

Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments

Introduction

- 2.1 The purpose of the *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, done at Canberra on 12 November 2002*, is to encourage and facilitate bilateral investment by citizens, permanent residents and companies of Australia and Sri Lanka, in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence.¹ The Agreement is intended to put Australian investors in a better position to benefit from the investment opportunities in Sri Lanka by providing them with a range of guarantees relating to non-commercial risk.²

1 Australia has concluded 19 Investment Promotion and Protection Agreements (IPPAs) since 1988. A list of these Agreements can be located at <http://www.info.dfat.gov.au/TREATIES>.

2 National Interest Analysis (NIA), para. 5, and see JSCOT, *Report 22: Five Treaties Tabled on 11 May 1999*, p. 4, where the Department of Foreign Affairs and Trade (DFAT) discussed how IPPAs are beneficial to both parties of an Agreement. This Agreement also accords

Background

- 2.2 Australia is the second largest foreign investor in Sri Lanka.³ In 1998 Australians invested about \$28 million in Sri Lanka out of total direct investment of \$193 million in that year from all countries. The Sri Lankan Board of Investment approved \$22 million in project proposals involving Australian investment in the first eight months of 2002. The Board estimated that, as at July 2002, the total stock of Australian investment in Sri Lanka was around \$600 million.⁴
- 2.3 The Committee was advised that:
- the Sri Lankans initiated the negotiations ... [Australian] Ministers look at a number of factors in deciding whether a country should be added to the [priority] list. These obviously include the levels of investment between the two countries, actual and potential; the bilateral relationship between the parties and matters such as those. Negotiations usually take the form of the parties exchanging their model investment agreements and then either entering into formal communications or face-to-face negotiations. In the case of the Sri Lankans there was one round of face-to-face negotiations in Canberra and negotiations were conducted on the basis of the Australian model text.⁵
- 2.4 A number of large Australian companies were part of a trade delegation that visited Sri Lanka in September 2001. Many of these companies are currently assessing investment options. Areas of potential investment include education, food processing and cold storage facilities.⁶
- 2.5 Currently, the major Australian investors in Sri Lanka include Australia's Pacific Dunlop, P&O Australia (Colombo Port), Hayleys/Australian Dyeing Company/MGT (knitted fabrics and dyeing), IE & DR Pope (woven polypropylene) and BHP Steel (roofing sheets). The Department of Foreign Affairs and Trade

with Article 23 of the Investment Promotion of the Multilateral Investment Guarantee Agency [1998] ATS 24.

3 NIA, para. 6.

4 NIA, para. 10.

5 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 3.

6 NIA, para. 12.

(DFAT) advised that at least \$100 million of the total Australian investment is tied up in the production of rubber gloves.⁷

- 2.6 The Committee understands that, in the medium term, Sri Lanka will require significant investment in its power sector and Australia is well placed to become involved as an investor and supplier to this sector.
- 2.7 Sri Lanka is considered to have a relatively open and transparent investment regime. The current peace process and the prospect of a return to strong economic growth are likely to lead to increased export and investment opportunities. According to the NIA, the implementation of much needed reforms should also lead to increased investor confidence.⁸

Features of the Agreement

IPPA Agreement model

- 2.8 The Committee was advised that this Agreement closely follows the Australian model Investment Protection and Promotion of Agreement (IPPA) text.⁹ The Agreement covers the post-establishment treatment of investments; decisions to admit new investments (either through acquisitions or new businesses) remain the sole purview of the host government. It establishes a clear set of obligations relating to the promotion and protection of investments in accordance with each Party's laws, regulations and investment policies.¹⁰
- 2.9 The Agreement does not limit either Government's ability to pass laws pertaining to pre-establishment investment or to regulate sensitive sectors.¹¹

7 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 5.

8 NIA, para. 9.

9 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 2.

