

Economic and Commercial Cooperation with Kazakhstan

Introduction

- 2.1 The purpose of the *Agreement between the Government of Australia and the Government of the Republic of Kazakhstan on Economic and Commercial Cooperation, done at Almaty on 7 May 1997* is to facilitate trade and economic cooperation between Australia and Kazakhstan.¹
- 2.2 The Agreement requires the countries to grant each other Most Favoured Nation (MFN) treatment in respect of duties, taxes or charges imposed in connection with the import or export of goods.² It also provides a context within which future commercial disputes can be managed. It also provides that the Agreement be brought into force by an exchange of notes.³

1 According to para. 37 of the National Interest Analysis (NIA), when the Agreement was signed in 1997, the standardised Roman spelling of the country name was 'Kazakstan' and was therefore used throughout the treaty text. In 1998 Kazakhstan advised that the correct standardised Roman spelling was 'Kazakhstan'. The latter spelling is used throughout this chapter.

2 NIA, para. 6.

3 NIA, para. 2.

Background

- 2.3 This is the second time that this proposed treaty action has come under scrutiny by this Committee. It was first concluded, signed and tabled in 1997⁴ but, after consideration, the Committee recommended in its *Eleventh Report*⁵ that ratification not proceed at that time.

Findings of the 1997 Review

- 2.4 The Committee discovered that Telstra had experienced severe difficulties in the operation of a joint venture in Kazakhstan, resulting in legal complications and financial losses, the details of which are set out in the Committee's *Eleventh Report*. The Committee considered that Australian ratification of the Agreement would demonstrate Australia's endorsement of a standard of commercial relations that the Committee considered unacceptable.
- 2.5 The *Eleventh Report* also commented extensively on flaws in the consultation process. The Committee was highly critical of aspects of the behaviour of the Department of Foreign Affairs and Trade (DFAT) in not presenting pertinent evidence, finding that 'both the NIA and much of the information given at the first hearing were seriously deficient'.⁶
- 2.6 In its *Eleventh Report* the Committee specifically recommended that
- Australia not ratify the proposed Economic and Commercial Agreement with Kazakhstan at this time
 - that Agreement should not be reconsidered for ratification unless and until there are demonstrations by Kazakhstan of good faith in its trade and investment relations with Australia, in particular appropriate compensation for Telstra
 - should the situation change in Kazakhstan, and before a decision is made to ratify such an Agreement, a revised National Interest Analysis should be tabled in both Houses

4 *Senate Journal*, 26 August 1997, p. 5708 and *House of Representatives Votes and Proceedings*, 26 August 1997, p. 6865.

5 Tabled on 24 November 1997, *Senate Journal*, pp. 9266-9267 and *House of Representatives Votes and Proceedings*, pp. 11046-11048.

6 Joint Standing Committee on Treaties, *Eleventh Report*, p. 13.

of the Parliament including the reasons for the new circumstances.⁷

Outstanding issues and their resolution

- 2.7 In September 1999, an agreement was reached by the Minister for Foreign Affairs and the Minister for Trade that a revised NIA be prepared, but ‘elections intervened’.⁸ The Government Response to the *Eleventh Report*, which was tabled in the Senate in August 2001, advised that ‘Telstra’s difficulties with Kazakhtelecom (*sic*) have been resolved’, and that a revised NIA would be prepared.⁹ The subsequent preparation and completion of a new NIA was then delayed due to ‘competing work priorities and an absence of any significant pressure from Australian business’.¹⁰
- 2.8 The Committee heard that while Telstra was ‘concerned about the slow pace of the liquidation’,¹¹ they were ‘generally satisfied’ with the process.¹² The Committee also understands that some assets were not able to be recovered.¹³
- 2.9 Another concern raised by the Committee in its *Eleventh Report* related to the modest size of the trade flow between Australia and Kazakhstan,¹⁴ and the reasons for the initial signature of an economic and commercial cooperation agreement where ‘contacts between the two nations are not great’—
- If Telstra’s experience is in any way typical, Australian and international companies will be wary of doing business in Kazakhstan and there will be little point in having any agreements for the protection of trade and investment there.¹⁵
- 2.10 The Committee recognises however that ongoing stability and economic growth in Kazakhstan are favourable factors in the re-evaluation of this proposed treaty action.

7 Joint Standing Committee on Treaties, *Eleventh Report*, pp. 15-16.

8 NIA, para. 4.

9 *Senate Journal*, 9 August 2001, pp. 26012-26013.

10 NIA, para. 4.

11 Dr Alexandra Siddall, *Transcript of Evidence*, 13 October 2003, p. 3.

12 NIA, para. 10.

13 NIA, para. 10.

14 Joint Standing Committee on Treaties, *Eleventh Report*, p. 13, notes that the two-way trade flow was only A\$2.11 million.

