The Need to Extend the Investment Provisions of the AUSFTA to Other Nations

A Response to a Question on Notice from the Senate Select Committee on the AUSFTA

In the hearings of the Senate Select Committee on the Free Trade Agreement between Australian and the United States of America on May 5, 2004 in Canberra I took a question on notice from Senator George Brandis.

The question was whether the investment advantages Australia will extend to the United States under the FTA may also have to be extended to Japan or New Zealand under our investment treaty with Japan or the CER Agreement with New Zealand.

Japan

The relevant treaty is the Basic Treaty of Friendship and Co-operation between Australia and Japan, (Australian Treaty Series 1977, No. 19).

Article IX, para 3 of this treaty provides:

> Each Contracting Party shall accord within its territory to the nationals of the other Contracting Party fair and equitable treatment with respect to matters relating to their business and professional activities, provided that in no case shall such treatment be discriminatory between nationals of the other Contracting Party and nationals of any third country.

It is certainly arguable that granting advantages to US nationals under this FTA is discriminatory of Japanese nationals seeking to invest in Australia, and thus in breach of this treaty unless the advantages extended to US nationals are also extended by Australia to Japanese nationals.

It may be that, as a practical matter, potential conflicts with Japan may be able to be avoided by diplomatic representations with Japan, or the negotiation of a simple amendment to this Treaty. However, on its face, this Treaty is at present a binding international obligation.

New Zealand

The CER Agreement with New Zealand does not contain provisions relating to investment. However the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (ATS 1988, No 20) provides in Article 6 that:

In relation to the provision of services inscribed by it in the Annex, each Member State shall accord to persons of the other Member State and services provided by them

treatment no less favourable than that accorded in like circumstances to persons of third States.

Australia has inscribed in the relevant Annex, a number of industries, such as banking, broadcasting, television and others that the AUSFTA would liberalise.

However, Article 2 (2) of the Protocol provides that:

The provisions of this Protocol shall apply subject to the foreign investment policies of the Member States.

Accordingly, the Protocol would be subject to the foreign investment policy of Australia to accord preferences to U.S. investors under the AUSFTA and thus there is no need to extend MFN treatment to New Zealand nationals under the Protocol.

Bilateral Investment Treaties Generally

Australia has entered into bilateral investment treaties ("BITs") with a wide range of countries though not Japan or New Zealand. These treaties contain a range of Most Favoured Nation provisions on investment.

The most common provision poses no difficulties for the AUSFTA. A typical example is the BIT with Egypt. The Agreement between Australia and Egypt on the Promotion and Protecton of Investments done at Cairo on 3 May, 2001, [2002] ATS 19, provides in Article 4:

> **Most favoured nation provision**
>
> Each Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country, provided that a Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:
>
> (a) any customs union, economic union, free trade area or regional economic integration agreement to which the Party belongs; or
>
> (b) the provisions of a double taxation agreement with a third country.

Australia's BITs with the following countries are to substantially the same effect: Chile [1999] ATS 37; China [1988] ATS 14; Czech Republic [1994] ATS 18; Hong Kong [1993] ATS 30; Hungary [1992] ATS 19; India [2000] ATS 14; Lao Republic [1995] ATS 9; Lithuania [2002] ATS 7; Pakistan [1998] ATS 23; Papua New Guinea [1991] ATS 38; Peru [1997] ATS 8; Philippines [1995] ATS 28; Poland [1992] ATS 10; Romania [1994] ATS 10; Uruguay [2003] ATS 10; and Vietnam [1991] ATS 36.

However, two BITS are cast in somewhat different terms. These are considered below.

Argentina

The BIT with Argentina [1997] ATS 4, provides in Article 4, para 3:

> If the laws or regulations of either Contracting Party or any bilateral treaty obligation between the Contracting Parties or any agreement between the investor

of one Contracting Party and the other Contracting Party contain rules, whether general or specific, entitling investments to more favourable treatment than are provided for in this Agreement, such rules, to the extent that they are more favourable, shall prevail.