10 NIA, para. 14.

11 NIA, para. 7.

Dispute resolution

2.10 The Committee has been informed that the investor-State dispute resolution procedures included in the Agreement provide an avenue by which Australian investors can redress wrongs without recourse to the local legal system (for example, by recourse to the International Centre for the Settlement of Investment Disputes).¹² DFAT advised the Committee that:

There is state-to-state dispute resolution, which is the traditional type in treaties between two countries. There is also investor-state dispute settlement, which allows an investor to take action against the host government in the event of a dispute relating to an investment. Under the 19 investment protection and promotion agreements that we have in force, we have never gone to state-to-state dispute settlement or investor-state dispute settlement. There have of course been issues in relation to the investment protection and promotion agreements, usually regarding Australian investments within other countries, but these have always been worked out before recourse to the dispute settlement procedures in the agreements.¹³

2.11 According to the NIA, the Parties undertake to consult on matters concerning the review, interpretation or application of the Agreement and endeavour to resolve any disputes connected with it by prompt consultations and negotiations.¹⁴ Formal procedures are established for the settlement of disputes concerning investments between the Parties and between a Party and an investor of the other Party.¹⁵

2.12 In dispute situations investors are to be provided with full access to competent judicial or administrative bodies regarding disputes with other investors and there is provision for the recognition and enforcement of any resulting judgements or awards.¹⁶

2.13 The NIA states that the Agreement is an important safeguard for Australian companies that wish to participate in major projects in Sri Lanka. It will send a positive message to Australian business about

12 NIA, para. 8, also see Joint Standing Committee on Treaties (JSCOT), *Report 22: Three Trade and Investment Treaties*, p. 4.

13 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 5.

14 NIA, para. 19.

15 NIA, para. 19.

16 NIA, para. 20.

investing in Sri Lanka by offering most favoured nation treatment in regard to the treatment of Australian investments, by providing guarantees about expropriation/nationalisation and by establishing mechanisms for resolving disputes over investment matters.¹⁷

Investment in education

- 2.14 The Committee understands that Australian educational institutions have been established in Sri Lanka. The Australian College of Business and Technology has opened a campus in Colombo and the University of Southern Queensland has launched a distance-education facility.¹⁸
- 2.15 There is opportunity for further development of investment initiatives in education between Sri Lanka and Australia.¹⁹ DFAT advised the Committee that though there are currently few Australian institutions investing in educational opportunities in Sri Lanka, this Agreement would facilitate the growth in joint venture educational enterprises between both countries:

... this is an area where we would be looking to make some inroads because of the number of Sri Lankan students currently in Australia—I think it is about 2,000. Generally, we are attracting a lot of students from that part of the world to Australia—we have got about 10,000 Indians and large numbers of Bangladeshis and Pakistanis. It would be part of that regional focus, if you like, to attract students to Australia and then, from that, you sometimes see investment going in in the form of campuses and joint venture educational enterprises. So I could confidently expect that that would be a growth area for us and that this treaty would assist that.²⁰

17 NIA, para. 8.

18 NIA, para. 11.

19 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 10.

20 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 11.

Issues

Costs

- 2.16 The Committee has been informed that compliance with the Agreement has few foreseeable direct financial costs for Australia. Costs may be incurred in the event of a dispute between the Parties, should the dispute be submitted to an Arbitral Tribunal at the request of either Party (Article 12). Under these circumstances each Party bears the cost of the arbitrator it has appointed and of its representation in arbitral proceedings, while the cost of the Chairman and the remaining costs of arbitration are borne in equal parts by the Parties unless otherwise decided by the Tribunal.²¹
- 2.17 Australia and Sri Lanka are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.²² Under Article 13(2)(b) of the Agreement, which deals with the settlement of disputes between a Party and an investor of another Party,²³ a Sri Lankan investor may refer a dispute relating to an investment in Australia to the International Centre for the Settlement of Investment Disputes (ICSID). In this case, the Australian Government may be required to bear all or part of the cost of arbitration and any relevant ICSID fees, subject to the discretion of the tribunal. The Government would also have to pay the cost of any award handed down in favour of the Sri Lankan investor. To date, no case has been referred to the ICSID in relation to Australia's existing investment promotion and protection agreements.²⁴
- 2.18 The Committee understands that under the Agreement Australia may be liable to pay compensation, indemnification or restitution for losses owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or similar events in its territory (Article 8), or in the event that an investment is expropriated or nationalised (Article 7). While this is a potential cost, it is highly unlikely that this would eventuate in the Australian political and investment environment. In addition, Australia's Constitution

21 NIA, para. 22.

22 *Convention of Settlement of Investment Disputes between States and Nationals of Other States* [1991] ATS 23.