15 Joint Standing Committee on Treaties, *Eleventh Report*, p. 13.

- 2.11 In terms of a presence in the region and future possibilities for increased bilateral trade, the Committee notes that Australia's profile in Kazakhstan is 'not as high as it was in the nineties, when this agreement was first signed', and that the Australian embassy in Almaty (opened in 1995) has since closed.¹⁶ While the Committee accepts DFAT's opinion that the agreement is seen as 'an opportunity to give some ballast to the bilateral relationship', it is not convinced that this alone is reason enough to proceed to ratification of the proposed treaty.
- 2.12 In the *Eleventh Report*, the Committee noted evidence from DFAT that the rule of law was 'virtually non-existent' in Kazakhstan at that time.¹⁷ The Committee notes the revised NIA observes that
- Corruption, particularly in the court system, remains an impediment to the development of a functioning market economy. Australian lawyers working in Kazakhstan have reported frustration at having to deal with a corrupt judiciary.¹⁸
- 2.13 DFAT accepts that Kazakhstan is 'a risky environment and commercial enterprises are entered into at their own risk' by companies.¹⁹ The Committee was concerned that companies be educated adequately as to the difficulties that may be experienced in entering into economic relationships with entities in Kazakhstan. Ms Margaret Twomey, from DFAT, explained that some 'fairly blunt data' exists, for example Transparency International's corruption rating, and further, that the experience of Telstra in Kazakhstan 'would be well known now within the business community.'²⁰
- 2.14 Further comment about these issues and other issues arising from the Committee's first consideration of the Agreement in 1997 will be made throughout this chapter.

16 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 5; NIA, paras 8 and 9. The NIA states at para. 9. that the embassy closed in 1999.

17 Joint Standing Committee on Treaties, *Eleventh Report*, p. 5.

18 NIA, para. 13.

19 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 9.

20 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 9.

Features of the Agreement

- 2.15 The Committee noted in its *Eleventh Report* that the agreement 'is fundamentally a trade agreement which has some implications for investment and wider cooperation'.²¹ DFAT advised the Committee that the provision of a framework within which future commercial disputes can be managed 'is useful in Kazakhstan's commercial environment where links between business and government still remain strong.'²²
- 2.16 In evidence taken at a public hearing on 30 September 1997, the Committee was advised that
- ...when doing business with economies in transition, there are generally three planks in the raft of legal agreements. The first is a double taxation agreement (DTA), the second is an investment promotion and protection agreement and the third is a trade agreement. Although the enforcement provisions of the latter are weak, it does include MFN status, if only for customs and similar matters.²³
- 2.17 The Committee notes that the Agreement is
- not an investment promotion and protection agreement and does not obviate the need for individual businesses to make their own assessment of business risk when exporting to or importing from another country.²⁴
- 2.18 The Committee also notes that the text of the Agreement corresponds closely to the text of similar agreements between Australia and Estonia, Latvia and Lithuania. As stated in the introduction to this chapter, the Agreement obliges each state to encourage alternative dispute resolution procedures and requires the Parties to grant each other MFN treatment in respect of duties, taxes or charges imposed in connection with the import or export of goods. The Agreement also encourages due regard for the protection of intellectual property.
- 2.19 The Committee notes that the Agreement commits Australia to encourage close cooperation and dialogue through a variety of activities, which may include providing assistance to Australian trade

21 Joint Standing Committee on Treaties, *Eleventh Report*, p. 8.

22 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

23 Joint Standing Committee on Treaties, *Eleventh Report*, p. 8.

24 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

missions or businesses in Kazakhstan, or Kazakhstani businesses in Australia,²⁵ and that the Agreement is not enforceable.²⁶

- 2.20 Article 9 of the Agreement provides that it will remain in force for an initial period of five years. Thereafter, the Agreement will remain in force until the expiration of 90 days from the date on which either party receives written notice of desire to terminate the Agreement from the other.
- 2.21 While the Committee notes that Australia's commercial interests in Kazakhstan are modest at present, it acknowledges that Kazakhstan is rich in resources and is enjoying strong economic growth, and therefore agrees with representatives from DFAT that there is potential for Australian traders and investors. The NIA suggests that as Kazakhstan 'works its way to realising its significant economic potential', the proposed Agreement will 'help position Australian traders for the future.'²⁷

Economic environment in Kazakhstan

- 2.22 The Committee was interested to learn of the economic environment and growth projections in Kazakhstan. The Country Brief prepared by DFAT on Kazakhstan reports that it has 'vast untapped natural resource and fossil fuel reserves'.²⁸ DFAT reported that Kazakhstan is
- enjoying strong economic growth, sustained now for the past three years, with predicted growth of six to seven percent per annum for the next few years. The national currency is stable and inflation has been reduced to manageable levels. Kazakhstan's record on economic reform is strong.²⁹
- 2.23 Given this positive indication, the Committee was also interested therefore to learn that economic development has been 'disappointingly slow'.³⁰ In her opening remarks to the Committee at

25 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

26 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 4.

