

Agreement with the United Mexican States on the Promotion and Reciprocal Protection of Investments and Protocol

Background

- 2.1 Australian direct investment in Mexico is approximately A\$285 million and Mexican investment in Australia is A\$10 million. Potential exists for greater Australian investment in Mexico, especially in the mining, resources, energy and agribusiness sectors. While Mexico is seen as a gateway to NAFTA¹ markets for Australian investors, similarly Australia is seen as a base for accessing South-East Asian markets for Mexican investors.²
- 2.2 Mexico is Australia's largest trading partner in Latin America.³ Australia's top four exports to Mexico are coal, meat, livestock and dairy. Mexico attracts significant direct investment due to NAFTA membership and its generally liberal investment laws. Australian companies with interests in Mexico include: Austmex, Bolnisi Gold, Orica, Howe Leather, Mincom, Baja Aqua Farms and TNA Packaging Systems.⁴

1 North American Free Trade Agreement.

2 National Interest Analysis (NIA), para. 1.

3 NIA, para. 5.

4 Department of Foreign Affairs and Trade, Mexico Country Brief, April 2006, viewed 22 June 2006, <www.dfat.gov.au>.

- 2.3 Australia currently has 20 investment protection and promotion agreements (IPPA) in force with: Argentina, Chile, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Turkey, Uruguay and Vietnam.⁵
- 2.4 Australia signed a Memorandum of Understanding on Mining with Mexico in July 2002⁶ and a memorandum of understanding on energy cooperation in January 2005.⁷
- 2.5 Australia is a leading supplier of coal to Mexico's Federal Electricity Commission and in 2005 won a 3.36 million metric tonne supply contract worth \$A330 million for the Commission's Petacalco Plant. This represents the largest export contract won by Australia in Mexico.⁸
- 2.6 Australian Liquefied Natural Gas (LNG) suppliers are interested in supplying LNG to Mexico and the west coast of the United States over 20 years in contracts worth around \$A50 billion which could begin in 2009.⁹
- 2.7 In 2002, the Australian Government published 'Doing Business in Mexico' in response to an increase in Australian business interest in Mexico.¹⁰

Purpose of the Agreement

- 2.8 *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, (the Agreement) by guaranteeing certain*
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- 5 NIA, List of treaties of the same type with other countries.
- 6 Vaile, M (Minister for Trade) 2002, *Australia and Mexico Sign Investment Declaration*, media release, Parliament House, Canberra, 18 November.
- 7 Macfarlane, I (Minister for Industry, Tourism and Resources) 2005, *Australia and Mexico Sign for Stronger Trade Relationship*, media release, Parliament House, Canberra, 29 August.
- 8 Macfarlane, I (Minister for Industry, Tourism and Resources) 2005, *Australia and Mexico Sign for Stronger Trade Relationship*, media release, Parliament House, Canberra, 29 August.
- 9 Macfarlane, I (Minister for Industry, Tourism and Resources) 2005, *Australia and Mexico Sign for Stronger Trade Relationship*, media release, Parliament House, Canberra, 29 August.
- 10 Department of Foreign Affairs and Trade, viewed 22 June 2006, <www.dfat.com.au>.

treatment for investments will encourage and facilitate bilateral investment by citizens, permanent residents and companies.¹¹ The Agreement is entered into in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non discrimination and mutual confidence.¹²

- 2.9 Citing the reason for the Agreement, a representative from the Department of Foreign Affairs and Trade stated:

What underpins Australia's interest in broadening the bilateral relationship through an agreement such as this one is the fact that Mexico is Australia's largest trading partner in Latin America. Mexico is also a significant education and training market for Australian institutions. Mexico and Australia regard each other as potential strategic partners in areas such as energy, mining and agriculture. This is based on Australia's ability to supply coal and liquefied natural gas and the potential for Australian miners to invest in Mexican projects. And yet, to date, we have seen relatively modest levels of investment between Mexico and Australia. Australian investment, including portfolio investment, is predominantly in services, which are followed by manufacturing, mining and extraction, whereas Mexican investment in Australia is in private real estate and manufacturing.¹³

Benefits of the Agreement

- 2.10 Mexico's investment regime is considered relatively open and transparent. Consistent with the prospect of continued economic growth and political stability in Mexico, increased export and investment opportunities are likely. The establishment of an IPPA framework between Australia and Mexico would greatly benefit investors.¹⁴

- 2.11 The Agreement would be an important safeguard for Australian companies that wish to participate in major projects in Mexico as it