23 Treaty text, p. 7.

24 NIA, para. 23.

provides for guarantees of compensation in the event of expropriation or nationalisation (s. 51(xxxi)).²⁵

Security

2.19 The Committee is concerned about the impact of the security situation on Australians working or trading with Sri Lanka.²⁶

2.20 According to the NIA, the substantial Sri Lankan community in Australia (around 70,000 people) has the potential to emerge as a significant source of investment funds for the Sri Lankan economy, and that Australian investment in Sri Lanka is likely to accelerate as the current peace process gains momentum.²⁷ However, the Committee notes that the acceleration of investment is dependent on the security environment and the current peace process in Sri Lanka. Phillip Stonehouse advised the Committee that the current security situation is safe for the time being:

The current security situation is quite stable. Our travel advices for Sri Lanka have been changed to reflect the fact that it is now a reasonably safe place to visit, do business and live. So, for the time being, the peace process is having a very positive effect on security for not just Sri Lankans but Australians and other international residents and visitors there.²⁸

2.21 The Committee acknowledges that Article 8 of the treaty provides that where an investor suffers loss by war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar event, any claim for compensation, restitution, indemnification or other settlement by an investor of a Party will be accorded treatment which is no less favourable than that for investors of any third country.²⁹

25 NIA, para. 24.

26 *Transcript of Evidence*, 16 June 2003, p. 4. Also see JSCOT, *Report 46: Treaties Tabled 12 March 2003*, pp. 56-57, where DFAT noted that Export Finance and Insurance Commission (EFIC, which is now a corporation) provides investment and political risk insurance to international corporate investors. See the EFIC website <http://www.efic.gov.au>.

27 NIA, para. 13.

28 Philip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 4.

29 NIA, para. 16.

Consultation

- 2.22 DFAT advised the Committee that the Australia-Sri Lanka Council had been consulted on the proposed Agreement. The Council supports the IPPA and will encourage investment.³⁰
- 2.23 Mr Russell Wild further advised that there had been no formal consultation with the Sri Lankan community,³¹ mainly because the Sri Lankan community in Australia is believed to be more professionally than commercially focused:
- I think it is fair to say that the Sri Lankan community here is not only well integrated but it is also substantially a professional community. It is not particularly commercially focused on its original homeland, if you like, but we are hoping that this treaty might spur some sort of bridging role by the community.³²
- 2.24 The Committee sought clarification on the consultation process set out in the NIA, particularly regarding the responses of industries and organisations approached by DFAT. The Committee was subsequently advised that all responses received by DFAT supported the proposed treaty action.³³

Implementation

- 2.25 The Committee understands that the Agreement complies with existing Australian legislation. The Agreement will be implemented within the framework of Australia's existing laws and policies relating to foreign investment.³⁴

Entry into force

- 2.26 The Committee has been advised that in accordance with Article 15(1), the Agreement will enter into force on the date on which both
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30 *Consultations Annex*, tabled with the NIA and Treaty text, p. 1.

31 Russell Wild, *Transcript of Evidence*, 16 June 2003, p. 6.

32 Phillip Stonehouse, *Transcript of Evidence*, 16 June 2003, p. 6.

33 DFAT, *Submission 23*, p. 1.

34 NIA, para. 21.

Parties have notified each other in writing that their internal legal requirements for the entry into force of the Agreement have been fulfilled. It is proposed that the exchange of notes take place as soon as both Parties have completed their internal legal requirements.³⁵

Concluding remarks and recommendations

2.27 The Committee is aware that this Agreement may be influenced by both the peace process and the security situation in Sri Lanka. The Committee believes however that the provisions of the proposed Agreement offer adequate protection to Australians and Australian companies investing in Sri Lanka. The Committee therefore supports the proposed treaty action between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka.

Recommendation 1

The Committee supports the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments and recommends that binding treaty action be taken.

35 NIA, para. 4.