IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. (SD) No. 61/2024 to S.C. (SD) No. 71/2024 and S.C. (SD) No. 73/2024 to S.C. (SD) 76/2024 and S.C. (SD) 78/2024 and S.C. (SD) 79/2024

"ECONOMIC TRANSFORMATION" BILL

BEFORE:

| | | |
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| Hon. S. Thurairaja, PC | - | Judge of the Supreme Court |
| Hon. A. H. M. D. Nawaz | - | Judge of the Supreme Court |
| Hon. A. L. Shiran Gooneratne | - | Judge of the Supreme Court |

S.C. (SD) No. 61/2024

Petitioner : Sri Lanka Board of Investment Non-Executive Officers Podujana Trade Union,
No. 246/C, Sri Ariyajothi Mawatha,
Issadeen City,
Matara.

Ahangama Vithanage Thushara Sisira Kumara,
No. 246/C, Sri Ariyajothi Mawatha,
Issadeen City,
Matara.

Lakshan Dimuthu Dissanayake,
Chief Secretary,
419/A, Neluwa Road,
Moraweka.

Counsel : Uditha Egalahewa, PC with N.K. Ashokbaran and Shenal Fernando.

S.C. (SD) No. 62/2024

Petitioner : Deshabandu Sureash Rapusingha Gunewardene,
28/3 A, 4th Lane, Epitiamulla Road, Pitakotte.

Counsel : Nuwan Pieris instructed by Ms. Amali Amarathunga.

S.C. (SD) No. 63/2024

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| Petitioner | : | Professor Lalithasiri Gunaruwan<br>"Gunaruwana",<br>Thuduwa,<br>Panadura. |
| Counsel | : | Manohara de Silva, PC with Ms. Harithriya Kumarage, Ms. Nadeeshani Lankatillake, Ms. Kaveesha Gamage, Hirosha Munasinghe, Ms. Sasiri Chandrasena, Senal Kariyawasam instructed by A. Perusinghe. |
| Intervenient Petitioner | : | K. M. Mahinda Siriwardana,<br>Secretary to the Ministry of Finance, Economic Stabilization and National Policies,<br>Ministry of Finance,<br>The Secretariat,<br>Colombo 01. |
| Counsel | : | Sanjeeva Jayawardena, PC with Rukshan Senadheera instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Meera Muhiadeen Nayeemudeen,<br>Secretary,<br>Ministry of Investment Promotion,<br>12th floor, West Tower, World Trade Center,<br>Echelone Square,<br>Colombo 01. |
| Counsel | : | Eraj De Silva, PC with Daminda Vijerathne and Janagan Sundramoorthi, Suel Lithufi instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Hon. Dilum Suraj Bandara Amunugama,<br>State Minister of Investment Promotion,<br>State Ministry of Investment Promotion,<br>25th floor, West Tower,<br>World Trade Center,<br>Echelon Square,<br>Colombo 01. |
| Counsel | : | Ronald Perera, PC with Suren Gnanaraj, Ms. Rashmi Dias and Sakuni Weerarathne instructed by Vidanapathirana Associates. |

**S.C. (SD) No. 64/2024**

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| Petitioners | : | 1. Sunil Handunneththi, |

No. 92/3, Paasal Mawatha,
Rukmale,
Pannipitiya

2. Dr. Harshana Suriyapperuma
No. 182/3, Desingha Mawatha, Pelawatta,
Battaramulla.

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| Counsel | : | Shantha Jayawardena with Nayantha Wijesundera, Hiranya Damunupola and Wihangi Tissera. |
| Intervenient Petitioner | : | K. M. Mahinda Siriwardana,<br>Secretary to the Ministry of Finance, Economic Stabilization and National Policies,<br>Ministry of Finance,<br>The Secretariat,<br>Colombo 01. |
| Counsel | : | Sanjeeva Jayawardena, PC with Rukshan Senadheera instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Meera Muhiadeen Nayeemudeen,<br>Secretary,<br>Ministry of Investment Promotion,<br>12th floor, West Tower, World Trade Center,<br>Echelone Square,<br>Colombo 01. |
| Counsel | : | Eraj De Silva, PC with Daminda Vijerathne and Janagan Sundramoorthi, Suel Lithufi instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Hon. Dilum Suraj Bandara Amunugama,<br>State Minister of Investment Promotion,<br>State Ministry of Investment Promotion,<br>25th floor, West Tower,<br>World Trade Center,<br>Echelon Square,<br>Colombo 01. |
| Counsel | : | Ronald Perera, PC with Suren Gnanaraj, Ms. Rashmi Dias and Sakuni Weerarathne instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Gorakapitiyage Don Indika Pushpakumara, |

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| | | Secretary,<br>No.416,<br>Jathika Sevaka Sangamaya,<br>Kotte Road,<br>Pitakotte. |
| Counsel | : | Dushantha Kularathna with Saman Liyanage, Janaka Gamage, and G.D.I Pushpakumara instructed by Optima Law Associates. |
| **S.C. (SD) No. 65/2024** | | |
| Petitioner | : | Palamandadige Viran Pushpa Kumara Fernando,<br>36/1, "Sandakelum",<br>Egodauyana,<br>Moratuwa. |
| Counsel | : | Uditha Egalahewa, PC with N.K. Ashokbaran and Shenal Fernando. |
| Intervenient Petitioner | : | K. M. Mahinda Siriwardana,<br>Secretary to the Ministry of Finance, Economic Stabilization and National Policies,<br>Ministry of Finance,<br>The Secretariat,<br>Colombo 01. |
| Counsel | : | Sanjeeva Jayawardena, PC with Rukshan Senadheera instructed by Vidanapathirana Associates |
| Intervenient Petitioner | : | Meera Muhiadeen Nayeemudeen,<br>Secretary,<br>Ministry of Investment Promotion,<br>12th floor, West Tower, World Trade Center,<br>Echelone Square,<br>Colombo 01. |
| Counsel | : | Eraj De Silva, PC with Daminda Vijerathne and Janagan Sundramoorthi, Suel Lithufi instructed by Vidanapathirana Associates. |
| Intervenient Petitioner | : | Hon. Dilum Suraj Bandara Amunugama,<br>State Minister of Investment Promotion,<br>State Ministry of Investment Promotion,<br>25th floor, West Tower,<br>World Trade Center, |

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| | | Echelon Square,<br>Colombo 01. |
| Counsel | : | Ronald Perera, PC with Suren Gnanaraj, Ms. Rashmi Dias and Sakuni Weerarathne instructed by Vidanapathirana Associates. |

**S.C. (SD) No. 66/2024**

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| Petitioner | : | Lahiru Chathuranga Weerasekara,<br>Organizing Secretary,<br>Youth For CH Enge,<br>22/1, Melder Place,<br>Nugegoda. |
| Counsel | : | Nuwan Bopage with Ms. Dinusha Thirinagama and Hansaka Chandrasinghe instructed by Ms. Nishadini Jayawardena. |

**S.C. (SD) No. 67/2024**

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| Petitioners | : | 1. Sarath Karunadasa,<br>Organizing Secretary,<br>Entrepreneurs Struggle Center,<br>No. 528,<br>Mahayaya, Ulpothagama,<br>Hasalaka.<br><br>2. Entrepreneurs Struggle Center,<br>No. 30, Kandewatta Rd,<br>Nawala, Nugegoda. |
| Counsel | : | Thanuka Nandasiri with Nuwan Bopage instructed by W. Charith De Silva. |

**S.C. (SD) No. 68/2024**

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| Petitioner | : | Dudeesha Duminda Nagamuwa,<br>Propaganda Secretary,<br>Frontline Socialist Party,<br>22/1, Melder Place, Nugegoda. |
| Counsel | : | Nuwan Bopage with Ms. Dinusha Thirinagama and Hansaka Chandrasinghe instructed by Ms. Nishadini Jayawardena. |

**S.C. (SD) No. 69/2024**

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| Petitioners | : | 1. Ajantha Niroshan Padukka,<br>No. 68, Kottawa Road,<br>Piliyandala. |

2. Enapatti Kankanamalage Achintha
Iranjith Dinalankara,
No. 490/1, Bopatta Road,
Minnana,
Gatahaththa.

Counsel : Farman Cassim, PC with Ms. Jessica Abeyratne, Vinura Kularatne and Faadhila Thassim instructed by A. D. Shayamali I. Athukorala.

**S.C. (SD) No. 70/2024**

Petitioners :

1. Amarasinghe Suranjaya,
General Secretary,
Commercial and Industrial Workers' Union,
No 17, Barracks Lane,
Colombo 02.

2. J. B. Gurusinghe,
General Secretary,
United Federation of Labour,
No 17, Barracks Lane,
Colombo 02.

3. Senanayake Mudiyanselage Amaranth
Ranajan Senanayake,
General Secretary,
Ceylon Bank Employees Union,
No. 20, Temple Road, Maradhana,
Colombo 10.

