

# TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Democratic Socialist Republic of Sri Lanka (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

## Article I.

1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) Tangible and intangible property, including rights such as mortgages, liens and pledges;

(ii) A company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) A claim to money or a claim to performance having economic value, and associated with an investment;

(iv) Intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, patentable inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) Any right conferred by law or contract, and any licenses and permits pursuant to law;

(b) "company" of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, insurance and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested undertaken in accordance with the laws of the Party concerned, provided that the application of such laws does not impair any rights under this Treaty, shall not affect their character as an investment.

## **Article II.**

1. Each Party shall permit and treat investment, activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies or any third country.

2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure through recourse to local remedies. Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure through recourse to local remedies.

(c) Investment shall be governed by the laws in force in the territory of the Party in which such investment is made, except as provided otherwise by this Treaty.

(d) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first party that employs them have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

7. Each Party shall make public all laws regulations, administrative practices and procedures, and adjudicatory decisions having general application that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of Sri Lanka under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or

companies of any third country by virtue of:

(a) That Party's binding obligation that derive from full membership in a free trade area or customs union; or

(b) That Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade enters into force subsequent to the signature of this Agreement. General Agreement on Tariffs and Trade enters into force subsequent to the signature of this Agreement.

### **Article III.**

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provide for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercial rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.

### **Article IV.**

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article III paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to sport transactions in the currency to be transferred. Article III paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to sport transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraph 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

### **Article V.**

Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

### **Article VI.**

1. For the purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between an Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such nations or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Subject to Paragraph 3 of this Article, if the dispute cannot be

resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures; any dispute-settlement procedures including those relating to expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the terms of the investment agreement, relevant provisions of arbitral awards.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") or to ad hoc arbitration applying the rules of the Centre, for the settlement by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute such proceedings provide:

(i) The dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures; and

(ii) The national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.

If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission Of an investment dispute to the Centre for settlement by conciliation or binding arbitration, or, in the event the Centre is not available, to the submission of the dispute to ad hoc arbitration applying the rules of the Centre.

(c) Conciliation or binding arbitration of such disputes shall be done applying the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ('Convention') and the Regulations and Rules of the Centre.

4. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

5. For the purposes of this Article, any company legally constituted under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment nationals or companies of the other Party, shall, in accordance with Article 25 (2) (b) of the Convention, be treated as a national or company of such other Party.

## **Article VII.**

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of arequest, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions; or the date of the closing or the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

## **Article VIII.**

The provisions of Article VI and VII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-import Bank of the United States, or (b) under other official credit, guarantee or insurance

arrangements pursuant to which the Parties have agreed to other means of setting disputes.

## **Article IX.**

This Treaty shall not derogate from:

- (a) Laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;
- (b) International legal obligations; or
- (c) Obligations assumed by either Party, including those contained in an investments agreement or an investment authorization,

That entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

## **Article X.**

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

## **Article XI.**

1. With respect to its tax policies, each Party shall strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect of the following: Article VI and VII, shall apply to matters of taxation only with respect of the following:

- (a) Expropriation, pursuant to Article III;
- (b) Transfers, pursuant to Article IV; or
- (c) The observance and enforcement of terms of an investment agreement of authorization as referred to in Article VI (1) (a) or (b),

To the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties or have been raised under such settlement provisions and are not resolved under the convention within a reasonable period of time.

## **Article XII.**

This Treaty shall apply to the political subdivisions of the Parties.

## **Article XIII.**

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Annex, Protocol, and related letters exchanged this day on investments in personal services and small-scale retail trade in Sri Lanka shall Form an integral part of the Treaty.

DONE in duplicate at Colombo on the Twentieth day of September, 1991 in the English and Sinhala languages, both texts being equally authentic.

FOR THE UNITED STATES AMERICA:

FOR THE SOCIALIST REPUBLIC OF DEMOCRATIC OF SRI LANKA:

## **ANNEX**

1. The United States reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real property; ownership and broadcast or common carrier operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

2. The United States reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Ownership of real property; mining on the public domain; maritime-related services; and primary dealership in United States government securities.

