ACTU

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PRESIDENT
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SECRETARY
Greg Combet

Ref: tm/dd

23 April 2002

The Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

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Dear Sir/Madam,

I refer to the proposed Bilateral Promotion and Protection of Investment Treaties with Uruguay and Egypt. I note that Article 7 of the proposed Treaties deals with expropriation and nationalization but significantly also refers to measures having equivalent effect to nationalization or expropriation. I believe that before endorsing these treaties the Committee should obtain advice on the ramifications of the reference to measures having equivalent effect. In particular the Committee should ascertain whether taxation measures are encompassed by this reference, and also whether new environmental laws, regulations, and other measures are also encompassed.

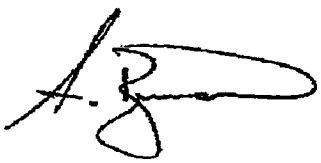
My concern is that should a future Australian Government act to prohibit a product or a production input or process, or to heavily tax the same as a deterrent to their use, that is central to the activities and viability of a Uruguayan or Egyptian company operating in Australia, it may be open to such a company to claim compensation for expropriation. It should be noted that under the terms of Article 7 such a claim would be tenable even if the Government action was in the public interest, under due process of law, and non-discriminatory between Australian and foreign-owned companies.

I also believe that advice should be obtained as to whether measures having equivalent effect may constitute expropriation even if the impact of such measures is to reduce the market value of a company to a significant degree, but by less than 50%.

Further the Committee should consider whether provisions of this kind confer greater rights to obtain compensation to Uruguayan or Egyptian companies operating in Australia than to domestic companies. Without limiting the scope of such consideration, it should be noted that under Article 13, an investor from Uruguay or Egypt would have options for arbitration of disputes which go beyond the options available under Australian law to Australian investors. It is further noted that it is the foreign investor's call whether to refer a dispute to an Australian or an international jurisdiction. This is particularly of concern if neither the overseas investor nor an Australian one with a similar grievance would be able to obtain compensation or other forms of redress under Australian law.

I am aware that these provisions are in line with Australia's Model Investment Promotion and Protection Agreement, and with existing bilateral treaties with countries such as Chile, Poland, and Hong Kong. However the fact that other treaties in these terms were made at a time when there was little community knowledge and scrutiny of trade and investment treaties is not sufficient reason to allow treaties of this kind to proliferate.

Yours sincerely,



SHARAN BURROW
President