4. K. A. Kalpa Madhuranga,
Secretary, PROTECT Union,
No. 475/4, Thimbirigasyaya Road,
Colombo 05.

5. Tharindu Iranga Jayawardhana,
President,
Young Journalists' Association,
No. 176/3, Oruthota,
Gampaha.

6. Rathnayake Mudiyanselage Tharindu
Amila Uduwaragedara,
National Organiser,
Federation of Media Employees' Unions,
No. 17, Barracks Lane,
Colombo 02.

7. Sellapperumage Anuradha Disapala Fernando,
No. 34/1/A, Eksath Housing Scheme, Mirigama.

8. K. Lalith Karunathilaka,
Joint Secretary,
Free Trade Zones & General Services Employees Union,
141, Ananda Rajakaruna Mawatha,
Colombo 10.

Counsel : Swastika Arulingam with Ms. Tharushi Kularatne instructed by Ineka Hendawitharana.

**S.C. (SD) No. 71/2024**

Petitioners : 1. Ameina Shafi Mohin,
39, Mosque Road, Periyamulla,
Negombo.

2. Premathilaka Jayakody,
No. 118, Gabbella.
Udispattuwa.

3. Chandima Kiriwandala,
No. 58/1, Sri Indrajothi Road,
Ratmalana.

4. Nalinda Wijerathne,
42/B, Vijaya Rd, Tudella,
Ja-Ela.

5. Sanjeewa Pattiwila,
127/3/B,
Sisila Mawatha, Aluthgama,
Gampaha.

6. Rekha Mallikarachchi,
96/1/3, P.S.Perera Mawatha, Mampe,
Piliyandala.

7. Seevali Wijewantha,
335/A/5/2, Kamburugallawatta,
Wathupitiwala, Nittambuwa.

8. Yasoji Gunawardana,

No 2/3, Batagolla,
Yakkala.

9. Shivanthi Abeyrathne,
44/1,
Heenatikumbura Road,
Koswatte,
Battaramulla.

10. Bhagya Abeykoon,
56/12B, Koongahawatta Road,
Kiribathgoda.

11. Kapila Kumara,
80/16/S/01, 5th Lane,
Panaluwa, Wataraka,
Padukka.

12. Sandun Sameera,
25/10, Mawathagama,
Homagama.

13. Prasadi Boomawalage,
282/A/1, Hettigoda, Pitipanana North,
Homagama.

14. Gaya Senaratne,
No. 474, Kahanthota Road, Arangala,
Hokandara.

15. Dilanga Hettiarachchi,
144 1/7, Thawalankoya,
Ukuwela.

16. Kasun Balaooriya,
No.199 A/4, Pattiyawatta Road,
Kothalawela,
Kaduwela.

17. Heshani Kaushalya,
9A/3, 6th Lane, Nawala,
Rajagiriya.

18. Somasena Mahadiulwewa,
No. 403,1,C,
Gunarathana Mawatha, Makola North,
Makola.

19. G. L. Gnanatheva,
No. 46 5/4, Hampden Lane,
Colombo 06.

20. Samantha Wijesekera,
Palle Aludeniya,
Gelioya.

21. Jagath Abeywarna,
No. 191/8/1,
Sirima Bandaranayake Mawatha, Mahara,
Kadawatha.

22. Ruwanthi Aryaratne,
12, Susiri Pedesa, Asiri Uyana, Katubedda,
Moratuwa.

23. Yasantha Yaddehi,
No. 244/5, Gonahena,
Kadawatha.

24. Shirani Ariyarathne,
No.99,
Circular Road,
Pothupitiya North,
Wadduwa.

25. Charitha Yattogoda,
No. 1037/09, Parakumba Place,
Athurugiriya Road,
Malabe.

26. Chandima Abeyratne,
No.354/22/18, Nagaha Mawatha
Palenwatte,
Pannipitiya.

27. Kishani Wickramasinghe,
No. 328/5, Ganewatta Road, Mampe,
Piliyandala.

28. Anil Sirimanne,
No. 115/8,
Mattegoda Terrace,
Mattegoda.

29. Nalika Kodikara,
No. 186D, Kesbewa Road,

Bandaragama.

30. Geshan Dissanayake,
No. 148, Naramminiya Road,
Waragoda,
Kelaniya.

31. Vireshika Bandara,
No. 288/3, Manikagara Road,
Korathota,
Kaduwela.

32. Srimali Jayarathna,
Welikumbura,
Narammala.

33. Chathurika Perera,
No. 114/B, Maithree Road,
Walgama,
Bandaragama.

34. Tharaka Boteju,
No. 54/4,
Prathibimbarama Road,
Kalubowila,
Dehiwala.

35. Senuja Samaraweera,
692/D1, Polhena Road,
Kohalwila, Kelaniya.

36. Thiloka Perera,
No. 114B, Maithree Road,
Walgama,
Bandaragama.

Counsel : Sanjeeva Jayawardena, PC with Rukshan Senadheera instructed by Halidha Begum.

**S.C. (SD) No. 73/2024**

Petitioners : 1. Wimal Weerawansha, MP,
Leader,
National Freedom Front,
No. 342/1/4, E.W. Perera Mawatha,
Pitakotte.

2. Udaya Prabath Gammanpila, MP,
Leader,

Pivithuru Hela Urumaya,
448, Kotte Road,
Pitakotte.

3. Gevindu Cumaratunga, MP,
President,
"Yuthukama Jathika Sanvidanaya",
31/14A, 2nd Lane, Koswatta,
Nawala.

4. Professor Channa Sudath Jayasumana, MP,
388/49, Harischandra Mawatha,
Anuradhapura.

5. Dilith Susantha Jayaweera,
Leader, Mawbima Janatha Party,
No. 11, Park Avenue,
Colombo 08.

6. Ranawaka Aarachchige Rathnasiri Nimal Ranawaka,
President,
Democratic Left Front, No. 42/26, Mihindu Mawatha, Wattegedera Road,
Maharagama.

7. Dr. Geeganage Weerasinghe,
General Secretary,
Communist Party of Sri Lanka,
No. 91, Dr. N.M. Perera Mawatha,
Colombo 08.

Counsel : Canishka G. Witharana with Ms. Sawani Rajakaruna, Ms. Malmi Dissanayaka and H. M. Thillakaratna.

**S.C. (SD) No. 74/2024**

Petitioner : Krisantha Gehan Nissanka,
588/1 Ekamuthu Mawatha,
Parliament Road,
Talawatugoda.

Counsel : Appeared in-person.

**S.C. (SD) No. 75/2024**

Petitioners : 1. All Ceylon Buddhist Congress,
No. 380, Bauddhaloka Mawatha,

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| | | Colombo 07. |
| | | 2. Chandra Nimal Wakishta,<br>President,<br>All Ceylon Buddhist Congress<br>No. 380, Bauddhaloka Mawatha,<br>Colombo 07. |
| Counsel | : | Manohara de Silva, PC with Ms. Harithriya Kumarage, Ms. Nadeeshani Lankatillake, Ms. Kaveesha Gamage, Hirosha Munasinghe, Ms. Sasiri Chandrasena, Senal Kariyawasam instructed by A. Perusinghe. |
| Intervenient Petitioner | : | K. M. Mahinda Siriwardana,<br>Secretary to the Ministry of Finance, Economic Stabilization and National Policies,<br>Ministry of Finance,<br>The Secretariat,<br>Colombo 01. |
| Counsel | : | Sanjeeva Jayawardena, PC with Rukshan Senadheera instructed by Vidanapathirana Associates. |
| **S.C. (SD) No. 76/2024**<br>Petitioners | :| 1. Ballanthudawa Achchige Nuwan Chamara Indunil,<br>415/34, Off High-Level Road,<br>Gangodawilla. |
| | | 2. Jayalath Abayawardhana Mudiyanselage Sanka Chandima Abayawardana,<br>No.295/A, Vewagedara,<br>Diwulapitiya. |
| Counsel | : | Manohara de Silva, PC with Ms. Harithriya Kumarage, Ms. Nadeeshani Lankatillake, Ms. Kaveesha Gamage, Hirosha Munasinghe, Ms. Sasiri Chandrasena, Senal Kariyawasam instructed by A. Perusinghe. |
| **S.C. (SD) No. 78/2024**<br>Petitioner | : | Law and Society Trust,<br>No. 3, Kynsey Terrace,<br>Colombo 07. |
| Counsel | | |

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| | : | Ms. Ermiza Tegal with Ms. Namashya Ratnayake and Ms. Taahira Lafir instructed by Ramzi Bacha Associates. |
| **S.C. (SD) No. 79/2024** | | |
| Petitioner | : | Rathnayake Mudiyanselage Ranjith Madduma Bandara,<br>No. 31/3, Kandawatte Terrace,<br>Nugegoda. |
| Counsel | : | Upul Jayasuriya, PC with Vishvaka Peiris, Ms. Kalpanee Dissanayake and Ms. Kassala Kamer instructed by W. Sithara Sampath Wijewardane. |
| | | **<u>Respondent in all cases</u>** |
| | | Hon. Attorney General<br>Attorney General's Department,<br>Colombo 12. |
| | | **<u>2nd Respondent in S.C. (SD) Nos. 74 and 79</u>** |
| | | Hon. Ranil Wickremesinghe,<br>Minister of Finance, Economic Stability and National Policies,<br>The Secretariat,<br>Colombo 01. |
| Counsel for the State | : | Nirmalan Wigneswaran, DSG with Dr. Avanti Perera, DSG, Ms. Navodi De Zoysa, SC, Tharanga Ranasinghe, SC, Ms. Abigail Sooriyakumar Jayakody, SC and Medhaka Fernando, SC. |

The Court assembled on the 6th, 7th and 9th June 2024 to hear the submissions made on behalf of the Petitioners and the Attorney-General on the Bill titled "**Economic Transformation Bill".** After the Bill had been placed on the order paper of Parliament on 22 May 2024, 17 petitions have been filed invoking the jurisdiction of this court under Article 121 (1) of the Constitution.

