

Legal Reforms to Promote Foreign Direct Investments in Sri Lanka

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I must say in this very outset, unless we attract foreign direct investment to this country, we have no future. We cannot overcome the present economic situation of the country without foreign direct investment. So therefore, we need to see we need to revisit our investment regime and to take strong possible action to attract more and more foreign direct investment. Of course our legal regime is concerned for a foreign direct investment we start with our constitution article 157 of the constitution provides that the investment agreements between government to government are adopted by parliaments 2/3 majority must be given protection by the constitution and no action should be taken by the government to frustrate those investments that is in the constitution and thereafter when we opened the economy in 1978 introduced a liberal economic system and in fact we were the first country to open the economy for a foreign investment its from our area South Asia and that was in 1978 and we immediately introduced GCC data colombo economic commission law and we opened up the country for a foreign investment with new legal machine and permitting the GCEC presently known as the board of investment to grant tax concessions and facilities and also to put up freeze its own export processing source and those things and from 1978 we have

attracted sufficient number of foreign investments through the BOI. thereafter we realized the mechanism is not effective to bring down a large investors and that is how we were compelled to introduce Strategic Development Projects Act No. 14 of 2008 to provide facilities for a flagship investment and the large investment and under the strategic development project act the government is empowered to give special incentives with the approval of the parliament to the flagship companies to invest in Sri Lanka. And recently we have adopted a very important, comprehensive legal machine in the colombo port city economic commission act no.11 of 2011 and to create specifically as set out in the preamble to one-stop shop and to grant all facilities registration, implementation even granting visas and tax exceptions and all those facilities under that in the colombo port city area for a foreign investment and that's exclusive for foreign investments and not for local investments and having done all these things from 1978 when we look back and when we compare our country with other countries in the region we have not achieved much and the countries in the region even the Bangladesh has overtaken us and there are more investments in Bangladesh even the Maldives than Sri Lanka. That shows that we're having a problem. So that is why we have to look into our legal regime and see

what we can do to remedy these problems. When i see the problem in a practitioner's point of view we have clients we get information from the clients and we know up to certain extent what went wrong with Sri Lankan system and we have a somewhat good legal system and complicated legal system and say for instance we have an archeological department established about 100-150 years back follows department wildlife department all those are very good institutes that protect whatever as a regulator they protect their relevant sphere of work. But when it comes to foreign direct investment, we have a problem because the investors come here not because they love us or not because they're fond of us. They come here to invest their money, make profit and repatriate the profit. If they cannot establish their business in Sri Lanka will change within the shortest possible time and if they're unable to run their business without interference from the government or in other institutes or regulators and they cannot repatriate their profit then they will not come to Sri Lanka. And that is where we have gone wrong. Though POI board of investment talks and advertises saying that they have one-stop shop is really not a one-stop shop it's only a post office for obvious reason because if somebody wants to get the approval to establish a foreign investment when they are starting an industry or even a hotel what they can do is to make the application to POI and the that approval from POI only a principal approval then to establish the, we'll say hotel we need to go from the pillar to post. Say for instance if you want

to establish a hotel in Dambulla in cultural triangle you know how many places you have to go, you have to go to the archeological department because that area is covered by the archeological department, then you have to go to the forest department, then you have to go to wildlife, then you have to go to Sigiriya, then to MBRO then to get the facilities you have to go to the RDA then you have to go to the electricity board and you have to go from pillar to post to collect all these approvals. Do you know that we have a very advanced data and voice telecommunication system and this telecommunication system depends on the towers. Do you know how many permissions you need to get to establish one tower? You have to get 27 license to put up one tower to have an effective telecommunication network, mobile network or internet network you must have at least 1300 towers in the country. With the 5G you must have a tower in every 500 meters to get the 27 licenses is not an easy thing and look at all the licenses most difficult is the parties of license. It is difficult to get the approval from the local authority and these are the problems. When the port city was established thus the legal regime there is only for a limited area, the port city reclaimed area and for their legal mechanism is very simple and port city is empowered to build all license and for our facilities. This is a different regime only for the port city. So, unless we amend our law and make facilities for one-stop shop and the single window facility it will be extremely difficult to attract the foreign investment to Sri Lanka. But it's not easy

because all these regulators are governed by separate legal machines. The forest department is the regulators for forest matters, wildlife department is the regulator for wildlife matters, central environmental authority is a regulator for environment matters and of course when we try to grab all these powers to one institute we know the difficulty and when the port city bill was presented it was challenged in the supreme court for good reasons they say how can these powers are given to different organizations ultimately the government was compelled to amend or suggest amendment two thirds of the bill was amended before it was for the third reading in the parliament. So, it's not easy to grab the powers of the other institutes into one institute to grant facilities for foreign investment where the GCC expert at was he my bill was introduced then constitutional council under the first republican constitution held or made a determination that was unconstitutional and luckily at that time there was no referendum provision and it was presented under the impact is under the republican constitution parliament can pass that bill in two thirds majority. Then government did not have two thirds majority they had a five six majority in the parliament. The then prime minister made a famous speech saying that i have no animosity against the judges who made the determination and i have five six majority i have passed this law. Of course, the law was passed. But the 2nd republican constitution was introduced and all those powers all those judges were sent. So that was the situation with the

