



PERU-AUSTRALIA

FREE TRADE AGREEMENT

OUTCOMES: INVESTMENT

Benefits of foreign investment to Australia

As a large country with a relatively small population, Australia relies on foreign investment to supplement domestic capital.

Foreign investment has helped Australia become the world's 13th largest economy, with 27 years of uninterrupted annual growth. Foreign investment has enabled Australians to enjoy higher rates of economic growth, employment and standards of living than could have been achieved with domestic capital alone.

Foreign investment helps Australia reach its economic potential by financing new industries and enhancing existing industries, boosting infrastructure, productivity and employment opportunities in the process.

Foreign investment also support jobs – for 2016-17 the Australian Bureau of Statistics reported that around one in four businesses in Australia with 200 or more employees have greater than 50 per cent foreign ownership. Foreign investment is integral to the Australian economy. As a resource rich country with a relatively high demand for capital and a small population, Australia has historically used foreign capital to finance the shortfall between national investment and national saving. Foreign investment provides businesses with the capital they need to grow and prosper, opens doors for Australian businesses to compete in global value chains, and contributes to the development of new industries.

Creating new businesses with connections in different markets, foreign investment opens up additional export opportunities, helping to boosting our overall export performance.

The Peru-Australia Free Trade Agreement (PAFTA) will promote further foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board, increasing the threshold from \$261 million to \$1,134 million. Under PAFTA, Australia retains the ability to screen investments in sensitive sectors to ensure they are not contrary to the national interest. Proposed investments by foreign governments will continue to be examined and lower screening thresholds of \$15 million and \$55 million will apply to investment in agricultural land and agribusiness respectively.

Benefits for Australian investors

Australia has significant energy and resources investments in Peru and is one of the largest foreign investors in Peru's mining sector.

PAFTA will promote further growth and diversification of Australian outward investment by opening up lucrative and growing market sectors such as mining and resources, telecommunications and financial services.

The PAFTA Investment Chapter contains a suite of rules that will provide additional protection to Australian investors operating in Peru. These protections include a minimum standard of treatment, the right to compensation for certain types of expropriation and protection against discrimination (see below). The Investor-State Dispute Settlement (ISDS) mechanism will provide Australian investors with the ability to enforce these protections.

KEY OUTCOMES

Investment rules are included in trade agreements like PAFTA because of the importance governments attach to guaranteeing the high standards of governance that are pivotal to attracting and sustaining foreign investment.

Investments include shares and stocks, enterprises and tangible and intangible property.

PAFTA investment rules:

- protect against discriminatory treatment;
- require payment of compensation in certain circumstances where an investment is expropriated;
- require that investment-related capital transfers can occur freely and without delay; and
- guarantee that investors and their investments will be accorded a minimum standard of treatment in accordance with the applicable customary international law standard, which includes an obligation to provide due process in court proceedings.

The PAFTA Investment Chapter contains an ISDS mechanism which provides investors with access to an independent arbitral tribunal to resolve disputes for breaches of these investment rules.

An ISDS claim concerning PAFTA may only be brought in relation to commitments in the Investment Chapter.

The ISDS mechanism contains explicit safeguards protecting the Australian Government's right to regulate in the public interest.

What ISDS safeguards have been included?

The PAFTA Investment Chapter contains a set of high-quality, modern rules governing the treatment of investors and their investments, balanced with robust safeguards to preserve the right of the Government to continue regulating in the public interest. As a result:

- there is explicit recognition that Australia and Peru have an inherent right to regulate to protect public welfare, including in the areas of health and the environment;
- a specific general exceptions provision for the investment chapter;
- public health measures cannot be challenged, including the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator;
- the scope of the application of ISDS provisions has been limited. These limitations include:
 - social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities
 - measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage
 - Australia's foreign investment framework, including decisions of the Foreign Investment Review Board.



- non-discriminatory regulatory actions to safeguard public welfare objectives, such as public health, safety or the environment, do not constitute indirect expropriation, except in rare circumstances;
- the fact that a subsidy or grant has not been issued or renewed, or has been reduced, does not breach the minimum standard of treatment obligation, even if it results in loss or damage to the investment. This includes subsidies issued under Australia's Pharmaceutical Benefits Scheme;
- government action which may be inconsistent with an investor's expectations does not constitute a breach of the minimum standard of treatment obligation, even if it results in loss or damage to the investment.

The ISDS mechanism in PAFTA also includes procedural safeguards to enhance the arbitration process. These include:

- a requirement that hearings will be open to the public, and that documents filed in the arbitration, as well as the tribunal's decision, will be made public;
- a right for the Party that is not involved in an ISDS case to make oral and written submissions;
- the ability to permit submissions from interested individuals, including from civil society and non-governmental organisations;
- a requirement that the burden of proof rests with the claimant to establish its claim against a government, which also directs tribunals to decide cases in accordance with established interpretations of investment commitments;
- rules preventing a claimant pursuing a claim in parallel proceedings, such as before an Australian court;
- expedited review of claims that are baseless, or manifestly without legal merit;
- the ability of the Parties to issue interpretations of the Agreement, which must be followed by ISDS tribunals;
- mechanisms to disincentivise unmeritorious claims, such as through the award of costs against a claimant and the ability for a respondent government to recoup costs;
- interim review and award challenges;
- time limits on bringing a claim;
- a requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests.