As the several counsel waxed eloquent on the pros and cons of the impugned Bill, the court listened with rapt attention to the plurality of submissions inclusive of those made on the contributory factors that some counsel alleged led to the financial quagmire Sri Lanka finds itself in and at the conclusion of the hearings, it was not lost on the Court that the submissions were as diverse and divergent as usual on the constitutional compatibility or otherwise of the Bill.

Given the robust heterogeneity of the arguments for and against the constitutional compliance of the Bill, we cannot resist, even at the risk of sounding uncharacteristic of our role in constitutional jurisdiction, recalling the opening lines from Charles Dickens' novel *'A Tale of Two Cities.'*

> *It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way - in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only'.*

In a broader sense, the arguments that were presented before Court on the Bill signified a recollection of extreme contrasts of our times harking back to both positive and negative aspects of the present situation where there had been antecedent moments of great joy and prosperity alongside moments of deep despair and hardship.

We hasten to point out that our observations as a prelude to the exercise of appraising the constitutional compatibility of the Bill are also prompted by documents that have been proffered to us in the course of arguments and post argument written submissions and before we proceed to assay and evaluate the arguments on the clauses of the Bill vis a vis their constitutional comportment, let us segue into a discourse of the times past and present that have led to a slew of bills inclusive of the Economic Transformation Bill under consideration.

There is a long narrative of literature on the economic woes of our island nation.[1]

The pith and substance of all this study on Sri Lankan economic perils and the ameliorative reform undertaken to redress the aftermath of the unprecedented economic crisis in order to build a foundation for sustainable and inclusive growth provoke robust responses from all organs of government inclusive of the judiciary and in the process the lasting influence of the idea of a "representation-reinforcing" approach to judicial review, in which the role of courts is to counter various "malfunctions" in the democratic process, rather than broadly substitute for democratic decision-making by the political branches of government cannot be overemphasized.[2] However, this theory of responsive judicial review in respect of Bills has to operate subject to the caveat that no perversity or unreasonableness in the designing of policies and reforms could be countenanced.

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[1] See Lakshya Bhatia & Ridhi Seth, *'Critical Analysis of the Collapsing Economy of Sri Lanka'* (2022) 4 Indian JL & Legal Rsch 1; Ning Shengnan, *'Rethinking the External Debt Issues of Sri Lanka: Causes and Implications'* (2019) 74 China Int'l Stud 138; Juan Pablo Bohoslavsky, *'Finance and Human Rights in Sri Lanka: A Potential Virtuous Circle'* (2018) 26 Sri Lanka J Int'l L 1; Ramdhass Perumal & Gourav Sharma, *'A Panoramic View of Sri Lankan Crisis Approaches from the Below'* (2022) 5 Int'l JL Mgmt & Human 1835; Aishwarya Deshpande, *'Analysis of Factors which led to the Sri Lankan Debt Crisis'* (2023) 5 Indian JL & Legal Rsch 1

[2] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); For a latter version of this approach see Rosalind Dixon, *The New Responsive Constitutionalism* (2024) Modern Law Review 87 (4) MLR 799 – 832.

At this juncture it behoves this court to revisit the woe-begone factors that contributed to the economic morass from which Sri Lanka is attempting to limp back to its feet.

A long catalogue demonstrates several key multifaceted issues that impacted on the economy of the country.

a) *The low tax regime introduced in late 2019 has been looked upon as policies that led to a significant loss of government revenue.*
b) *The revenue to GDP ratio had fallen from 12.7% in 2019 to 8.7% in 2021 (including due to the COVID-19 pandemic).*
c) *The Budget Deficit had fallen from 9.6% in* 2019 to 12.2% in 2021.
d) *The Government debt to GDP ratio had increased from 86.9% in 2019 to 104.6% in 2021.*
e) *The fiscal imbalance had significant adverse spillover effects over the economy.*
f) *The situation aggravated to such a critical extent, where the General Treasury had to increasingly obtain Central Bank financing to make government expenditures, including a substantial part of interest, salaries and wages, pensions and Samurdhi payments etc.*
g) *Such an eventuality is clearly unsustainable and hence the need of a strong fiscal consolidation plan.*
h) *During the technical negotiations, the International Monetary Fund (IMF) observed that Sri Lanka requires more aggressive revenue measures to reach anticipated revenue targets in addition to the reforms announced by the Cabinet.*
i) *The Capacity Development Mission of the IMF fielded during 6-17 June 2022 recommended several policy reforms to structurally raise revenue.*
j) *This has been further endorsed by the IMF Staff Level Agreement reached on 1 September 2022 to support Sri Lanka's comprehensive economic reform*

*programme with a 48-month arrangement under the Extended Fund Facility of about US$ 2.9 Billion*

An excerpt from an opinion article by the IMF which was published around February 2024 contains the portentous advice to all Sri Lankans;

> *Everyone will have to pitch in for all to enjoy the fruits of these efforts. Those who are better off will need to contribute more so the government can provide essential services and help those most in need. Working together is also needed to help eliminate corruption and inefficiency. Corruption, tax exemptions, and non-competitive procurement and allocation practices imply higher taxes and costs for everyone, hitting the most vulnerable hardest. The ongoing efforts to implement the recommendations of the IMF Governance Diagnostic Report—the first in Asia—will help to reduce these losses for the benefit of everyone. Prevention also requires providing a safe space for public engagement in governance.*
>
> *There is light at the end of the tunnel. Although it may seem as small as a pinhole at the moment, continued reforms will accelerate passage through the tunnel and allow this light to become bigger and bigger. Maintaining the reform momentum is Sri Lanka's best hope for recovering from one of its most severe economic crises.*[3]

From the above this Court cannot institutionally gainsay the verity of the following oft quoted assertion namely *unless uncertainties associated with the external debt restructuring and the stability of the policy framework are resolved and taken forward, domestic financing conditions are not bound to ease allowing the nascent recovery to become more broad-based.*

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[3] www.imf.org

Neither does any of the Petitioners controvert this assertion with contrary facts and figures. As is usual in these proceedings under Article 121 of the Constitution, the major challenges of the Petitioners are rights-based alleging that some of the clauses of the Economic Transformation Bill impinge on the sacrosanct principles of fundamental rights, separation of powers and sovereignty. We bear in mind that there has been a slew of Bills that were brought within the broader context of economic recovery and it is indubitable that all those Bills embodied a reform of fiscal policy. The determinations of this Court in ***Re Surcharge Tax Bill***[4] and ***Re Inland Revenue (Amendment) Bill***[5] alluded to the apocalyptic gloom and doom that fell over this nation and thus looms the quintessential question - who will deny the eternal verity of that memorable statement made by the US Supreme Court Justice Louis Brandeis many moons ago *"sunlight is said to be the best of disinfectants'*. The US Justice had good governance and transparency in mind, and it is not irrelevant to observe that this eternal sunshine is dearly yearned for by the nation. Any diagnostic law enacted during an economic crisis must have a prophylactic effect, but it cannot curtail rights except as prescribed by the constitutional instrument. Having made these prefatory observations, we turn to the impugned Bill. In seeking to understand the scope and ambit of the Economic Transformation Bill, the structure of the Bill warrants a brief survey.

