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Business Council of Australia

The Hon Peter Cook
Chair
Senate Select Committee on the Free Trade Agreement
between Australia and the United States of America
The Senate
Parliament House
Canberra ACT 2600

Dear Senator

The Business Council would like once again to thank the Senate Select Committee for the opportunity to provide evidence at the Senate Select Committee hearing recently.

During the hearing I took a question on notice, which I address below.

I was asked whether the Business Council had a view on the rights created under Article 11.7 in the Australia – United States Free Trade Agreement (AUSFTA), that being the article dealing with expropriation. A reference was also made to a claim in a submission from the Australian Conservation Foundation, where it was suggested that the Article in question created rights for foreign investors in Australia not currently enjoyed by Australian investors under Australian law.

Article 11.7 does not create actionable rights for foreign investors, the article deals only with the rights of Parties to the agreement (i.e. international Governments), under international law.

The expropriation provisions are a normal part of investment treaty-making, originally used to protect investments in legal jurisdictions where nationalisation still occurred. This is hardly the case in Australia, or in the US, yet the Article remains as a guarantee, in the same way that Articles on civil strife remain, although US investments in Australia or Australian investments in the US are equally unlikely to be troubled by such problems. In practice, because property rights are strong in both countries – and given the framework for pursuing such complaints that is provided in the AUSFTA – if the Article did not feature in the Agreement the practical outcome would be largely the same.

The Article in question outlines the responsibilities of both Governments toward the nationalisation of foreign investments. The US and Australian Governments cannot take measures that expropriate or nationalise an investment from the other party unless they do so under certain conditions.

If a US or Australian investor believed these terms were breached they could approach their respective Governments to ask them to address this issue through diplomatic channels with the other party to the agreement. The respective Government could then decide if it wished to take this measure up with the other party. The issue could then be solved through a range of diplomatic means, through the Joint Committee set up under Chapter 21 of the Agreement (Article 21.1), or eventually, through a Panel set up under Article 21.7.

The Business Council recognises that under the Australian Constitution there are no actionable rights under the heading of "expropriation" for compensation if parliaments diminish the value of a private investment by regulation. However, there are avenues for administrative review open to all private investors in Australia who feel that Government regulation has treated them in a discriminatory manner.

The rights created are enjoyed equally by both parties to the Agreement. Thus Australian investors could equally approach the Australian Government if they believed their investment had been harmed by measures equivalent to nationalisation in the US.

In the Australian Conservation Foundation's submission comparisons were made to tribunal cases under Chapter 11 of the North American Free Trade Agreement (NAFTA). The comparisons are erroneous. Under NAFTA Chapter 11 investors can take a complaint of breach under the Agreement to tribunals on their own behalf. The AUSFTA provides no rights for individuals or companies to take their problems under the investment chapter to an international tribunal. The AUSFTA provides no rights under international law for private parties to seek to enforce any of the investment chapter's provisions, including those dealing with expropriation. Moves by US or Canadian private parties to expand the sense of expropriation under international law under NAFTA and with reference to US and Canadian jurisprudence,[1] have been at the behest of the private parties, not of national Governments.

The meaning of expropriation under international law is weaker than its meaning in US and Canadian law. International law is the relevant body of law in the case of the AUSFTA. In the unlikely event that an Australian Government decided to nationalise a US investment without compensation and then failed to negotiate terms to mollify the US Government, thus leading to a panel dispute, the panel would have among its members a balance of Australian and US officials. A panel thus construed would be unlikely to adopt singularly a North American view of expropriation without reference to its meaning in international law, where it is narrowly understood to mean nationalisation.[2]

[1] See Micahel Trebilcock and Robert Howse (2001) "The Regulation of International Trade", London: Routeledge, p.355.

[2] See Jon Johnson (1998) International Trade Law, Concord, Ontario: Irwin Law, p 223

The Business Council does not view the Article as creating singular and actionable rights for US investors to enforce a US definition of expropriation. In coming to that conclusion the Council has examined the Article in the context of the rights created in the rest of chapter 11, in the Agreement more broadly, the meaning of expropriation in the context of international law, and, the strength of property rights in both countries.

Yours sincerely

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Director Policy