AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, DONE AT CANBERRA ON 12 NOVEMBER 2002

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SUMMARY PAGE

Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, done at Canberra on 12 November 2002

Date of Tabling of Proposed Treaty Action

1. 14 May 2003.

Nature and Timing of Proposed Treaty Action

2. It is proposed that Australia bring into force, by an exchange of notes, the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (the "Agreement").

3. The Agreement was signed on 12 November 2002.

4. In accordance with Article 15(1), the Agreement will enter into force on the date on which both Parties have notified each other in writing that their internal legal requirements for the entry into force of the Agreement have been fulfilled. It is proposed that the exchange of notes take place as soon as both Parties have completed their internal legal requirements.

Overview and National Interest Summary

5. The Australian Government recognises the importance of promoting the flow of capital for economic activity and its role in expanding economic relations and technical cooperation between countries. The Agreement, by guaranteeing certain treatment for investments, will encourage and facilitate bilateral investment by citizens, permanent residents and companies of Australia and Sri Lanka, in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence. The Agreement will put Australian investors in a better position to benefit from the investment opportunities in Sri Lanka by providing them with a range of guarantees relating to non-commercial risk.

6. Australia is already the second largest investor in Sri Lanka and if the peace process remains on track, coupled with Sri Lanka's expected economic recovery, Australia is well-placed to take advantage of the increased investment opportunities that are likely to ensue.

Reasons for Australia to Take the Proposed Treaty Action

7. The Agreement is intended to encourage and facilitate bilateral investment by citizens, permanent residents and companies of Australia and Sri Lanka, consistent with the Australian Government's foreign investment policy. The Agreement does not limit either Government's ability to pass laws pertaining to pre-establishment investment or to regulate sensitive sectors.

8. The Agreement would be an important safeguard for Australian companies that wish to participate in major projects in Sri Lanka. It would send a positive message to Australian business about investing in Sri Lanka by offering most favoured nation treatment in regard to the treatment of Australian investments, by providing guarantees about expropriation/nationalisation and by establishing mechanisms for resolving disputes over investment matters. The investor-State dispute resolution procedures included in the Agreement provide an avenue by which Australian investors can redress wrongs without recourse to the local legal system (for example, by recourse to the International Centre for the Settlement of Investment Disputes). No formal dispute resolution procedures have ever been invoked against Australia in relation to the nineteen investment protection and promotion agreements (IPAs) currently in force for Australia.

9. Sri Lanka is considered to have a relatively open and transparent investment regime. The current peace process and the prospect of a return to strong economic growth are likely to lead to increased export and investment opportunities. The implementation of much needed reforms should also lead to increased investor confidence.

10. In 1998, Australians invested about $28 million in Sri Lanka out of total direct investment of $193 million in that year from all countries. The Sri Lankan Board of Investment approved $22 million in project proposals involving Australian investment in the first eight months of 2002. Australia is the second largest foreign investor in Sri Lanka. The Sri Lankan Board of Investment estimated that, as at July 2002, the total stock of Australian investment in Sri Lanka was around $600 million.

11. Australia’s Pacific Dunlop’s Ansell Lanka rubber products plant in Biyagama is the largest foreign investment in an industrial plant in Sri Lanka, and the largest single industrial enterprise in the country. Other major Australian investors in Sri Lanka include P&O Australia (Colombo Port), Hayleys/Australian Dyeing Company/MGT (knitted fabrics and dyeing), IE & DR Pope (woven polypropylene) and BHP Steel (roofing sheets). Australian educational institutions have also been established in Sri Lanka. The Australian College of Business and Technology has opened a campus in Colombo and the University of Southern Queensland has launched a distance-education facility.

12. In the medium term, Sri Lanka will require significant investment in its power sector and Australia is well placed to become involved as an investor and supplier to this sector. A number of large Australian companies were part of a trade delegation that visited Sri Lanka in September 2001. Many of these companies are currently assessing investment options. Areas of potential investment include education, food processing and cold storage facilities.

13. The substantial Sri Lankan community in Australia (around 70,000 people) has the potential to emerge as a significant source of investment funds for the Sri Lankan economy. Australian investment in Sri Lanka is likely to accelerate as the current peace process gains momentum.