## STRUCTURE OF THE BILL

### Long Title

*AN ACT TO PROVIDE FOR THE NATIONAL POLICY ON ECONOMIC TRANSFORMATION AND FOR THE ESTABLISHMENT OF THE ECONOMIC COMMISSION OF SRI LANKA, INVESTMENT ZONES SRI LANKA, OFFICE FOR INTERNATIONAL TRADE, NATIONAL PRODUCTIVITY COMMISSION, AND SRI LANKA INSTITUTE OF ECONOMICS AND*

[4] SC/SD/ 19/2022 to SC/SD/ 21/2022 and SC/SD/ 23/2022 to SC/SD/ 29/2022
[5] SC/SD/63-64/2023

*INTERNATIONAL TRADE; FOR THE REPEAL OF THE BOARD OF INVESTMENT OF SRI LANKA LAW, NO. 4 OF 1978 AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO*

As is clear from the above, the long title of the Act declares its intent to provide for a National Policy on Economic Transformation and seeks to establish distinct statutory bodies assigned with different tasks to achieve the National Policy on Economic Transformation.

Accordingly, the Bill proposes to establish an Economic Commission of Sri Lanka, Zones Sri Lanka, Invest Sri Lanka, the Office for International Trade, National Productivity Commission and Sri Lanka Institute of Economics and International Trade. In the process of establishing new institutions, the proposed legislation seeks to repeal the Board of Investment Law, No.4 of 1978 (henceforth the BOI Law), while it has to be noted that the BOI Law has remained the primary legislation for mobilizing foreign indirect investments into this country.

**The Preamble**

The preamble to the proposed legislation elucidates the necessity for a sea change in the National Policy on Economic Transformation. The preamble bears recitation in order to understand the aspirational goals set down by the Bill.

> *WHEREAS the global economic landscape is rapidly evolving, characterized by technological advancements, shifting demographics, and emerging environmental challenges:*
>
> *AND WHEREAS acknowledging the interconnectedness of national economies and the importance of international cooperation in addressing shared economic challenges:*

*AND WHEREAS economic transformation is vital for fostering sustainable development, enhancing prosperity, boosting productivity, promoting social progress and ensuring equitable opportunities for all citizens:*

*AND WHEREAS understanding the role of the Government of Sri Lanka in creating an enabling environment for economic transformation, including through targeted interventions, investment in infrastructure, and the provision of essential public services:*

*AND WHEREAS acknowledging the crucial role of investment in driving economic growth, creating employment opportunities, and fostering innovation and technological advancement:*

*AND WHEREAS affirming Sri Lanka's commitment to fostering a transparent, inclusive, and rules-based system that promotes fair and equitable treatment of investors, both domestic and foreign:*

*AND WHEREAS recognizing the significance of international trade as a catalyst for economic development, promoting competitiveness, and facilitating the integration of economies into the global marketplace:*

*AND WHEREAS understanding the imperative need to enact legislation that provides a conducive environment for investment, expanded trade opportunities, negotiates trade agreements, and facilitates export-import activities to stimulate economic growth:*

*AND WHEREAS reaffirming Sri Lanka's commitment to international cooperation and collaboration to address global challenges* *and harness opportunities for mutual benefit:*

*AND WHEREAS considering the objectives of the Democratic Socialist Society as provided in subparagraphs (c) and (d) of paragraph (2) of Article 27 of the Constitution,*

At first blush, the preamble promises to usher in globalization, liberalization, foreign direct investment, international trade, competitiveness, modernization, and economic recovery to achieve rapid development, growth, and employment. In order to achieve these objectives, in order to achieve these objectives, the Bill seeks to;

a) Set out clear targets for economic policies for Governments
b) Create Investment climate reforms and focused promotion
c) Establish investment friendly infrastructure and ecosystem
d) Expand international trade, with a focus on export generation
e) Improve national productivity

The Bill comprises seven parts, and herein follows a compendium of their contents.

a) **Part I** – provides for the formulation of a **National Policy on Economic Transformation**, the establishment of the **Economic Commission, National Policies on Investments and Exports, rights and duties of investors**, and the establishment of **Invest Sri Lanka.**

b) **Part II** - provides for the establishment of an entity called **Economic Commission of Sri Lanka** and matters incidental thereto

c) **Part III** - provides for the establishment of an entity called **Investment Zones Sri Lanka (Zones SL)**

d) **Part IV** -provides for the establishment of **the Office for International Trade**

e) **Part V** establishes the **National Productivity Commission**

f) **Part VI** establishes the **Institute of Economics and International Trade**

g) **Part VII** provides certain general provisions as well as **repeals the BOI Law and sets out certain transitional provisions.**

The Court will now examine the individual Parts of the Bill, with particular reference to the clauses that were impugned by the Petitioners.

**PART I – Chapter I**

As we pointed out before, Part 1 sets out the Objectives, Bases, and Targets for Government regarding the National Policy on Economic Transformation. Clauses 2, 3, 4, 5, 6, 7, and 8 of Part 1 of the Bill were challenged by a majority of petitioners as unconstitutional. The main crux of their arguments was that policies and targets cannot be established in legislation in the manner and form that has been done, and that setting these targets in such manner and form acts as fetters on the executive and even future Parliaments.

**Clause 2** sets out the objects of the national policy; **Clause 3** provides for certain targets to be achieved for the policy. **Clause 4** sets down several specific targets. **Clause 5** mandates the President to prepare a report to be submitted to Parliament through the Cabinet and the relevant minister. **Clause 6** requires that all policies, programs, regulations, circulars, and directives of the Government conform to the national policy. **Clause 7** prescribes further reporting and monitoring requirements, while **Clause 8** reaffirms Parliamentary supervision over the

Cabinet. **Clause 9** itemizes the new institutions to be created through the Bill to assist the Government in achieving the economic targets.

We will now proceed to focus on the clauses in order to test the argument of constitutional invalidity. The impugned clauses are examined initially before appraising their constitutional congruence with established constitutional principles.

**Clause 2 -Objects of the National Policy on Economic Transformation**

The objects of the National Policy on Economic Transformation are set out as follows:

> *a) to make realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities;*
>
> *b) to create rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and control as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal; and*
>
> *c) to avoid an economic crisis.*

The contention on the part of some of the petitioners is that Clause 2 (a) of the Bill reflects a mirror image of Article 27 (2) (c) of the Directive Principles of State Policy in the Constitution, whilst Clause 2 (b) of the Bill which privileges rapid development of the whole country is a verbatim reproduction of Article 27 (2) (d) of the Directive Principles. The gravamen of the Petitioners is that there is no comprehensive provisioning for all other directive principles as set out in Chapter VI of the Constitution and that there cannot be a selective prioritization of only two of the provisions in the Directive Principles. A well-meaning submission as it was, it however overlooks the basic premise on which socio-economic rights are structured. Polycentricity is the essence of socio-economic rights and as Aristotle warned, "in framing an ideal, we may assume what we wish, but should avoid impossibilities."[6] One criticism of socio-economic rights is that they rest on utopian fantasy of unlimited resources, unimpeded distribution, and unfettered access. The provision for a full amplitude of socio-economic rights demands a strong state that is rich in national productivity, strong in administrative capacity and flush with an abundance of financial resources-otherwise constitutional claims will far surpass supply and breed distrust in the law. As Mark Tushnet puts it succinctly,

> *Protecting private law rights and first- and second-generation constitutional rights is cheap, though not free. Protecting social welfare rights is expensive. Constitutional rights with large fiscal consequences require someone to raise the funds, either through taxation or through the redirection of existing taxes, to ensure that the constitutional rights are effectively realized. But courts lack the power to raise money through taxes. Only legislatures can do that.*[7]

Responding to this criticism, national constitutions that include positive obligations in the form of directive principles of state policy temper these guarantees with the realism of disclaimers that speak of "*available resources*" and "*progressive realization*."[8] The guiding principles of the International Covenant on Economic, Social and Cultural Rights (ICESCR) declare that;

[6] Aristotle, 2000, *Politics*, trans. Benjamin Jowett, Mineola, NY: Dover Publications, p.68.
[7] Mark Tushnet 2004, Social welfare rights and the forms of judicial review. *Tex.L.Rev.* 82; 1895, 1896-1897.
[8] See Eric C. Christiansen 2007. Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court. *Colum.Hum.Rts.Rev* 321, 341.

