

Constitutionalising Investor Rights

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Manjuka Fernandopulle

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During the course of a chat with Prof. Roger Alford over lunch in Notre Dame I realized the “uniqueness” of Article 157 of the Sri Lankan constitution. It defines the status of Bilateral Investment Protection Treaties (BITS) within the Sri Lankan constitutional order. Article 157 of the Sri Lankan constitution states as follows:

“Where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour approves as being essential for the development of the national economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka, and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement”.

What makes this provision intriguing is that no judicial body either in Sri Lanka or internationally has interpreted the ambit of this provision. The fact that there is uncertainty as to its meaning was clearly manifested by the passing of the “REVIVAL OF UNDERPERFORMING ENTERPRISES OR UNDERUTILIZED ASSETS ACT, No. 43 OF 2011” by the Sri Lankan government, which expropriated assets and enterprises which had been privatized or been given concession in terms of an investment agreement by the government, without any legal challenge in a domestic forum either to the passage of the bill or to the expropriation of the affected assets and enterprises, on the basis that the bill violated the provisions of article 157. Therefore, I thought this blog would be an appropriate forum to invite comments as to my thought to its ambit.

Given that article 157 uses the phrase “no written law shall be enacted or made in contravention of such Treaty or agreement”, the question arises as to whether article 157 allows for judicial review of legislation based on violation of a Bilateral Investment Treaty (BIT) provision. If this was so, it would stand in direct conflict with the constitutional provisions that incorporate the concept of parliamentary supremacy to the Sri Lankan constitution and limit the judicial review of legislation to pre-enactment judicial review. Article 80(3) of the Sri Lankan constitution states once a bill has been certified by the Speaker of the Sri Lankan parliament or the President as a duly enacted law, no court or tribunal shall inquire into or pronounce upon in any manner or call into question the validity of such an act on any grounds whatsoever. Moreover, article 84 of the constitution allows for parliament to enact legislation that is inconsistent with any provision of the constitution so long as it has been passed by the requisite majority in parliament. Therefore, to interpret the provisions of the article 157 to mean that it permits the judicial review of legislation or there is an absolute bar on enactment of laws that violate Sri Lanka’s BIT obligation would indeed be a stretch. Does this mean the provisions of article

157 are redundant? My answer is no. This is because provisions of article 157 are still applicable in interpreting legislation which is not explicitly stated to be enacted in violation in the constitution but have provisions which can be seen to be in violation of the provisions of article 157 and legislation which have been given retrospective validity by the constitution and vests discretionary powers.

In my view article 157 incorporates a more limited rule. It incorporates the rule that court should assume that legislature has enacted laws consistent with the constitution and therefore should be interpreted in the light constitutional provisions. In the context article 157 this would mean a given legislation should be interpreted consistent with Sri Lanka's BIT obligations unless it is a legislation enacted in terms of article 84 and explicitly states that it is a legislation that has been enacted inconsistent with the provisions of article 157. This would mean legislation would have to be interpreted in light of the obligation that investment could only be expropriated for public purposes and that too after payment of prompt adequate and effective compensation. It also means the discretionary power granted by a law should be interpreted in light of fair and equitable treatment, national treatment and MFN treatment standards contained in a BIT.

The other interesting issue since BITs have the force of law, does interpretation of these BIT provisions by Arbitral Tribunals create judicial precedent that bind Sri Lankan courts. Given that the offer to arbitrate is contained in a BIT which has the force of law and therefore a tribunal created by Sri Lankan law, even the Supreme Court of Sri Lanka which is the court of last resort might be bound by their interpretation of BIT provisions. It may also mean that the award made by such a tribunal may be executed by taking out a writ of execution without need for formal enforcement proceedings as it would be in the case of an international commercial arbitration award.

Another moot point is whether, giving BITs a force of law creates a constitutional absolute right to property for foreign investors? If this is so, it would be departure from hitherto defined right to property in Sri Lanka. Firstly, the Sri Lankan constitution does not expressly recognize the right to property and secondly, land law in Sri Lanka which based on Roman Dutch law recognizes the principle of eminent domain.