

Agreement between the Government of the Swiss Confederation and the Government of the Democratic Socialist Republic of Sri Lanka for the reciprocal promotion and protection of Investments

The Government of the Swiss Confederation and the Government of the Democratic Socialist Republic of Sri Lanka,

Desiring to create favourable conditions for greater economic cooperation between them and in particular for investments by nationals of one State in the territory of the other State,

Recognising that the encouragement and reciprocal protection of such investments will be conducive to stimulating individual business initiative and increasing prosperity in both States,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) Movable and immovable property and any other property rights such as mortgages, liens or pledges,

(ii) Shares, stock and debentures of companies or interests in the property of such companies,

(iii) Claims to money or to any performance under contract having a financial value,

(iv) Intellectual property rights exercised in commercial production and associated with activities carried on in the territory of a Contracting Party, and goodwill,

(v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees.

(c) "nationals" means:

(i) In respect of Sri Lanka a person who is a citizen of Sri Lanka according to its laws,

(ii) In respect of Switzerland a physical person who is a citizen of Switzerland according to its laws.

(d) "companies" means:

(i) In respect of Sri Lanka corporations, firms or associations incorporated or constituted under the law in force in any part of Sri Lanka,

(ii) In respect of the Swiss Confederation, companies, institutions or foundations with legal personality, as well as partnership firms or limited partnerships and other associations without legal personality, in which Swiss nationals have directly or indirectly a controlling interest,

(e) "territory" means:

(i) In respect of Sri Lanka the territory which constitutes the Republic of Sri Lanka,

(ii) In respect of the Swiss Confederation the territory which constitutes the Swiss Confederation.

Article 2. Applicability of this Agreement

(1) This Agreement shall apply to all investments made in compliance with the relevant laws and regulations in the territory of either Contracting Party by nationals or companies of the other Contracting Party.

(2) Subject to the provisions of the foregoing paragraph, this Agreement shall apply to all investments made in the territory of a Contracting Party by nationals or companies of the other Contracting Party before or after the entry into force of this Agreement.

Article 3. Promotion and Protection of Investments

(1) Each Contracting Party shall, subject to its rights to exercise powers conferred by its laws, encourage and create favourable conditions for nationals and companies of the other Contracting Party to make in its territory investments that are in line with its general economic policy.

(2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

Article 4. Most-favoured-nation Treatment

Subject to the provisions of Article 5 of this Agreement neither Contracting Party shall in its territory subject investments admitted in accordance with the provisions of Article 3 or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State, if the latter is more favourable.

Article 5. Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from

a) Any existing or future customs union or similar international economic agreement to which either of the Contracting Parties is or may become a party, or

b) Any bilateral agreement for the avoidance of double taxation.

Article 6. Expropriation

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and shall include interest at a normal commercial rate until the date of payment. Payments of compensation shall be made without delay and shall be freely transferable at the official rate of exchange prevailing on the date used for the determination of value. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation to prompt determination of the amount of compensation either by law or by agreement between the parties and to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this article.

Article 7. Free Transfer

(1) Each Contracting Party shall guarantee to nationals and companies of the other Contracting Party the free transfer of their capital and the returns from any investments, and any compensation obtained under Article 6. Article 6.

(2) The free transfer shall also be guaranteed for amortisation and contractual repayments, amounts assigned to cover expenses relating to the management of the investment and additional contributions of capital necessary for the maintenance or development of the investment.

Article 8. Laws

For the avoidance of any doubt, it is declared that all investments shall, subject to this Agreement and other rules of international law, be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

Article 9. Reference to International Centre for Settlement of Investment Disputes

(1) In the event of a dispute arising between a national or a company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the International Centre for Settlement of Investment Disputes established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated March 18, 1965.

(2) A company which is incorporated or constituted under the law in force in the territory of the Contracting Party and which before such a dispute arises is controlled by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention be treated for the purpose of the Convention as a company of the other Contracting Party. If any such dispute cannot be disposed of within 12 months between the parties to this dispute through pursuit of local remedies or otherwise, then, the national or company affected having also consented in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

(3) Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless:

(a) The Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre, or

(b) The other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.