*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.*[9]

So, the ICESCR to which Sri Lanka became a party on 11 June 1980 does not prescribe the full realization of socio-economic rights pronto. A progressive realization of socio-economic rights is mandated only having regard to the available resources of a state party. It is precisely for this reason that our Constitution enacts with clarity in Article 29 that Directive Principles do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. The legislature cannot aim at an impossibility where a depleted exchequer has to subserve polycentric needs and courts cannot boast of institutional capacity to dictate the specific social rights to which fiscal resources must be disbursed. Though the status of the Directive Principles has been explicated subsequently by several decisions of this Court,[10] the core minimum of its utility is apparent upon a clear reading of Article 27 (1) which declares:

*The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.*

The pivotal question would then be whether the Directive Principles would guide the legislature in enacting legislation to achieve a progressive progression of socio-

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[9] See Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[10] See Sarath N Silva C.J in *Haputhantirige and Others v Attorney General* (2007) 1 Sri.LR 101 at 118 (***the Directive Principles cannot become as illusive as a mirage in the desert***); Prasanna Jayawardene., PCJ *in Ravindra Gunawardene Karyawasam v CEA* SC FR 141/2015 SC minutes of 4.4.2019 at 50 (***The Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to***).

economic rights subject to its available resources. Inasmuch as we find such a rational nexus in the proposed legislation, the omission to refer to all the directive principles in the Bill would not be inconsistent with the Constitution. For instance, as we have pointed out above, there cannot be a full realization of socio-economic rights so long as the national kitty remains empty as Mother Hubbard's cupboard. A progressive realization of socio-economic rights will be elusive until and unless the country becomes affluent in its national productivity, The Bill prioritizes National Productivity as part of the new economic transformation drives and in order to improve national productivity, it also seeks to establish a National Productivity Commission.[11] In the circumstances it would be preposterous to contend that the whole range of Directive Principles in the Chapter on Directive Principles of State Policy (Chapter VI of the Constitution) must be itemized in the Bill. If one were to look for comparative experience, the well-known South African case of ***Grootboom***,[12] bears attention. The South African Government contended that the goal of its housing program was to realize everyone's right to have access to adequate housing **in the longer term** and, that it had taken concrete actions to this effect. The Constitutional Court of South Africa could not in fact strike down the measures as being "unsuitable" given that its articulated goal was achieving long-term solutions to the housing crisis in the Western Cape.[13] The fact that the government had made no provision for the short-term housing of those who were in desperate need could not be challenged on the ground of "suitability" given that its stated goal was providing housing for all in the long-term. The provisioning of the whole range of socio-economic rights becomes difficult of accomplishment in times of economic crisis and an austerity package, for instance, of not providing for the full amplitude of other equally important socio-economic rights may be crucial

[11] See the long title to the Bill, Clause 9 which references National Productivity Commission as one of the Agencies to assist the Government and Clause 132 which establishes a National Productivity Commission.
[12] *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC).
[13] See David Bilchitz, *Socio – Economic Rights, Economic Crisis, and Legal Doctrine*, I.Con (2014) Vol.12 No.3, 710-739

measures in order to secure greater benefits for all in the longer term.[14] The proper question to pose in the context of socio-economic rights is whether the measures being taken are suitable for the realization of the purposes they are designed to achieve.

On account of the manifold reasons we have recited above, **Clause 2** of the Bill entirely accords with what we consider to be the proper interpretation of Directive Principles and the clause aligns with the purposes that the statute has designed to achieve. Thus, no inconsistency arises in regard to **Clause 2.**

We will now turn to **Clause 3.**

**Clause 3 in extenso**

As we observed earlier, this was one of a set of provisions that was assailed as inconsistent with the Constitution, as Mr. Manohara de Silva, PC, strenuously contended that the clause imposes fetters on the policy-making power of the executive and consequently the legislature, as do, according to his contention, the allied provisions such as Clauses 4, 5, 6, 7, and 8. Thus, there is a cumulative challenge to Clauses 3, 4, 5 and 6 by majority of the petitioners. In the circumstances it becomes necessary to examine these clauses and the nub of the unified argument of the petitioners.

**Clause 3** deals with National Policy on Economic Transformation and when one examines **Clause 3,** it contains a two-pronged approach to National Policy on Economic Transformation (NPoET). **Clause 3 (1) (a)** deals with restructuring of the debt owned by the government, while **Clause 3 (1) (b)** envisages the transformation of Sri Lanka to a highly competitive, export-oriented, digital economy. We would reproduce Clause 3 *in extenso.*

[14] See, for examples of the austerity measures in the European countries, *EU Austerity Drive Country by Country, European Institute.*

**Clause 3**

(1) *The National Policy on Economic Transformation shall provide for–*

*(a) the restructuring of the debt owed by the Government, that the-*

*(i) Public Debt to Gross Domestic Production ratio shall be below ninety-five per centum by the year 2032 and thereafter;*

*(ii) Central Government Annual Gross Financing Needs to Gross Domestic Production ratio shall be below thirteen per centum by the year 2032 and thereafter; and National Policy on Economic Transformation*

*(iii) Central Government Annual Debt Service in Foreign Currency to Gross Domestic Production ratio shall be below four decimal half per centum by 2027 and thereafter; and*

*(b) the transformation of Sri Lanka to a highly competitive, export-oriented, digital economy including-*

*(i) diversification and deep structural changes of the national economy to boost competitiveness;*

*(ii) achieving Net Zero by the year 2050;*

*(iii) increasing integration with the global economy;*

*(iv) achieving stable macroeconomic balances and sustainable debt;*

*(v) modernize agriculture to boost farmer productivity, farmer incomes, and agriculture exports; and*

*(vi) promote inclusive economic growth and social progress.*

*(2) For the purpose of this section "NET Zero" means the balance between the amount of greenhouse gas that is produced in Sri Lanka and the amount that is removed from the atmosphere.*

**Clause 3 (1) (a)**

It is axiomatic that, with a view to restoring macroeconomic stability and public debt sustainability while safeguarding financial stability, the Government of Sri Lanka entered into a forty-eight-month arrangement under the Extended Fund Facility (EFF) with the International Monetary Fund (IMF) on 20 March 2023 to secure a speedy transition to economic recovery. [15]

As a consequence, this arrangement has brought about the following debt sustainability targets under the IMF-EFF supported programme namely;

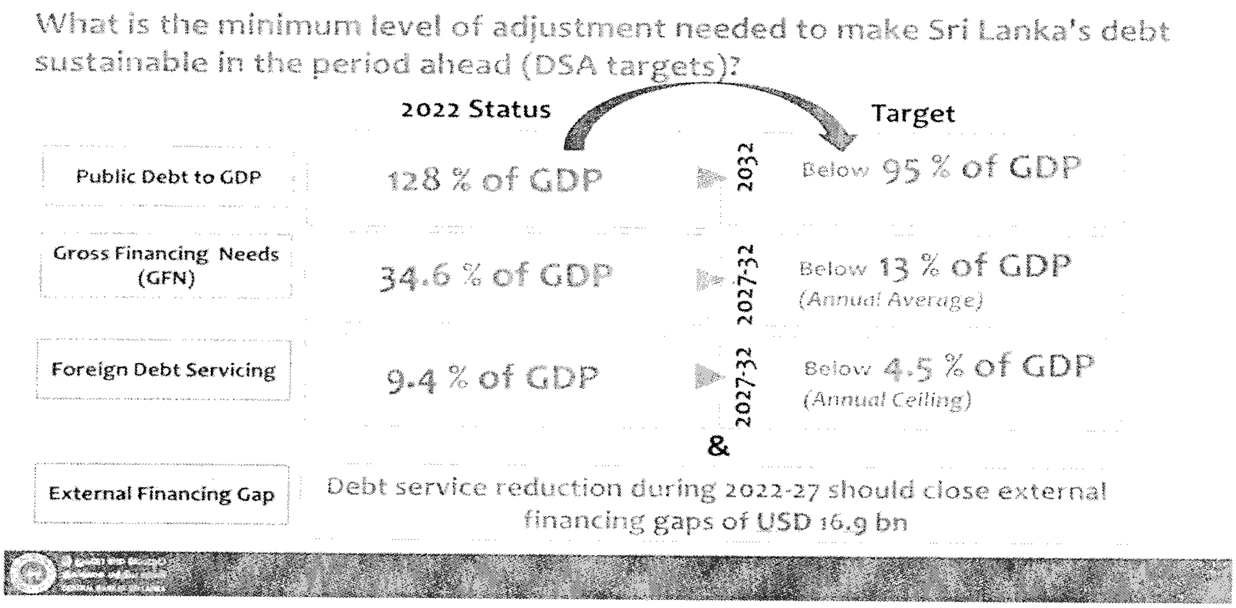
i. To reduce the level of public debt from its status in 2022 of 128% of GDP to below 95% of GDP by 2032;
ii. To reduce the average central Government Gross Financing Needs (GFNs) from its status in 2022 of 34.6% of GDP to below 13% of GDP for the period of 2027-2032, so that rollover risks under stress are manageable;
iii. To limit the foreign exchange debt service of the central government from 9.4% of GDP as at 2022 to below 4.5% of GDP in any year during 2027-32; and
iv. To ensure that the fiscal and external financing gaps are closed.

**Background to Clause 3 (1) (a)**

In the course of the arguments both Mr. Sanjeeva Jayawardena, PC who appeared for the Intervenient Petitioner in S.C. (SD) No. 63/2024 and the learned Deputy

[15] Vide, Cabinet Memorandum titled "Implementation of the Domestic Debt Optimization to restore sovereign debt sustainability" dated 28 June 2023

Solicitor General Mr. Nirmalan Wigneshwaran both brought to the attention of court the following pictorial representation that reflects the aforesaid debt sustainability targets.




