to be established by the FIRB and the treasurer setting out the criteria used in making a decision to accept or reject a foreign direct investment proposal. Such 'judgements' would then help establish precedents that can be used as a guide by future foreign investors allowing for greater openness and transparency of the process. The difficulty with such recommendations lies in convincing politicians to abrogate their right to the exercise of power which at present is secretly administered.

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