27 NIA, para. 5.

28 DFAT, Kazakhstan - Country Brief
<http://www.dfat.gov.au/geo/kazakhstan/index.html>

29 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

30 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

the public hearing on 13 October, Ms Twomey noted that since independence from the former Soviet Union in 1991,

Kazakhstan has shown itself to be one of the most stable members of the Commonwealth of Independent States and the most economically viable amongst the Central Asian republics.³¹

- 2.24 The Committee also heard that among the former Soviet countries, apart from Russia, Kazakhstan is seen as having the greatest potential for the development of Australian commercial interests.³² According to Ms Twomey

To put it in general terms, while the Kazakhstan economy booms, as it is doing now as a result of its oil and mineral exports, and that boom will get bigger, that will strengthen the economy. It will give greater wealth to the citizens of Kazakhstan, who will in turn change their living habits. We see a myriad of different export opportunities opening up.³³

Trade prospects

- 2.25 Despite positive economic trends in Kazakhstan, the NIA states that recent trade levels have been ‘disappointingly low’.³⁴ In 2002, Australia’s exports to Kazakhstan totalled A\$5.7 million, and imports from Kazakhstan totalled A\$1.9 million.³⁵ As stated earlier, in 1996 total two-way trade amounted to only A\$2.11 million.³⁶
- 2.26 Despite the relatively small trade involvement in economic terms to date, DFAT was optimistic about the future of trade relations. The Committee was concerned that the relatively small number of responses by industry groups and governments consulted was reflective of a high level of disinterest in future involvement, however Ms Twomey suggested that

31 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 1.

32 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 1.

33 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 6.

34 NIA, para. 5.

35 DFAT, Kazakhstan - Country Brief
<http://www.dfat.gov.au/geo/kazakhstan/index.html>

36 Joint Standing Committee on Treaties, *Eleventh Report*, p. 9.

It is more the case that most of [the companies] do not hold out much interest now. We would argue that what this treaty is about is positioning ourselves for the long-term future.³⁷

- 2.27 The Committee notes that while agribusiness was seen to be a potential area of trade and investment at the time of the negotiation of the treaty, expectations were not fulfilled, although Austrade continues to see potential activity in this and other areas.³⁸ The NIA also notes that new areas of commercial interest are developing, including the development of the oil and gas sector - 'a big ticket item for potential Australian trade and investment'.³⁹
- 2.28 The Committee also understands that while the proposed Agreement does not cover services, 'it may pave the way for the future export of services to Kazakhstan by Australian companies in sectors such as education and consultancy'.⁴⁰ The Committee was advised that the Snowy Mountain Engineering Corporation (SMEC) has identified future opportunities in Kazakhstan and has an office in Almaty.⁴¹
- 2.29 The Committee notes that the presence and involvement in Kazakhstan of international agencies such as the Asian Development Bank, the European Bank for Reconstruction and Development and the World Bank may mean that Australian companies may benefit from contract work under the aegis of those institutions.⁴²
- 2.30 The Committee was advised that the education sector is identified as receiving 'probably the second greatest level of interest at the moment'.⁴³ The Committee was interested to learn of an Austrade-coordinated trade mission undertaken by Curtin University in Western Australia, and their indication that

...this sort of agreement would be very positive in improving the profile of educational services, as other agreements have done in other countries. It does promote the idea of Australia as a world leader in education.⁴⁴

37 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 7.

38 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 6.

39 NIA, para. 15.

40 NIA, para. 17.

41 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 6.

42 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 8.

43 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 8.

44 Dr Alexandra Siddall, *Transcript of Evidence*, 13 October 2003, p. 8.

- 2.31 The Queensland Government advised the Committee that the Agreement is consistent with the State's trade strategy and ...could create export opportunities in agribusiness, construction, consumer goods, food products, warehousing, transport, logistics, and mining and energy equipment, technologies and services.⁴⁵
- 2.32 The commercial environment in Kazakhstan remains difficult, but the Committee accepts the Department's advice that Kazakhstan has made progress towards a favourable investment climate.⁴⁶ While business opportunities are currently limited the Committee also accepts DFAT's view that having a treaty of this kind will assist businesses seeking trade with Kazakhstan in the future.