*(Source: Presentation to the Cabinet of Ministers by the Governor of Central Bank of Sri Lanka on 28 June 2023, pg 12)*

It is these policy targets that have found their way into Clause 3 (1) (a) for **the restructuring of debt owed by the Government**. In a nutshell, the targets aimed at are the following:

- *Public Debt to Gross Domestic Production ratio shall be below ninety-five per centum (95%) by the year 2032 and thereafter; - Clause 3 (1) (a) (i)*
- *Central Government Annual Gross Financing Needs to Gross Domestic Production ratio shall be below thirteen per centum (13%)* of GDP *by the year 2032 and thereafter; and - Clause 3 (1) (a) (ii)*
- *Central Government Annual Debt Service in Foreign Currency to Gross Domestic Production ratio shall be below four decimal half per centum (4.5%) by 2027 and thereafter - Clause 3 (1) (a) (iii)*

As is apparent, Clause 3 (1) (a) seeks to limit the financial needs of the Government in a belt-tightening exercise; it also exhorts limited foreign borrowings. The clause thus dovetails perfectly with the objectives spelled out in Clause 2, insofar as it enables Parliament to have full control over finance, thereby minimizing the likelihood of another economic crisis-the golden mean the country as a whole would yearn for.

**Clause 3 (1) (b) and Clause 3 (2)**

Clause 3 (1) (b) is also aspirational in that it seeks to transform Sri Lanka into a highly **competitive, export-oriented, digital economy.** Towards this end, it envisages:

- Diversification and deep structural changes to boost competitiveness.
- Achieving Net Zero Emissions by the year 2050.
- Increasing integration with the global economy.
- Achieving macroeconomic balances and sustainable debt.
- Modernizing agriculture; boosting productivity, incomes and agricultural exports.
- Promoting inclusive growth and economic progress.

In Clause 3 (2) the term Net Zero is defined to mean *"The balance between the amount of greenhouse gas that is produced in Sri Lanka and the amount that is removed from the atmosphere".*

Clause 3 (2) as part of its broader National Policy on Economic Transformation (NPoET) identifies "key climate mitigation concerns" that are likely to arise in the likelihood of direct greenhouse gas emissions (GHG), due to an increased demand for energy". There are some consequential questions that are bound to arise as investment flows in and industries take off: 'Will the proposed investment significantly influence demand for energy? Is it possible to use renewable energy sources?' Additionally, indirect GHG emissions caused by any supporting activities or infrastructure are directly linked to the implementation of the proposed investment or project, such as transport, need consideration: 'Will the proposed project significantly increase or decrease personal travel? Will the proposed project significantly increase or decrease freight transport?' We do not consider these questions to be exhaustive, as environmental justice is bound to raise many more such questions.

In adopting the Paris Agreement on 12 December 2015, a majority of the nations of the world have acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the decision to adopt the agreement) and have agreed on the goal of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels": Article 2(1)(a). It is left to each state party to decide what measures it will take towards achieving this goal by preparing, communicating and maintaining successive "nationally determined contributions" that it intends to achieve: see Article 4(2). To date, most state parties' planned contributions have focused on setting targets for reducing GHG emissions from the consumption of fossil fuels within their own territory and taking measures aimed at reducing such consumption - for example, by promoting the development and use of alternative sources of energy. Therefore, it is appropriate to stipulate Net Zero as a legislative response to the perennial challenge of climate change.

Environmental policy is acknowledged to be economic policy[16]. In accordance with the principle that no government should sacrifice the environment at the altar of fiscal expediency, Sri Lanka has pledged to achieve its "Net-Zero" Carbon status by

[16] Andrew Leach, 'Environmental Policy Is Economic Policy: Climate Change Policy and the General Trade and Commerce Power' (2020) 52 Ottawa L Rev 295.

2050 in the updated Nationally Determined Contributions (NDCs) submitted in July 2021[17].

Having thus examined the salient features of Clause 3, we acknowledge the criticism regarding the provisions—specifically, the constraints and limitations imposed on the executive and legislature. We will proceed to assess and evaluate the submissions of the petitioners after examining Clauses 4, 5, 6, 7, and 8, which were also challenged on similar constitutional grounds.

## Clause 4 in extenso

Clause 4 establishes goals and targets for successive cabinets. The specific goals and targets as outlined are as follows:

> *It shall be the duty of the Cabinet of Ministers charged with the direction and control of the Government of Sri Lanka under Article 43 of the Constitution, to base the National Policy on Economic Transformation on the following targets:*
>
> -
>
> *(a) Gross Domestic Production growth to reach-*
>
> *(i) five per centum annually by the year 2027; and*
>
> *(ii) above five per centum annually thereafter;*
>
> ***Explanation***
>
> *The year 2027 will mark five years since the beginning of the crisis. Sri Lanka's positive recovery must enshrine a full economic recovery by the year 2027. The economic growth should be accelerated to above five per*

[17] Carbon Net Zero 2050 Roadmap and Strategic Plan Sri Lanka, published by the Ministry of Environment, November 2023.

*centum after the year 2030 to achieve an Advanced Economy status by the year 2048.*

*(b) unemployment to reach below five per centum of the labour force from the year 2025;*

***Explanation***

*Unemployment rates in Sri Lanka have typically been low and a target rate of five per centum locks this in.*

*(c) Female Labour Force Participation to reach-*

*(i) not less than forty per centum by the year 2030; and*

*(ii) not less than fifty per centum by the year 2040;*

***Explanation***

*Measures to increase Female Labour Force Participation can significantly increase labour productivity and growth in the economy.*

*(d) current account deficit of the balance of payments shall not exceed one per centum of Gross Domestic Production annually;*

***Explanation***

*Persistent current account surpluses will help Sri Lanka manage its external debt service obligations on a sustainable basis. However, in case of a current account deficit in a given year, this deficit should be limited to less than one*

*per centum of Gross Domestic Production.*

*(e) exports of goods and services as a percentage of Gross Domestic Production to reach-*

*(i) not less than twenty-five per centum of Gross Domestic Production by the year 2025;*

*(ii) not less than forty per centum of Gross Domestic Production by the year 2030; and*

*(iii) sixty per centum of Gross Domestic Production by the year 2040;*

***Explanation***

*A target of forty per centum of Gross Domestic Production by the year 2030 is needed to convert Sri Lanka from an inward-oriented economy to an outward-oriented economy.*

*(f) Net Foreign Direct Investment as a percentage of Gross Domestic Production to reach-*

*(i) not less than five per centum of Gross Domestic Production by the year 2030; and*

*(ii) at least forty per centum of Net Foreign Direct Investment to be in exports of goods or exports of services by the year 2030;*

***Explanation***

*Shift to export-oriented Foreign Direct Investment in order to support the growth of non-debt creating inflows to the economy.*

*(g) Primary Balance in the Government Budget to reach two decimal three per centum of Gross Domestic Production until the year 2032 and at least two per*

*centum of Gross Domestic Production from the year 2032 onwards;*

***Explanation***

*In order to prevent the recurrence of such an economic crisis, it is essential to ensure that a primary surplus of at least two per centum of Gross Domestic Production is maintained in the Government budget.*

*(h) Government revenue to reach at least fifteen per centum of the Gross Domestic Production beyond the year 2027; and*

***Explanation***

*To maintain robust domestic resource mobilization.*

*(i) multi–dimensional poverty headcount ratio to be less than fifteen per centum by the year 2027 and less than ten per centum by the year 2035.*

***Explanation***

*The reduction of multi-dimensional poverty (including education, health, housing and access to basic services) to promote inclusive growth through economic transformation.*

In a nutshell the specific goals and targets which are cast upon successive cabinets would be as follows;

- **GDP growth** - **5%** (or more) beyond the Year 2027, i.e., within 5-years from economic crisis – Clause 4 (a)
- **Unemployment** levels has to be below 5% from the Year 2025 – Clause 4 (b)
- **Female Labour Force Participation** should not be less than 40% by the Year 2030 & not less than 50% by the Year 2040 – Clause 4 (c)
- **Current Account Deficit of the Balance of Payment** should not exceed 1% of GDP – Clause 4 (d)
- **Exports to reach**; - Clause 4 (e)
    - Not less than 25% of GDP by the Year 2025

    - Not less than 40% of GDP by the Year 2030
    - Not less than 60% of GDP by the Year 2040

- **Net Foreign Direct Investment**; Clause 4 (f)
    - Not less than 5% of GDP by the Year 2030, > 40% to be export of Goods & Services by the Year 2030

- **Primary Balance of the Budget** to reach 2.3% of GDP till the Year 2032, and at least 2% thereafter – Clause 4 (g)

- **Govt. Revenue** to reach 15% of GDP beyond the Year 2027 – Clause 4 (h)

- **Multidimensional Poverty headcount ration** to be less than 15% by the Year 2027 and less than 10% by the Year 2035 – Clause 4 (i)

The argument of many of the petitioners that these targets shackle the executive and the future governments is not borne out by the content of these targets as Clauses 5, 6, 7 & 8 put together appear to aim at debt reduction and debt sustainability of the country. For the purpose of addressing the argument that the policies and targets set out in Clauses 3 and 4 operate as fetters on the executive and Parliament, an overall examination of the related Clauses becomes appropriate.

