



World Investment Forum 2014: Investing in Sustainable Development

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My sincere gratitude to UNCTAD for organizing this forum focusing on this timely theme, devoting a session to discuss IIA regime and giving us the opportunity to share our experiences with all of you.

After the end of a 30 year civil war in Sri Lanka in 2009, we are eager to reach our development goals as early as possible. In this context, FDI is considered as a vital element for the economic, social and environment development of the country. Sri Lanka faces the challenge of choosing the Right investment policy instruments among a menu of options and BITs have been used as one of the marketing tools for this purpose.

Sri Lanka inked its first ever land mark BIT with Germany, way back on 08/11/1963, and the second one with USA on 23rd February 1966 who were the most dynamic trading partners of Sri Lanka during that era. Since then, we have signed 27 BITs and the highest number of BITs (16) was signed in 1980's with the introduction of open economic policy in 1977. Sri Lanka recognized the importance of inward FDI to bridge the investment-savings gap to accelerate the development process. Accordingly, the Board of Investment of Sri Lanka was established in 1978 as the single window to facilitate most needed FDI that helped to attract new technologies, generating employment as well as to improve management techniques and capabilities.

As of to date, around 65 countries have invested in Sri Lanka, but we have signed BITs only with 27 countries. However, due to reasons such as a) tenuous relationship between BITs and increased inward investment, b) bitter lessons learned from international arbitrations and c) the tendency for BITs to constrain domestic policy space, Sri Lanka considered to "move away from BITs" to "establish appropriate domestic legislation to protect inward FDI". This option was considered when we faced the first law suit on 20th July 1987, under the United Kingdom-Sri Lanka BIT (ICSID Case No. ARB/87/3) which is reported to be the first Arbitration Case in ICSID. We were faced with the second ICSID (ICSID Case No. ARB/00/2) in January January 11, 2000, US investor "Mihaly" international filed a claim but dismissed on a jurisdiction issue. However, the government of Sri Lanka followed a "wait and see" approach as substantive changes at once could damage the investment environment of the country. However in 2007, Ceylon Petroleum Corporation (CPC) made oil price hedging deals with several banks and when the oil market crashed, the hedging deals' negative payoff for CPC reached several hundred millions. CPC defaulted on the hedging payments which resulted in the three banks (Standard Chartered Bank, Deutsche Bank and Citi Bank) taking CPC to International Courts in 2010.

Even under this scenario, due to international political situation, the government did not want to do away with the BIT concept altogether, but decided to revise the model BIT to be used as the basis for future negotiations. At the

same time we are extremely careful on entering into new BITs in the future, “except in cases of compelling economic and political circumstances”.

In this regard, Part IV of the World Investment Report (WIR) 2014 can be highlighted as an important source document for policy makers and treaty negotiators as it gives a clear insight to a methodical approach that a country could take in order to reform the IIA regime to achieve sustainable development goals. Further, the UNCTAD Report on Investment Policy Framework for Sustainable Development that was published as a part of WIR 2012 also extremely helpful to formulate and amend the provisions in our model BIT. By making use of these guidance Sri Lanka seeks to create a more supportive environment for ongoing revision of the country's investment policy framework, and, in particular, its decision to overhaul its policy on bilateral investment treaties (BITs).

The definition of investment is one of the core areas that Sri Lanka has been focusing while revising the model BIT. Similarly, Sri Lanka would not want the provision for state-investor dispute settlement, which gives investors the power to drag governments to dispute over policy changes (e.g. made to safeguard public interest, sustainable development) to be part of investment treaties, but it may have crept into some which needs to be checked and addressed on priority basis.

BITs are a two-way tool that serves not only to protect and promote inward investment in a particular country, but also to provide protection for outward investments between the two member countries. Therefore, the role and impact of BITs should be considered not only in terms of their effect on inward investments, but also on their ability to protect and promote outward investments.

Probably Sri Lanka has not considered the importance of a BIT for in the context of outward investments and with the BIT Policy review we may need to articulate relevant provisions for the potential needs of Sri Lankan companies seeking to expand operations outside Sri Lanka.

In addition I would like UNCTAD to intervene with few grey areas that we have come across when negotiating BITs with economies such as Gulf States considering the dual role played by them both as “states” and “investor”.

Also at times we have realized that despite agreements upon the provisions in the BITs the domestic legislation of one country prohibits the application of the provision. For example, both countries may agree in the BIT for the “Free transfer of inflow and outflow of funds” but the national law of one particular country may prohibit/ restrict these transactions. Hence, it may only be beneficial to one country if we are not fully aware of the prevailing legal framework of the partner country.

Before signing a BIT, understanding the commitments is of paramount importance and if not, we will have to face costly claims. Hence this need should be seriously felt by the authorities and building up expertise and serious focus on sustainable investments will be the core when signing BITs in future. In this context, UNCTAD should continue with this exercise and draw the broad guidelines needed for a road map for IIA reforms to move forward along with capital importing countries leading them at the right direction. In this exercise, we would also request UNCTAD to conduct more research in this area and share the findings with us to enable a gradual shift from a short to medium term “selective adjustment process” to a long term “systematic reform process”. In this regard Sri Lanka has chosen a selective adjustment reform path but we have to concede in some areas aggressively to persuade the capital exporting partner countries to agree to the policy changes that we propose.

Finally, we profusely thank UNCTAD for the fullest support given to us at the time we shared our draft model BIT with them in 2013. We extremely value the tireless effort UNCTAD took in providing comments on each and every provision. Sri Lanka has immensely benefited from UNCTAD's advisory services as well as their research and analysis work for sustainable development. Like many other countries Sri Lanka faces many challenges when negotiating and drafting BITs and dearth of experts in this field can be considered as one of the serious issues. Compilation of FDI data following international recommended methodology is also another challenge before us and we seek continuous technical assistance of UNCTAD for both these areas in future.