

Australian Government
Department of Foreign Affairs and Trade

21 February 2007

Dr Andrew Southcott MP
Chair
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Dr Southcott

Australia - Mexico Investment Promotion and Protection Agreement

Thank you for the opportunity to comment upon the letter prepared by Mr Ross Rolfe of the Queensland Government on the terms of the *Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, and Protocol*, done at Mexico City on 23 August 2005 (the 'Agreement').

We appreciate the concerns listed by Mr Rolfe regarding the expropriation and compensation provisions of the Agreement. We note, however, that the provisions contained in the Agreement with Mexico are substantially the same as those in the 19 other investment promotion and protection agreements to which Australia is already a party. They are also substantially the same as those contained in our Free Trade Agreements with Singapore, Thailand and the United States.

These investment agreements date back to the late 1980s and have been ratified by Governments of both persuasions. They have also previously been endorsed by State Governments. As late as January 2006, the Queensland Government, in its submission to the Committee regarding the *Agreement between the Government of Australia and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments*, done at Canberra 16 June 2005, did not identify any significant concerns with substantially similar provisions.

Aside from already being binding on Australia under existing international treaties, the conditions expressed within these agreements on expropriation and compensation contain obligations that also exist for Australia at customary international law. These would be binding for Australia even if it was not already a party to treaties containing these provisions.

Additionally, these conditions represent the bare minimum that Australian investors expect when investing overseas. The Australian Government is keen to maintain a high standard for Australian investors internationally and these standards would be difficult to maintain if Australia were unable to commit itself to them.

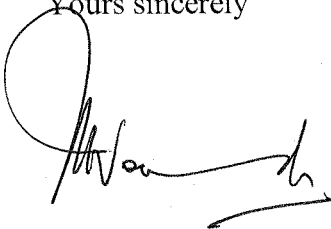
Indeed, foreign investment in Australia would likely be affected by any move by Australia away from these minimum conditions. As a number of international examples show, programs of nationalisation have had dramatic effects on foreign investment and these effects are even more significant when these programs have failed to accord adequate compensation to investors.

It should also be noted that it seems doubtful that the provisions in the agreement would require compensation be paid in the circumstances illustrated by Mr Rolfe. Under international law, States retain the right to regulate activities within their borders for legitimate public purposes. Thus, regulatory actions by States, such as the imposition of taxation or the lawful revocation of licences or permits, are unlikely to constitute an expropriation at international law. Whether such an action amounts to expropriation in any individual case will be a question of fact. However, if no expropriation is found, there is no obligation to pay compensation.

Finally, the established mechanism for ensuring effective consultation with the States and Territories on such matters is through the biannual Commonwealth/States Standing Committee on Treaties (SCOT) meetings, which were last held in Canberra, on 27 September 2006. We understand that, under the aegis of the SCOT process, States and Territories were informed about the Agreement as early as March 2001 and, after that, before all subsequent biannual SCOT meetings. At no point did any State or Territory, including Queensland, seek to have the Agreement placed on the SCOT agenda for discussion. It is regrettable that the Queensland Government appears not to have taken the earlier opportunities afforded to it to discuss their concerns.

We would be happy to elaborate on these points in writing or to appear before the Committee to discuss them further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John ML Woods', with a large loop at the start and a horizontal line extending to the right.

John ML Woods
A/g Assistant Secretary
Canada and Latin America Branch