**Clauses 5, 6, 7 & 8 – Obligations of the President / Cabinet of Ministers**

A composite reading of the above Clauses makes it patently clear;

- President shall, commencing from 2025, ensure that every five years, the Cabinet of Ministers shall prepare and present to Parliament a report on the policy framework and strategies to give effect to the National Policy on

Economic Transformation, whereas the Cabinet of Ministers may from time to time revise such report and present such revisions to Parliament[18]

- all policies, programmes, regulations, circulars and directives of the Government shall conform to such National Policy on Economic Transformation (NPoET), thereby once again seeking to ensure that the Executive conforms to the legislated policy[19]
- the Government shall, through the Minister assigned the subject of Economic Policy present to Parliament on 31 March each year a report on the measures being taken towards achieving each target of the National Policy on Economic Transformation (NPoET)[20]
- If targets are not met, the government shall inform Parliament of the measures being taken to remedy the situation and indicate when the target will be met. The remedial measures will reflect a firm commitment and comprehensive strategy to meet the targets, which shall be a binding condition[21]
- Parliament, will have oversight on the cabinet of ministers in the execution of its powers and responsibilities under the Act[22]

**Arguments for and against the Constitutionality of Clauses 3, 4, 5, 6, 7 & 8.**

Various assertions were made that Clauses 3 and 4 of the Bill violate principles of sustainable development and Buddhism. In our view this submission is ill-founded and inaccurate.

[18] See Clauses 5 (1) and (2) of the Bill.
[19] See Clause 6 of the Bill
[20] See Clause 7 (1) of the Bill
[21] See Clause 7 (2) of the Bill
[22] See Clause 8 of the Bill which also makes reference to Articles 4, 43 and 148.

In certain countries policy areas have become legalized to a substantial degree, even though the legislative and executive branches remain leading decision makers in these areas.

The observations of Krishna Iyer, J. in ***State of Kerala* vs. *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd***[23] reflects the attitude of the Supreme Court towards the administrative and legislative policy decisions:

> "*What programme of agrarian reform should be initiated to satisfy the requirement of rural uplift in a particular community under the prevailing circumstances is* ***a matter for legislative judgment.*** *Here, in this field* ***the legislature is the policy maker and the court cannot assume the role of an economic advisor or censor competent*** *to pronounce whether a particular programme of agrarian reform is good or bad from the point of view of the needs of the community. The sole issue for the Court is whether it is in fact a scheme of agrarian reform, and if it is, the prudence or folly thereof falls, outside the orbit of judicial review* ***being a blend of policy, politics and economics ordinarily beyond the expertise of*** the proper function of the court."[24]

In ***Directorate of Film Festivals* vs. *Gaurav Ashwin Jain,***[25] the Indian Supreme Court following the dicta in ***Asif Hameed* vs. *State of J&K, Sitaram Sugar Co. Ltd.* vs. *Union of India, Khoday Distilleries Ltd.* vs. *State of Karnataka, BALCO Employees' Union* vs. *Union of India, State of Orissa* vs. *Gopinath Dash* and**

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[23] *State of Kerala v Gwalior Rayon Silk Mfg. (Wvg.) Co.Ltd.,* (1973) 2 SCC 713.
[24] *Ibid*
[25] *Directorate of Film Festivals v Gaurav Ashwin Jain,* (2007) 4 SCC 737.

***Akhil Bharat Goseva Sangh* vs. *State of Andra Pradesh***, summed up the scope of judicial review of executive and governmental policy as follows:

> *"The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."*

In ***2G Telecom Spectrum Scam Case*** (2012) the Indian Supreme Court scrutinized the auction processes for allocation of both the telecom blocks to private entities based on Article 14 arbitrariness review, while at the same time also playing an active role in investigating allegations of corruption.[26] Despite the activist role of the Indian Supreme Court in policing corruption in privatization and liberalization policies, it is worthy of observing that the court articulated a narrow and limited scope of judicial review for economic policies.

In the ***2G Telecom Spectrum Scam Case*** *(supra)* whose citation also goes as ***Centre for Public Interest Litigation and Others vs. Union of India and Others with***

[26] See Subramanian Swamy v. A. Raja, (2012) 3 SCC 1 (quashing allocation of telecom licenses); Subramaniam Swamy v. A. Raja (2012) 9 SCC 257 (Court adjudication of investigation into 2G scam); Manohar Lal Sharma v. Union of India (2014) 9 SCC 516 (cancelling Coal Block mining licenses).

***Subramanian Swamy v. Union of India and Others***[27] the Supreme Court of India articulated the narrow approach towards economic policies thus:

> *Power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with a task of framing the policies.*[28]

The Supreme Court of India in the same breath held that when it is clearly demonstrated that the policy framed by the state or its agency - instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognized parameters.

In our own country decisions made on economic considerations must largely be left to the legislature in view of the inherent complexity of fiscal adjustment of diverse elements that require to be made

According to the petitioners, Clauses 2, 3 and 4 of the Bill are inconsistent with the Sovereignty of the People guaranteed by Article 3 read with Article 4 of the Constitution. This argument is premised on the contentions that the Constitution of Sri Lanka recognizes the separation of powers between the organs of government, i.e. Executive, Legislature and Judiciary, National Policy lies within the realm of Executive power under Article 4(b) and, therefore, Parliament which exercises Legislative power under Article 4(a) cannot dictate the substance of National Policy and impose a duty on the Cabinet of Ministers (which belongs to the Executive arm of government and is charged with *inter alia* the formulation of

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[27] (2012) 3 SCC 1 at p.62
[28] *Ibid* at para 99.

policy as part of its power under Article 43) to base National Policy on specific targets fixed by the Legislature by law. This argument of the Petitioners is misconceived for the following reasons:

a) The Reserved List specifically includes National Policy as a matter within the Legislative Competence of Parliament

b) In any event, Article 33(a) only provides for the right to make a statement and is not a conferment of unfettered power

c) The Petitioners have ignored several articles of the Constitution that restrict the President's powers vis a vis Parliament

d) The Petitioners argument taken to its logical conclusion would result in no law being passed

e) Clause 2 mirrors Article 27 and as such cannot, by definition, be unconstitutional

f) The Bill's "ideology" is not incompatible with Article 1 of the Constitution and in any event Court is not concerned with economic ideology

g) The Bill is not inconsistent with Article 9 of the Constitution

Further, Parliament retains the said full control over public finance by Clauses 5, 6, 7 and 8 of the Bill. These provisions require the Executive arm of government to be responsible to the Legislative arm in numerous ways and, therefore, illustrate the third vital component of control over public finance, i.e. control by way of continuous audit and check as to due diligence.

In the circumstances the argument that the Bill is in consistent with Articles 3 & 4 is fallacious. In any event one Parliament cannot bind another Parliament and these targets could always be changed by a successive Parliament. Therefore, the provisions pass constitutional muster.

Before we part with Part I, we would observe that Parliamentary supervision, as contemplated in Clause 8, should be amended by deleting Article 4 contained therein, as such supervision is adequately covered by Articles 43 and 148.

**New Agencies to be established under the proposed Law**

**Clause 9 – Agencies to assist the government.**

Clause 9 declares that, in order to achieve the objectives of rapid growth for National Economic Transformation, the following agencies will be established under the proposed legislation to assist the government.

(a) Economic Commission established by section 11;

(b) Zones SL established by section 61;

(c) Office for International Trade established by section 99;

(d) National Productivity Commission established by section 132; and

(e) Sri Lanka Institute of Economics and International Trade established by section 162;

## PART II, Chapters II – XIV

**Economic Commission**

Part II deals with the establishment of the Economic Commission (EC) and sets out its objects[29], duties and functions[30], as well as provisions regarding the power of the minister to declare Investment Zones.

[29] See Clause 12 of the Bill
[30] See Clause 14 of the Bill

Chapter IV deals with administration and management of the Economic Commissions and sets out its composition.[31]

Clauses 18 to 21 address disqualification for being a member of the Economic Commission Board (EC), the term of office of every appointed member, the removal and resignation of appointed members, and conflicts of interest involving any member of the EC Board.

Chapter V creates the office of a Director General of the EC and establishes the staff of the EC.[32]

Clause 28 is a salutary provision in that any officer in public service may with the consent of the officer and the Public Service Commission could be temporarily appointed to the staff of the EC for such period as may be determined by the EC.

In regard to the permanent appointment of such an officer to the staff of the EC, the provisions of subsection (3) of section 14 of the National Transport Commission Act, No. 37 of 1991, shall *mutatis mutandis*, apply to and in relation to such officer.