11 NIA, para. 7.

12 NIA, para. 4.

13 Mr David Glass, *Transcript of Evidence*, 14 August 2006, pp. 2-3.

14 NIA, para. 9.

offers most favoured nation status and national treatment of Australian investments. It does this by providing guarantees about expropriation/nationalism and by establishing a mechanism for resolving investment disputes. The investor-state dispute settlement provisions provide an avenue by which Australian investors can choose to take alleged breaches of the obligations of this Agreement to international arbitration, instead of relying on the local legal system.¹⁵

- 2.12 An IPPA would also give Australian investors parity with Mexico's other bilateral investment treaty partners.¹⁶

Concerns raised by the Queensland Government

- 2.13 The Queensland Government wrote to the Committee in July and December 2006 with concerns regarding the expropriation and compensation provisions of the Agreement.¹⁷ The Queensland Government was concerned that the expropriation and compensation provisions of the Agreement went further than what was provided under Queensland legislation, that the Queensland Government should determine in what circumstances compensation is appropriate and that the Agreement may create disparity between the rights of foreign and domestic investors.¹⁸
- 2.14 The Department of Foreign Affairs and Trade (DFAT) informed the Committee that the expropriation and compensation provisions of the Agreement are the 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.¹⁹

15 NIA, para. 8; Mr David Glass, *Transcript of Evidence*, 14 August 2006, p. 3.

16 NIA, para. 12.

17 Queensland Government, *Submission 3 and Supplementary Submission 3.1*. Article 7 of the provides the expropriation and compensation provisions.

18 Queensland Government, *Submission 3 and Supplementary Submission 3.1*.

19 Department of Foreign Affairs and Trade, *Supplementary Submission 6.1*, p. 2.

- 2.15 The expropriation and compensation provisions are also common among Australia's other investment promotion and protection agreements, the free trade agreements with Singapore, Thailand and the United States, and have also been endorsed by State Governments.²⁰
- 2.16 Addressing a specific concern relating to the payment of compensation for the cancellation of a permit or lease, DFAT advised that it was unlikely that regulatory action by States, such as the imposition of taxation or the lawful revocation of licences of permits, would constitute expropriation at international law.

Consultation

- 2.17 Although negotiations were encouraged by industry representatives, no formal submissions were received in relation to the negotiation of this Agreement.²¹
- 2.18 All relevant agencies were consulted during negotiations and have given their approval to the final text of the Agreement including Treasury and the Attorney-General's Department.²²
- 2.19 State and Territory governments were informed of the proposed agreement when negotiations commenced in 2001 through the Commonwealth-State/Territory Standing Committee on Treaties. No objections or concerns were raised.²³

Costs

- 2.20 Costs may be incurred in the event of a dispute between the Parties, if the dispute is submitted to an arbitration at the request of either Party. Under such circumstances each Party would bear the cost of the arbitrator it has appointed and of its representation in arbitration proceedings, while the cost of the Chairman and the remaining costs

20 Department of Foreign Affairs and Trade, *Supplementary Submission 6.1*. Australia has 19 other investment promotion and protection agreements.

21 NIA, Consultation Annex

22 NIA, Consultation Annex

23 NIA, Consultation Annex

of arbitration would be borne in equal parts by the Parties unless otherwise decided by a Tribunal.²⁴

- 2.21 Costs may also be incurred if it is necessary to defend disputes brought forward by Mexican investors. If a claim is brought forward in an Australian court or tribunal, Australia would incur the ordinary costs associated with litigating domestic disputes as determined by the court. If a claim is brought forward in an international tribunal, costs would be determined by the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law rules respectively, depending on the forum in which the claim was prosecuted.²⁵
- 2.22 Australia may also be liable to pay compensation for losses owing to war or other armed conflict, revolution, a state of national emergency, a civil disturbance or similar events in its territory, or in the event that an investment is expropriated or nationalised.²⁶

Implementation

- 2.23 The Agreement will be implemented within the framework of Australia's existing laws and policies relating to foreign investment.²⁷

Entry into force and withdrawal

- 2.24 The Agreement will enter into force 60 days after the date on which an exchange of notes takes place between the Parties. The Agreement will remain in force for a period of ten years.²⁸ The Agreement may be terminated with twelve months written notice of termination after ten years has expired. The Agreement will continue to be effective in respect to investments made or acquired before the date of termination for a further period of ten years after the date of termination.²⁹

24 NIA, para. 28.

25 NIA, para. 29.

26 NIA, para. 31.

27 NIA, para. 27.

28 NIA, para. 1.

29 NIA, paras 34 and 35.

Conclusion and recommendation

- 2.25 The Committee acknowledges that the Agreement will provide a formal framework that has the potential to encourage greater investment between Mexico and Australia.

Recommendation 1

The Committee supports 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 (Mexico City, 23 August 2005)* and recommends that binding treaty action be taken.