Article 5 then continues:

> Each Contracting Party shall accord to investments by investors of the other Contracting Party, made in its territory, treatment which is not less favourable than that which it accords to investments of investors of any third country and, subject to its laws, regulations and investment policies, than that which it accords to investments by its own investors, provided that a Contracting Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:
>
> > (a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs;

Indonesia

The Agreement with Indonesia [1993] ATS 19 provides in Article IV:

> **Most favoured nation provisions**
>
> 1. Each Party shall at all times treat investments or returns in its territory on a basis no less favourable than that accorded to investments or returns of investors of any third country, provided that a Party shall not be obliged to extend to investments or returns any treatment, preference or privilege resulting from:
>
> > (a) any customs union, economic union, free trade area, regional economic integration agreement, or cross-border trade arrangement or similar economic agreement to which the Party belongs; or
> >
> > (b) a double taxation agreement or arrangement with a third country.
>
> 2. Neither Party shall in its territory subject investors of the other Party, as regards their management, use, enjoyment or disposal of investments or returns, or any other activities associated with investments, to treatment less favourable than that which it accords to investors of any third country.

Discussion of Argentine and Indonesian Treaties

The first point is that these provisions are post-establishment, and most of the liberalisation of investment into Australia from the U.S. under the AUSFTA relates to pre-establishment matters, ie. the AUSFTA smooths the way for the entry of US investors and investments into Australia.

To the extent, however, that the AUSFTA confers benefits on U.S. investments once they are in place in Australia, however, these treaties with Argentina and Indonesia would come into play.

Article 4(3) of the Argentine Treaty is a most curious provision as it does not appear to achieve anything that Article 5 does not achieve, and so its reason for existence is difficult to fathom.

The Argentine Treaty only applies to laws or regulations of Australia, so it would only demand that we extend to Argentine investors any benefits extended under the AUSFTA to US investors, if those benefits are conferred by law or regulation. It is highly unlikely that the AUSFTA in and of itself is a law or regulation, and most benefits it confers it does so in and of itself, ie. it does not appear that in the investment field (as opposed for instance to intellectual property) ratification of the AUSFTA will require extensive enactment of Australian laws or regulations.

Article IV(2) of the Indonesian Treaty is likewise a most curious provision. It relates to investors while Article IV(1) relates to investments. But it is difficult to conceive how there can be an investment without an investor, and equally difficult to see why, if the investment is protected, investors need any additional protection.

Nonetheless, Article IV(2) is not subject to the carve-out seen in Article IV(1)(a) and thus, to the limited extent the AUSFTA may confer post-establishment benefits upon US investors in Australia, it is likely that we need, under this treaty, to also confer those benefits upon Indonesian investors in their "management, use, enjoyment and disposal of investments or returns".

Conclusion

In conclusion, should Australia implement the AUSFTA we may well be required by our existing treaty obligations to extend all of the investment advantages under the AUSFTA to investors from Japan, the post-establishment investment advantages to investors from Indonesia, and the post-establishment investment advantages conferred by way of Australian laws or regulations upon investors from Argentina.

In this regard the relevant investment provisions of the AUSFTA are not limited to those in Chapter Eleven entitled 'Investment' but are to be found throughout the AUSFTA from Chapter 10 to Chapter 23 to the extent these benefits accrue to an investment in Australia by a US entity.

The benefits to be accorded U.S. investors and investments are substantial. The Report by the Centre for International Economics, commissioned by DFAT, predicts an increase in Australia's GDP of $6.1 billion per year in a decade's time from the FTA and ascribes the majority of this increase to the benefits that will flow from investment liberalisation.

If Australia signs and ratifies the AUSFTA, to remain in compliance with our existing treaty obligations it appears we will have to extend a small proportion of these benefits to investors from nations other than the U.S.

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