THE PROPOSED FOREIGN INVESTMENT AUTHORITY LAW OF SRI LANKA (1976). By SENAKA WEERARATNA. [Colombo: Lake House Investments Ltd. 1982. xii+156 pp.]

This is a book about a law that never was, and probably never will be.

The left-wing government of Mrs. Bandarnaike was reeling under the impact of a severe economic crisis in the wake of the 1971 insurgency when it issued a white paper on foreign investment in Sri Lanka. Contradictory to its general political philosophy (reflected by a spate of nationalisations of private foreign enterprises) the government declared in this 1972 white paper that it recognized "that private foreign investment has an important role to play in the economic development of the country." The effort to attract foreign capital by the white paper was a non-starter. In a desperate attempt to induce investors to do business with her socialist state, Mrs. Bandarnaike attempted to streamline and integrate the Sri Lankan regulation of foreign investment by the promulgation of a new law. This law would be based on the white paper and would unify and integrate all regulations on foreign investment.

This 'Foreign Investment Authority Law' did not evolve beyond the draft stage as Mrs. Bandarnaike was defeated at the polls in 1977. The law therefore never saw the light of (legislative) day.

Mr. Weeraratna's book is a detailed examination of this proposed law. One may rest assured that it has, along with various other matters, been buried by the people of Sri Lanka. In fact, political changes have superceded not only the law but the political philosophy of the government that drafted it. The present government has enacted new legislation regulating companies, taxation, investment, etc., and has also set up a free trade zone. The winds of capitalism are now blowing across Sri Lanka.

What then is the relevance of this book? Why was it published at all, five years after its pre-natal demise (if that's possible)? The proposed law provides a model for the regulation of foreign investment by countries that are basically suspicious of the motives of foreign investors. As a theoretical model, one may view the mechanisms by which the state conceded some interests of investors and protected its own interests.

The law did not contribute any new or dramatic concept to the area, merely developing ideas already used/discussed in other jurisdictions and contexts. But it does provide a basis for the discussion of the problems surrounding foreign investment and the attempts of a government "to maximise its social yield... without drastically affecting the expectation of a fair return from the investment by the investor". Perhaps the most distinctive idea in the proposed law — other than the idea of the integration of all regulation of foreign investment through one statute — was the establishment of a regulatory body called the Foreign Investment Authority which would negotiate investment agreements and supervise the investment itself.

It is interesting that the law conceded to investors some valuable rights, considering that it was a product of a left wing government. Thus the draft law envisaged the setting up of "foreign enterprises" that were foreign owned, other than the "joint enterprises" that were owned by nationals (at least up to 51% of the equity). Even the local involvement was defined in terms of 51% of equity, rather than in terms of de facto control. Admittedly, the law envisaged a transfer of control of foreign enterprises to local hands in 10 years, but it would have been possible for investors to maintain control during the crucial initial period.

Though the white paper limited potential foreign investment (as is usually done) to specified sectors, the law would not have imposed any such general restrictions. There is no proposal to exclude repatriation of capital even during the currency of tax concessions. The law would offer specific investment guarantees. The most important guarantee would be against expropriation. Another accepts third party international arbitration (under ICSID rules, if applicable) as the chosen method of dispute settlement, rather than subjecting the investor to the domestic forum. The Authority would also agree to the waiver of sovereign immunity defences in any legal proceedings.

There could also be other stabilization clauses in the investment agreement itself, on a bilateral basis. There would be a general commitment to pay "fair, just and prompt" compensation (the standard usually acceptable to the West) if expropriation of any part of the investment occurred in the "interests of national defence or security" (the only exception permissible to the guarantee against expropriation).

There are however, significant rights reserved to the host state. Some of these militate against the spirit of the concessions discussed above, though they do not differ significantly from rights usually sought by host countries. One basic difference is, however, that these host country reservations are usually successfully entrenched in the context of concession agreements granting rights to exploit valuable mineral resources, primary commodities, etc. If Sri Lanka was looking for foreign investment for the purposes of a wider input of capital and technology into the economy (as she was) it was unlikely that such harsh conditions would have been acceptable to investors. The most interesting provision in this regard is the right of the country's Parliament to approve every investment agreement. The consequent public exposure of the terms of the investment, the profile of the investor, etc., would have been of serious concern to most investors. The investor would have to convert all foreign enterprises to locally controlled joint enterprises in 10 years. Financing — of capital investment, trade debt and recurrent expenditure (to be expended in foreign exchange) — would have to be from export earnings or foreign funds either supplied by the investor or borrowed at low interest rates (or interest free). Each item of such expenditure would have to be approved by the Authority. Limits would be imposed on capital as well as dividend repatriation. There would be a commitment of minimum net foreign exchange earnings. There would be stipulations as to the use of local inputs. Technical service fees would be regulated.

The law applicable to the Agreement would be the law of Sri Lanka, presumably to balance the decision to submit disputes to third party international arbitration.

The regime that would have been created by the proposed law is a highly bureacratic one, with the Authority constantly exercising discretion to approve each stage of the development of the investment. One wonders how efficiently this may have been done.

Mr. Weeraratna's analysis of the proposed law is competent and systematic. It does however lack a depth of analysis that would have made this work of wider interest in the area. There are hardly any references to other investment agreements (except in the footnotes, rather superficially). The evaluation of the proposed law is also rather technical, without an analysis of the broader policy issues reflected by the white paper and the law. The author seems to adopt a posture that places more faith in the possible courses of action that may have been adopted by the Bandarnaike government than her public utterances — or the decisions of her government — would justify.

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