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**FOREIGN
AFFAIRS AND
TRADE**

Canberra ACT 0221 www.dfat.gov.au

Facsimile Message

To:
Ms Shelley McInnis

Telephone Number:
6277 4002

Facsimile Number:
6277 4827

From:
Amanda Gorely

Telephone Number:
6261 2069

Facsimile Number:
6261 2144

Date: 7 June 2002

No. of Pages (including this page): 10

Subject: JSCOT hearings on 13 May 2002 - Response to questions on notice regarding the investment agreements with Uruguay and Egypt

Ms McInnis,

Please find enclosed

1. a letter regarding the response of the Department of Foreign Affairs and Trade to JSCOT's questions on notice at its 13 May 2002 public hearing in relation to the investment agreements with Uruguay and Egypt; and
2. the response.

I will also post you a copy of the letter and response.

Yours sincerely,

Amanda Gorely
Director
International Law and Transnational Crime Section
Legal Branch
International Organisations and Legal Division
Department of Foreign Affairs and Trade

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**FOREIGN
AFFAIRS AND
TRADE**

International Organisations and
Legal Division

7 June 2002

Ms. Shelley McInnis
Inquiry Secretary
Parliament of Australia
Joint Standing Committee on Treaties
R1 Suite 116
Parliament House
Canberra ACT 2600

Dear Ms. McInnis

Please find enclosed the response of the Department of Foreign Affairs and Trade to JSCOT's questions on notice at its 13 May 2002 public hearing in relation to the investment agreements with Uruguay and Egypt.

Yours sincerely,

Amanda Gorely
Director
International Law and Transnational Crime Section
Legal Branch
International Organisations and Legal Division
Department of Foreign Affairs and Trade

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE**JOINT STANDING COMMITTEE ON TREATIES****(AN AGREEMENT BETWEEN AUSTRALIA AND URUGUAY ON THE PROMOTION AND PROTECTION OF INVESTMENTS AND AN AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT ON THE PROMOTION AND PROTECTION OF INVESTMENTS)**

The Chair of the Joint Standing Committee on Treaties, Ms Julie Bishop, asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (1) Have we got similar bilateral investment protection agreements with other countries?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

Seventeen similar investment protection and promotion agreements are in force for Australia. These agreements are as follows:

1. Agreement between the Government of Australia and the Government of the **Argentine Republic** on the Promotion and Protection of Investments, and Protocol (Canberra, 23 August 1995) Entry into force: 11 January 1997 (Australian Treaty Series 97/4);
2. Agreement between the Government of Australia and the Government of the **Republic of Chile** on the Reciprocal Promotion and Protection of Investments, and Protocol (Canberra, 9 July 1996) Entry into force: 16 September 1999 (Australian Treaty Series 99/37);
3. Agreement between the Government of Australia and the Government of the **People's Republic of China** on the Reciprocal Encouragement and Protection of Investments (Beijing, 11 July 1988) Entry into force: 11 July 1988 (Australian Treaty Series 88/14);
4. Agreement between Australia and the **Czech Republic** on the Reciprocal Promotion and Protection of Investments (Canberra, 30 September 1993) Entry into force: 29 June 1994 (Australian Treaty Series 94/18);

5. Agreement between the Government of Australia and the Government of **Hong Kong** for the Promotion and Protection of Investments (Hong Kong, 15 September 1993) Entry into force: 15 October 1993 (Australian Treaty Series 93/30);
6. Agreement between the Government of Australia and the **Republic of Hungary** on the Reciprocal Promotion and Protection of Investments (Budapest, 15 August 1991) Entry into force: 10 May 1992 (Australian Treaty Series 92/19);
7. Agreement between the Government of Australia and the Government of the **Republic of India** on the Promotion and Protection of Investments (New Delhi, 26 February 1999) Entry into force: 4 May 2000 (Australian Treaty Series 00/14);
8. Agreement between the Government of Australia and the Government of the **Republic of Indonesia** concerning the Promotion and Protection of Investments, and Exchange of Letters (Jakarta, 17 November 1992) Entry into force: 29 July 1993 (Australian Treaty Series 93/19);
9. Agreement between the Government of Australia and the **Lao People's Democratic Republic** on the Reciprocal Promotion and Protection of Investments (Vientiane, 6 April 1994) Entry into force: 8 April 1995 (Australian Treaty Series 95/9);
10. Agreement between the Government of Australia and the Government of the **Republic of Lithuania** on the Promotion and Protection of Investments (Vilnius, 24 November 1998) Entry into force: May 2002;
11. Agreement between the Government of Australia and the **Islamic Republic of Pakistan** on the Promotion and Protection of Investments (Islamabad, 7 February 1998) Entry into force: 14 October 1998 (Australian Treaty Series 98/23);
12. Agreement between the Government of Australia and the Government of the **Independent State of Papua New Guinea** for the Promotion and Protection of Investments (Port Moresby, 3 September 1990) Entry into force: 20 October 1991 (Australian Treaty Series 91/38);
13. Agreement between the Government of Australia and the **Republic of Peru** on the Promotion and Protection of Investments, and Protocol (Lima, 7 December 1995) Entry into force: 2 February 1997 (Australian Treaty Series 97/8);