government tried to influence certain things and get the things done even for the benefit of the foreign investment to have our assistance and of course people are entitled to 100% constitution to go before the supreme court and challenge these enactments and that's their right. So we need to be careful when we try to grab all these powers and give the foreign investment under one place one window and one shop. And of course, we can do it administratively and I am aware at certain point at that time that there was a very powerful bureaucrat and he was chairing all meetings, he called all the agencies and to say yes, there was a problem and the electricity board. Of course, it was some time back in 2005 to 2010 also the same thing was implemented then there was a complaint by the ministers saying so and so is trying to abuse our power and the power is given to the electricity minister but the president's office officer is using that power to grant benefit to foreign investors. So, unless we adopt a system like this administratively its extremely difficult to attract the foreign investment to this country. The second matter regarding the land and without land we cannot get the investors. Unfortunately we know that our Land Act prevents the investors from buying the land even the board of BOI investors so we have to change that law and to allow BOI have to investors into to purchase land for their business as long as they do business in Sri Lanka . Then we have a problem with the tax, incentives. No one will come to this country for foreign investment unless they get special incentives from the government and that's the truth and. Now

why should I come here and give this money if I can't get the tax concession of course it's a matter for the parliament. They are in charge of the funds and they need to take the decision and when enactments are introduced strategic development at every approval must go before the parliament every approval for any investor must go before the parliament for the approval sometimes it takes about six months for an approval so that didn't work so that's why the port commission act or the Colombo Port City Bill this functions were brought and it was challenged before the supreme court and of course the supreme court allowed subject to certain amendments to grant a special tax incentives for the investors in the port city. At the same time, we have to understand the system now is slow and is changing under the organization of economic corporation and development. OECD those are the 37 developed western countries they have a forum called global corporate minimum tax and international treaty and as all developing countries to sign that imposing minimum tax for a foreign investment. Next, 136 countries have signed and notable exception to Sri Lanka. But now we're not that, we are now vegas not users very soon we need to sign that agreement and under that agreement we cannot give tax incentives below certain level imposed by the western countries. What happens world big multinationals like amazon, Google they've entered into investment in Ireland and they got their 10% tax in the Ireland so United States lost the money as a result this is the benefit this is the reaction and now, we cannot do the tax incentives

below certain level imposed by the western countries. There's another matter that we have to consider is the labour, Industrial Disputes act, Termination of Employment Act, trade union act and so investors are not willing to subject to these matters. Trade union actions to them is not acceptable and you cannot have strikes with the foreign investors so we have to control certain way this trade union actions in respect of the foreign direct investments. Then we come to the most important matter, the dispute resolution mechanism. Of course, we know that according to the business 2020 indicator, Sri Lanka is ranked in the 164th place out of 190 economies in relation to enforcement of contracts in other words if you go to courts to enforce a contract even in commercial high court. It will take 46 days if we appeal it will take about 10-12 years. So, these are not good for the foreign investment and therefore we need to look for a mechanism and the only mechanism is the alternate dispute resolution and arbitrations so we have to encourage all investors and even the commercial sector to go for arbitration and unfortunately our arbitrations are ad hoc arbitrations where we go and decide how to proceed the arbitration, we don't follow established rules even ancestral rules or even ICC rules or even the British rules. Therefore, we have our own rules we are according to that and our arbitration takes 3-4 years to come to an end. After that when we go to the high court for enforcement, another couple of years in the high court. Therefore not only we must have arbitration, we must have a mechanism to allow foreign direct investors and all those who are

dealing with them commercially must have a provision to have a compulsory arbitration under the properly established arbitration center and subject to prescribed rules and of course our arbitration center is established even on the port city act and there should be a special arbitration for the port city and we must have a separate arbitration center regulated by law and the governing council must be appointed by independent body something like a judicial service commission and they must have a arbitrators panel with competent qualified arbitrators properly trained. Presently our arbitrators are handled by the lawyers and or retired judges or represent lawyers. That is why there is a long relay in determination of even arbitration matters. So, we have to go for alternate dispute resolution, compulsory arbitrations then only we can think about foreign direct investments in this country otherwise they cannot take years and years for a dispute resolution. Our legal system is

very slow to get all of this sorted sometimes we need to wait for years. Today one of my matters is the order of the interim orders was postponed for four days and the interim order against the bank preventing the product execution to recover one and a half billion rupees in force for the last two years and of course I am mindful of that I am making this presentation in the presence of his lordship the chief justice. But these are the facts these are delays in our legal system so we have to deviate from our old system and go for arbitrations. Those are my initial presentations and do reforms to attract more foreign direct investments to the country. Of course, I have not mentioned in detail about another factor that we need to minimize the corruption in the country and primary corruption act must be applicable not only to the government sector but also be introduced to the private sector.