WTO admission

- 2.33 Kazakhstan has applied for membership of the World Trade Organisation (WTO). Ms Twomey informed the Committee that Kazakhstan will probably be admitted to the WTO in about three years, and that until that time, the MFN status for both states will be valuable.⁴⁷ The Committee notes however that WTO admission has been a stated goal since the first time the proposed treaty was reviewed, and that negotiations are 'ongoing'.⁴⁸

Implementation and costs

- 2.34 The Agreement will enter into force as soon as both parties have completed their domestic legal requirements. The Committee understands that Kazakhstan completed its domestic requirements in July 1997.⁴⁹
- 2.35 The NIA states that no new legislation will be required, and that no additional direct costs will be incurred as a result of the treaty action.⁵⁰ However, according to the NIA, some costs may be incurred

45 Queensland Government, *Submission*, p. 2.

46 NIA, para. 13.

47 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 5.

48 See Joint Standing Committee on Treaties, *Eleventh Report*, p. 6; Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 5.

49 NIA, para. 2.

50 NIA, paras 29 and 31.

in fulfilling the aims of the Agreement such as holding periodic government-to-government meetings.⁵¹

Consultation

- 2.36 In its 1997 report the Committee expressed deep concerns regarding the manner in which consultations were conducted with the States and Territories

The NIA refers to Australian interests in mining, agriculture, telecommunications and provision of services in areas such as transport, public management training and the law. There is no evidence that any organisation or individual, outside Government agencies, with an actual or potential interest in Kazakhstan was contacted about this Agreement.⁵²

- 2.37 The revised NIA states that ‘the consultation process primarily targeted the Australian energy and resources and agribusiness sectors, as these are the dominant export industries in Kazakhstan’.⁵³ The Committee was generally satisfied with the Consultations Annex provided with the NIA and considers that the 29 industry partners contacted provides a fair representation of the level of interest across a range of sectors and interests.

Concluding observations and recommendation

- 2.38 During the Committee’s 1997 review of this proposed treaty action, concerns were raised about the benefits of entering into such an Agreement with Kazakhstan.⁵⁴ At the conclusion of the current review, the Committee continues to doubt the tangible effects of entering into this treaty and finds that the claims of DFAT and Austrade that the economic outlook in Kazakhstan will continue to improve and involvement by Australian industry will continue to expand are unconvincing.

51 NIA, para. 31.

52 Joint Standing Committee on Treaties, *Eleventh Report*, p. 14.

53 NIA, para. 32.

54 Joint Standing Committee on Treaties, *Eleventh Report*, p. 14.

2.39 The Committee notes that this proposed treaty action would be the only bilateral Agreement between Australia and Kazakhstan. The Committee understands that no further treaties are currently being negotiated, nor does it appear that any are proposed for the future.⁵⁵ The Committee acknowledges Ms Twomey's remarks with concern and interest

At the time of Kazakhstan's independence there was quite a flurry of activity on the part of the Australian government and many other governments with regard to agreements. As time wore on and the boom did not show itself to be quite the El Dorado that some might have thought it would have been, we rationalised our agreement activity with them.⁵⁶

2.40 The Committee recognises that substantial resources are involved in negotiating treaties and ensuring their entry into force, and is concerned that in the case of this proposed treaty action, the outcome may not be clearly justified or quantified. The Committee is not convinced that the economic and political situation in Kazakhstan can be predicted with any confidence, and therefore the benefits of the proposed Agreement may be difficult to define.

2.41 Notwithstanding the above remarks, the Committee is prepared to accept the Department's view that as Kazakhstan's reform program and economic growth continues it is an increasingly attractive trading partner.⁵⁷ The Committee also concurs with the view that the Agreement

will support Australia's broader foreign policy goal of integrating Kazakhstan into the world economy by strengthening the legal and commercial framework which commits Kazakhstan to facilitate and develop trade on a stable and predictable basis.⁵⁸

2.42 The Committee notes that the Agreement is one of 'encouragement' and is not an enforceable treaty.⁵⁹ It was initiated at a time when it was considered to be in the national interest to raise Australia's profile in newly emerging nations. The Committee acknowledges the benefits of the Agreement in providing a formal framework within

55 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 7.

56 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 7.

57 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 2.

58 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 3.

59 Ms Margaret Twomey, *Transcript of Evidence*, 13 October 2003, p. 4.

which future commercial disputes can be managed but nonetheless questions the value of such treaties. However the Committee considers that, on balance, it is in the national interest to proceed with binding treaty action.

Recommendation 1

The Committee supports *Agreement between the Government of Australia and the Government of the Republic of Kazakhstan on Economic and Commercial Cooperation, done at Almaty on 7 May 1997* and recommends that binding treaty action be taken.