Obligations

14. The Agreement closely follows the Australian model IPA text. It covers only the post-establishment treatment of investments; decisions to admit new investments (either through acquisitions or new businesses) remain the sole purview of the host government. The Agreement establishes a clear set of obligations relating to the promotion and protection of investments in accordance with each Party's laws, regulations and investment policies. Article 3 requires each Party to encourage, promote and, where lawful and in accordance with applicable investment policies, admit investments by investors (including citizens and permanent residents) and companies of the other Party. Article 4 ensures that investments will receive most favoured nation treatment (i.e. investments of investors of a Party will be treated on a basis no less favourable than investments of investors from third countries) with exceptions to cover special treatment under free trade and double taxation agreements.

15. Article 5 requires the Parties to allow investors and their employees to enter and remain in the territory of the other Party to engage in investment activities (subject to its laws and policies applicable from time to time), while Article 6 covers the important issue of promoting the transparency of the investment regime - Parties must make public and readily accessible those laws, regulations and policies which pertain to or affect investments.

16. Under Article 7, the Agreement prohibits the expropriation or nationalisation of investments unless it is for a public purpose under due process of law, non-discriminatory, and compensated promptly, adequately and effectively in the currency in which the investment was originally made or any other freely usable currency. Article 8 provides that where an investor suffers loss by war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar event, any claim for compensation, restitution, indemnification or other settlement by an investor of a Party will be accorded treatment which is no less favourable than that for investors of any third country.

17. Article 9 requires Parties to permit all funds related to investments to be freely transferred, subject to certain exceptions. Transfers are to be permitted in a freely usable currency.

18. Article 10 concerns indemnities and guarantees provided by a Party. It ensures that when a Party or an agency of a Party (e.g. EFIC) pays an investor of that Party under a guarantee or other form of indemnity which it has granted regarding an investment, the other Party must recognise the resulting transfer of any rights in respect of such investment.

19. The Parties undertake to consult on matters concerning the review, interpretation or application of the Agreement and endeavour to resolve any disputes connected with it by prompt consultations and negotiations (Articles 11 and 12(1)). Formal procedures for the settlement of disputes concerning investments between the Parties and between a Party and an investor of the other Party are established under Articles 12 and 13 respectively.

20. Article 14 requires investors to be provided with full access to competent judicial or administrative bodies regarding disputes with other investors and provides for the recognition and enforcement of any resulting judgements or awards.

Implementation

21. The Agreement complies with existing Australian legislation. The Agreement will be implemented within the framework of Australia's existing laws and policies relating to foreign investment.

Costs

22. Compliance with the Agreement has few foreseeable direct financial costs for Australia. Costs may be incurred in the event of a dispute between the Parties, should the dispute be submitted to an Arbitral Tribunal at the request of either Party (Article 12). Under these circumstances each Party bears the cost of the arbitrator it has appointed and of its representation in arbitral proceedings, while the cost of the Chairman and the remaining costs of arbitration are borne in equal parts by the Parties unless otherwise decided by the Tribunal (Annex A).

23. Australia and Sri Lanka are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Under Article 13(2)(b) of the Agreement, which deals with the settlement of disputes between a Party and an investor of another Party, a Sri Lankan investor may refer a dispute relating to an investment in Australia to the International Centre for the Settlement of Investment Disputes (ICSID). In this case, the Australian Government may be required to bear all or part of the cost of arbitration and any relevant ICSID fees, subject to the discretion of the tribunal. The Government would also have to pay the cost of any award handed down in favour of the Sri Lankan investor. To date, no case has been referred to the ICSID in relation to Australia's existing investment promotion and protection agreements.

24. Finally, under the Agreement Australia may be liable to pay compensation, indemnification or restitution for losses owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or similar events in its territory (Article 8), or in the event that an investment is expropriated or nationalised (Article 7). Again, while this is a potential cost it is highly unlikely that this would eventuate in the Australian political and investment environment. In addition, Australia's Constitution provides for guarantees of compensation in the event of expropriation or nationalisation (s. 51(xxxi)).

Consultation

25. Information on consultations can be found in the Consultations Annex.

Regulation Impact Statement

26. No Regulation Impact Statement is required for the proposed treaty action.

Future Treaty Action

27. The text of the Agreement has no explicit reference to the negotiation of future legally binding instruments or a procedure for its amendment. It may nevertheless be amended at any time by agreement between the Parties in accordance with the Vienna Convention on the Law of Treaties. Such amendments would be subject to the domestic treaty process.

Withdrawal or Denunciation

28. Article 15(2) provides that the Agreement will remain in force for a period of ten years and after that will remain in force until one of the Parties gives twelve months written notice of termination to the other Party. Any such decision to terminate would be subject to the domestic treaty process.

29. Article 15(2) provides that the Agreement will continue to be effective in respect of investments made or acquired before the date of termination for a further period of ten years after the date of termination.

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