14. Agreement between the Government of Australia and the Government of the **Republic of the Philippines** on the Promotion and Protection of Investments, and Protocol (Manila, 25 January 1995) Entry into force: 8 December 1995 (Australian Treaty Series 95/28);

15. Agreement between Government of Australia and the **Republic of Poland** on the Reciprocal Promotion and Protection of Investments (Canberra, 7 May 1991) Entry into force: 27 March 1992 (Australian Treaty Series 92/10);

16. Agreement between the Government of Australia and the Government of **Romania** on the Reciprocal Promotion and Protection of Investments (Bucharest, 21 June 1993) Entry into force: 22 April 1994 (Australian Treaty Series 94/10); and

17. Agreement between the Government of Australia and the **Socialist Republic of Vietnam** on the Reciprocal Promotion and Protection of Investments (Canberra, 5 March 1991) Entry into force: 11 September 1991 (Australian Treaty Series 91/36).

Senator the Hon. Chris Schacht asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (2) Do you have any information about particular Australian companies that have contacted the Department of Foreign Affairs and Trade to say that the conclusion of an investment protection and promotion agreement would encourage them to invest?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

Australia's Senior Trade Commissioner in Egypt, Mr. Chris Heysen, has advised that when promoting Australian investment in Egypt, he mentions the investment protection and promotion agreement as a safeguard for Australian investors. The Commissioner advised that such an agreement is seen as a source of comfort because it lowers the perceived risk of investment.

The Department is not, however, aware of any current or potential Australian investors in Egypt who have expressly contacted the Department and stated that an investment protection and promotion agreement with Egypt would encourage them to invest.

Similarly, the Department is not aware of any current or potential Australian investors in Uruguay who have expressly contacted the Department and stated that an investment protection and promotion agreement with Uruguay would encourage them to invest.

The Chair of the Joint Standing Committee on Treaties, Ms Julie Bishop, asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (3) What was the nationality of the applicant in the case involving Egypt before the International Centre for Settlement of Investment Disputes ("ICSID")?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The case of *Southern Pacific Properties (Middle East) Limited vs Arab Republic of Egypt* (Case No. ARB/84/3) was brought by a corporation from Hong Kong. The case concerned the expropriation without adequate compensation of a tourism project being developed by the plaintiff. The case was not taken pursuant to an investment protection and promotion agreement.

Senator the Hon. Chris Schacht asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (4) Is there any evidence that the Egyptian legal system is under undue pressure to be Islamic in outcome?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The Department is not aware of any such pressure.

Mr Kerry Bartlett asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (5) Have any foreign corporations or governments challenged Australian Government legislation pursuant to Australia's investment protection and promotion agreements?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The Department is not aware of any challenge to Australian Government legislation pursuant to an investment protection and promotion agreement into which Australia has entered.

Mr Kerry Bartlett asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (6) Are we signing away some of Australia's sovereignty in allowing foreign countries to question or undermine what really are legitimate decisions of the Australian Government?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

Investment protection and promotion agreements do not limit Australia's sovereignty. Such agreements form part of the Australian Government's overall framework to attract foreign investment to Australia. To this extent, the investment protection and promotion agreements are consistent with the Australian Government's foreign investment policy. An investor can only successfully take action under an investment protection and promotion agreement if the government in question fails to comply with its obligations under the agreement. This may occur if the government imposes unfair, inequitable, arbitrary or discriminatory measures.

The agreements only regulate the treatment of investments that have been admitted to Australia. That is, they do not regulate the decision as to whether or not to admit a foreign investment to Australia. Under Article 3(1) of the agreements, each party promises only to admit investments in accordance with its laws and investment policies.