Article 10. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through diplomatic channels.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party, or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments. paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party, or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting

Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

Article 11. Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognise:

(a) The assignment, whether under law or pursuant to a legal transaction, of any right or claim from the party indemnified to the former Contracting Party (or its designated Agency), and

(b) That the former Contracting Party (or its designated Agency) is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party, provided that such Contracting Party shall not be entitled under this paragraph to exercise any rights other than such rights as the national or company would have been entitled to exercise.

The former Contracting Party (or its designated Agency) shall accordingly, if it so desires, be entitled to assert any such right or claim to the same extent as its predecessor in title either before a Court or tribunal in the territory of the latter Contracting Party or in any other circumstances. If the former Contracting Party acquires amounts in the lawful currency of the other Contracting Party or credits thereof by assignment under the terms of an indemnity the former Contracting Party shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of companies or nationals of the latter Contracting Party or of any third State deriving from investment activities similar to those in which the party indemnified was engaged.

Article 12. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force on the day when both Contracting Parties notify each other that the constitutional requirements for the entry into force of international agreements have been fulfilled.

(2) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investment made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

Done at Berne, this 23rd day of September, 1981, in two originals each in English, Sinhala and German, all texts being equally authentic, but in case of divergence the English text shall prevail.

For the Government of the Swiss Confederation:

Philippe Lévy

Ambassador

For the Government of the Democratic Socialist Republic of Sri Lanka:

L. Athulathmudali

Minister of Trade and Shipping

The Head of the Delegation of Sri Lanka

Berne, September 23, 1981

Mr. Ambassador,

In the course of the discussions which led to the conclusion of the Agreement between the Government of the Swiss Confederation and the Government of the Democratic Socialist Republic of Sri Lanka on the reciprocal promotion and

protection of investments, the two Contracting Parties have with regard to Article 1 lit. d) ii) agreed upon the following:

Swiss nationals are considered having a controlling interest if they exercise a decisive influence on a company, either directly or indirectly through another company. In order to assess the controlling interest, the share in the stock capital held by Swiss nationals and other elements which make it clear that Swiss nationals exercise a decisive influence on the company shall be considered.

In the event that the Government of the Democratic Socialist Republic of Sri Lanka considers that Swiss nationals do not have a controlling interest in a company which has made an investment in Sri Lanka, it will inform the Government of Switzerland accordingly. The Contracting Parties will then endeavour to come to an understanding as to whether the interest held by Swiss nationals is a controlling one.

Should such an understanding not be reached, the difference shall be settled in accordance with Article 10 of this Agreement.

I would appreciate it if you could confirm your agreement with the foregoing.

Please accept, Mr. Ambassador, the assurances of my highest consideration.

L. Athulathmudali

Minister of Trade and Shipping

Ambassador

Philippe Lévy

Federal Office for Foreign Economic Affairs

Berne

The Head of the Delegation of Switzerland

Bern, September 23, 1981

Excellency,

I have the honour to acknowledge receipt of your letter of today which reads as follows:

"In the course of the discussions which led to the conclusion of the Agreement between the Government of the Swiss Confederation and the Government of the Democratic Socialist Republic of Sri Lanka on the reciprocal promotion and protection of investments, the two Contracting Parties have with regard to Article 1 lit. d) ii) agreed upon the following:

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In the event that the Government of the Democratic Socialist Republic of Sri Lanka considers that Swiss nationals do not have a controlling interest in a company which has made an investment in Sri Lanka, it will inform the Government of Switzerland accordingly. The Contracting Parties will then endeavour to come to an understanding as to whether the interest held by Swiss nationals is a controlling one.

Should such an understanding not be reached, the difference shall be settled in accordance with Article 10 of this Agreement.

I would appreciate it if you could confirm your agreement with the foregoing".

I have the honour to confirm to you that I agree to the contents of your letter.

Please accept, Excellency, the assurances of my highest consideration.

Ph. Lévy

Ambassador

His Excellency

Lalith Athulathmudali

Minister of Trade and Shipping of the Democratic Socialist Republic of Sri Lanka