3. Sri Lanka reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Air transportation; ocean and coastal shipping; banking and small-scale money-lending; insurance; government grants and loan programs; finance companies; production and distribution of energy and power; stock brokering; customs house brokering; ownership and operation of broadcast or common carrier radio and television stations; post and telecommunications including sub-marine cable services; publishing of newspapers and periodicals; exploitation of natural resources; ownership of real estate; maritime-related services; dealing in government securities; pawn brokering; lotteries; fishing; travel agencies; mass transportation; supply of water; allocation of textile and apparel export quotas; education; growing of plantation crops and rice and spices.

4. Sri Lanka reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

Ownership, use and dealings in land and real property; exploitation of non-renewable natural resources; maritime-related Services; dealings in government securities.

## **Protocol**

1. With respect to Article 1, paragraph 1(iv), at present Sri Lanka does not have any legislation providing protection for semiconductor mask works as intellectual property.

2. With respect to Article II, paragraph 2(a), the Parties agree that the phrase "full protection and security" shall be construed according to its common usage under international law.

3. With respect to Article II, paragraph 3, the phrase "laws relating to the entry and sojourn of aliens" shall be understood to include relevant regulations and other administrative procedures of a Party.

4. With respect to the treatment of investment under Article II, the Parties note that Sri Lanka has laws and regulations providing certain incentives to nationals and companies which export or which contribute new technology. Each Party agrees to consult with the other upon request concerning any adverse effects arising from such laws and regulations, with a view to eliminating any such effects.

5. With respect to Article III, paragraph 1, the phrase "become known" is intended to refer to any knowledge resulting in the

diminution of the fair market value of the investment.

6. With respect to Article IV, paragraph 1(e), a Party may, in the event of exceptional balance of payments difficulties and in consultation with the other Party, temporarily delay transfer of the proceeds from the sale or liquidation of an investment, but only on the following conditions:

(a) the transfer of such proceeds may be delayed for a period not to exceed three years from the date the transfer is requested;

(b) a minimum of thirty-three and one-third percent of the proceeds may be transferred each year;

(c) the Party availing itself of this provision shall ensure that the portion of the proceeds whose transfer is delayed can be invested in a manner that will preserve its real value free of exchange rate risk;

(d) this provision will be used only to the extent and for the time necessary to restore foreign exchange reserves to a minimally acceptable level; and

(e) the Party availing itself of this provision will ensure that investments under this Treaty are accorded treatment with respect to such transfers in a manner not less favorable than that accorded nationals or companies of third countries.

7. With reference to Sri Lanka's exception to the principle of national treatment for the "allocation of textile and apparel export quotas" in paragraph three of the Annex, Sri Lanka affirms that, should a textile or apparel item become subject to a bilateral export quota subsequent to the entry into force of this Treaty, the allocation of the export quota for that item would be considered a "future exception" within the meaning of Article II.1, and that accordingly the exception would not apply to investments producing that item at the time the exception became effective.

## **Exchange of Letters**

MINISTRY OF FINANCE SEPTEMBER 20, 1991

H.E. Marion V. Creekmore, Jr.,

Ambassador of the United States of America,

Embassy of the United States of America,

Colombo

Dear Mr. Paskaralingam:

I have the honor to refer to your letter of this date and to confirm the following understanding reached between the delegation of the Democratic Socialist Republic of Sri Lanka and the United States of America in the course of negotiating the treaty concerning the encouragement and reciprocal protection of investment (the "Treaty"), signed this day:

"The Government of Sri Lanka welcomes investments by nationals and companies of the United States in accordance with the Treaty. However, the Government of Sri Lanka is concerned about investment in the personal service and small-scale retail sectors in Sri Lanka. It may, therefore, request consultations in accordance with Article V of the Treaty about investment in these sectors, should the need arise."

Sincerely,

Marion V. Creekmore, Jr.

Ambassador of the United States of America