Senator Cooney asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (7) Could you get a list of those companies or those people that Australia guarantees under Article 10 and Article 14 and any disputes arising out of that?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The Export Finance and Insurance Corporation ('EFIC') provides overseas investment insurance and political risk insurance to cover Australian investments overseas. EFIC has no previous or current policies covering Egyptian or Uruguayan risks.

EFIC has advised that: (a) in many instances Australian investors who take cover from EFIC do not want the existence of the cover made public; and (b) the commercial-in-confidence nature of some EFIC facilities is recognised by the secrecy provisions in the EFIC Act and the exclusion of EFIC transactional business from FOI coverage.

EFIC has current exposures under 14 policies for overseas investment insurance and/or political risk insurance. Generally, the policies cover investors against losses due to one or more of the following risks: (a) politically motivated violence; (b) expropriation; and (c) exchange blockage/currency inconvertibility.

EFIC's current maximum liability in relation to these policies is approximately (approximately as they are written in various currencies) A\$257m. The policies relate to fourteen investments in five countries - twelve in Asia, one in South America and one in the Pacific.

EFIC as it currently exists was established under the 1991 EFIC Act. Since then, it has paid one claim (A\$0.5m) under an overseas investment insurance policy.

According to information held by EFIC, there have been no investment protection and promotion agreement disputes arising out of a subrogation of rights or claims by EFIC under the subrogation articles in Australia's investment protection and promotion agreements.

EFIC is very much in favour of investment protection and promotion agreements and, in particular, the subrogation clauses. According to information held by EFIC, some of its counterpart organisations overseas will not issue an overseas investment insurance or political risk insurance policy unless there is an investment protection and promotion agreement in existence containing an appropriate subrogation clause.

Senator the Hon. Chris Schacht asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (8) Could you provide details of any dialogue between Australia and China, or Australia and an investor in China, over conditions prevailing in China?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The decision to invest in China is a commercial one, made on the investor's understanding of the conditions prevailing in China. Advice is offered on market conditions and regulatory regimes in China, primarily through the DFAT and Austrade network of posts in Australia and China. Advice varies depending on investor needs but will generally stress the need for appropriate due diligence in connection with potential partners and the need for clear contracts covering all aspects of the venture.

Resolution of disputes with Chinese partners is usually set out in the joint venture contract, with an emphasis on a negotiated solution, and arbitration as a next best step. When this is not possible, recourse to legal action in Chinese courts is usually the next step. Firms are advised to obtain legal advice, noting that a number of Australia legal firms are represented in China. If a Chinese court finds in favour of the Australian investor, but the judgement is not enforced, the matter is usually raised in the peak bilateral economic institution, the Joint Ministerial Economic Commission. Our posts in China will also make representations to relevant Chinese authorities.

Senator the Hon. Chris Schacht asked the Department of Foreign Affairs and Trade upon notice on 13 May 2002:

- (9) Could you provide any examples of where a foreign country has used one of the investment protection and promotion agreements to pressure the Government of Australian to take action against an Australian company?

The Department of Foreign Affairs and Trade - the answer to the question is as follows:

The Department is not aware of any formal dispute settlement procedures initiated pursuant to Australia's investment protection and promotion agreements. Nor is the Department aware of any instances where a foreign government or company has approached the Australian Government and indicated that it is considering instigating formal dispute settlement procedures against the Australian Government pursuant to an investment protection and promotion agreement.

There have been a number of instances where Australian investors have sought the assistance of the Department in relation to difficulties experienced with their investments in other countries. In these cases, where an investment protection

and promotion agreement exists between Australia and the country involved, consideration has sometimes been given to the use of the formal dispute settlement procedures under the relevant investment protection and promotion agreement. However, no such formal dispute settlement procedure has ever been used.

The following are disputes that DFAT is aware of which have occurred between Australian investors and foreign governments in relation to investments in countries with which Australia has an investment protection and promotion agreement:

- (a) a dispute with Argentina related to the operation of a waste treatment plant;
- (b) a dispute with Argentina regarding taxation;
- (c) a dispute with China regarding the effective expropriation of an Australian investor's interest in a commercial property;
- (d) a dispute with China regarding the forced closure of quarries;
- (e) a dispute with China regarding changes in import quotas required to source the raw materials needed to operate an Australian owned factory in China;
- (f) a dispute with Papua New Guinea regarding contracts with the Government of Papua New Guinea; and
- (g) a dispute with Laos regarding a consultancy contract.

The Department is not aware of the initiation of any formal dispute resolution procedures under an investment protection and promotion agreement in relation to any of these disputes.