**Colombo Port City Special Economic Zone Excluded**

It has to be borne in mind that the provisions of Part II of the Bill covering Chapters II to XIV will not apply to the Colombo Port City Special Economic Zone established under Section 2 of the Colombo Port City Economic Commission Act No.11 of 2021.

An overall conspectus of Part II, concerning the Economic Commission of Sri Lanka, which will spearhead investment and international trade in the country, will deal

[31] See Clause 16 of the Bill
[32] See Clauses 26 & 27 of the Bill

with the following broad areas. That displays the range of multiple roles that the EC is expected play.

a) Policy Level support to the Government
b) Promotion and Facilitation of Investment
c) Registration of Investments
d) Dispute Resolution Facilitation
e) Regulatory Oversight of Investment Zones (through Zones SL)

## Policy Level Support

The Economic Commission's role in this regard may be summarized as follows:

a) Reviewing policies and advising Minister (Clause 13(d))
b) Recommending Policies (Clause 14(a))
c) Performance reviews and research (Cause 14(g) and (h))
d) Specific procedure set out National Policies on Investment, International Trade and Investment Zones to be recommended to the Minister (Clause 32)
e) Determine investments of strategic importance (Clause 12(d))
f) Promotion of sustainable FDI (Clause 12(a))
g) Increase employment focused recommendations (Clause 12(a))
h) Recommend policies for diversification of sources of foreign exchange by increasing exports (Clause 12(g))

## Promotion and Facilitation of Investment

The role of the Economic Commission in this regard can be summarized as follows:

a) Creation and maintenance of a robust investment climate (Clause 13(c))
b) Promote both domestic and foreign investments (Clause 13(e))

c) Streamlining the regulatory environment to ensure transparency (Clause 14(c))

d) Empowered to recommend to the Minister incentives and exemptions to investors (Clause 45)

e) Facilitate the expeditious approvals from other Specified Institutions (Clause 46)

f) Promotion of Investment in Sri Lanka by establishing a Company - Invest Sri Lanka (Clause 48)

g) Promote and enable Ease of Doing Business (Clause 12(c))

h) Stimulate international trade by increasing exports (Clause 14(d))

i) Encourage & foster development of Industrial & commercial enterprises within Sri Lanka (Clause 12(h))

j) The Economic Commission is required to ensure transparency by publishing all relevant written law and other resources in one place (Clause 42).

**Amendments to Clause 13**

**Deletion of Clause 13 (b)**

It has been brought to the attention of this court in the written submissions of the Attorney General that Clause 13 (b) will be deleted in toto. Though this matter was not argued before Court, we have examined Clause 13 (b) and are in agreement that there is no necessity to have a separate clause with regard to the recommendations that the Economic Commission needs to make as regards an independent regulator for the investment zones. This clause is otiose as this is only a provision to recommend the creation of such an independent regulator. This can be suitably implemented by an amending legislation. In the circumstances, Clause 13 (b) shall not be proceeded with.

**Amendment to Clause 13-the Corporate attribute of proprietary right to be included in Clause 13.**

Though this was tangentially touched upon in the course of the argument, we have examined the question of the Economic Commission acquiring property as it is a legal person. In the circumstances, the Court suggests an amendment to Clause 13 in order to invest the Economic Commission with the power of purchasing, holding and disposing of shares, stocks, and similar assets.

**Clause15 - Alienation of State Land and Acquisition of Private Land**

Several petitioners[33] impugned Clause 15, which, as it stands, does not afford adequate safeguards in the event of acquisition of private lands. For instance, Mr. Uditha Egalahewa PC contended that the alienation of State land to corporate bodies undermines Article 3 of the Constitution. He pointed out that Article 33 (f) of the Constitution read with Appendix II, vests the President with the exclusive jurisdiction over the grant and alienation of State land, to be exercised on the advice of the relevant provincial Council. The 13th Amendment introduced Article 33 (d), which was renumbered as Article 33 (f) after the 20th amendment. In this context, it was his contention that Clause 15 of the proposed law designates the Minister, rather than the President, to declare land as an investment zone and vest it in Zones SL.

Mr. Manohara de Silva PC also impugned this provision on the same lines and contended that the Bill cannot become law without consulting the provincial councils as land and land acquisition reside in Provincial Council List. Mr. Nuwan Bopage who appeared for the Petitioner in SC/SD/66/2024 cited the locus classicus on public trust ***Bulankulama v Secretary, Ministry of Industrial***

[33] SC/SD/61-2024 & SC/SD 65/2024, SC/SD/63/2024, SC/SD/65/2024, SC/SD/75/2024, SC/SD 76/2024 and SC/SD?78/2024.

***Development (Eppawela Case)***[34] drive home his point that natural resources face the danger of depletion because of the extensive powers vested in the Minister by way of Clause 15. It has to be acknowledged that this Court is not confronted with facts as were established by the petitioners in the *Eppawela case*. What is in contention before this Court is the constitutional validity of Clause 15 as it stands and not the conjectural depletion that may or may not take place, if at all, due to arbitrary action.

It has to be recognized that Amerasinghe J echoed the principle that natural resources should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans. Amerasinghe J took the view that due regard should be had by the authorities concerned the general principle encapsulated in the phrase 'sustainable development', namely human development and the use of natural resources must take place in a sustainable manner. The learned Judge also reiterated the importance of the principle of inter-generational equity.

Provided these competing principles are borne in mind, it is not objectionable to the rapid development of the country to promote sustainable development and the constitutional validity of the provision before us cannot be challenged by the possibility of a prospective abuse of the principles of public trust, sustainable development and intergenerational equity.

Having examined the respective submissions of Counsel, we take the view that Clause 15 as regards alienation or disposition of State Land offends the Constitution inasmuch as it does not recognize the power of the President in Appendix II of the Constitution titled **Land and Land Settlement** and can only be

[34] (2000) 3 Sri.LR 243.

passed with a special majority and a referendum since the non-recognition of President's power is an intrusion on executive power and Article 3 would be attracted as a result.

Thus, in light of the above constitutional requirement, the power of the President to alienate or dispose of State land has to be recognized in the Bill and it is only thereafter that the duty can be cast upon the Zones SL to utilize the land. The Attorney General has proposed the following committee stage amendment in order to resolve this issue.

The provision as it stands, and the proposed committee stage amendment can now be juxtaposed.

**Current formulation of Clause 15 (1)**

After having decided the requirements for an investment zone, the Economic Commission will make the recommendation to the Minister.

Clause 15(1) which gives the power to the Minister to declare investment zones. reads as follows:

> *"(1) The Minister shall, upon receipt of a recommendation under paragraph (f) of section 14 to declare an Investment Zone, with the approval of the Cabinet of Ministers, by Notice published in the Gazette, declare such Investment Zone by specifying-*
>
> *a) the metes and bounds of the land area which shall fall within such Zone; and*
> *b) the sector in which such zone falls and whether it is a single sector or multiple sector zone as referred to in subsection (4)"*

But the contention raised before Court is the non-recognition of the President's power to dispose of state land.

**The Suggested Committee Stage Amendment by the Attorney-General**

> "(2) Where whole or part of Investment Zone is private land, the notice published under subsection (1) shall, in respect such private land, be deemed to be a notice published under section 2 of the Land Acquisition Act (Chapter 450) and the provisions of that Act shall *mutatis mutandis* apply in relation to such private land.
>
> (3) The President may make or execute a grant or any other disposition of any State land within any Investment Zone to the Zones SL, subject to the condition that any such State land shall not be alienated for private use except to the developers, operators or enterprises or other body of persons established within such Investment Zone.
>
> (4) Upon a grant or disposition made or executed under subsection (3), the Zones SL shall, subject to conditions specified therein, be responsible for the use of such land.";

Since alienation or disposition of State land is subject to the provisions of the constitutions and any other written law, the above formulation suffices but this court would suggest the insertion of the word "alienation" just before the word disposition in the proposed amendment in Clause 15 (3) and a consequent insertion of the word "alienation" in Clause 15 (4) as well.

If this amendment as formulated above is made, the inconsistency in Clause 15 as it stands now, will cease. As regards the contention that provincial Councils have to be consulted, this question would not arise in view of this Court's determination in ***Colombo Port City Economic Commission Bill***[35] in which the Court invoked *lex*

[35] SC/SD Nos.4, 5 & 7-23/2021

*non-cogit ad impossibilia* (law will not compel the performance of impossible things). In any event, this question is irrelevant to the determination of the relevant provision of the Bill as we find them. So long as alienation or disposition of State land is effected in accordance with the provisions of the Constitution and any written law, such an exercise would be invested with constitutional propriety.

Before we part with this discussion on alienation or disposition of State land, let us examine the commencement of the acquisition procedure.

**Acquisition procedure for establishing investment zones.**

The commencement of the acquisition procedure for the purpose of creating investment zones begins from **clause 81(1)** which reads as follows;

> *"(1) The Zones SL Board shall, in consultation with the Economic Commission, conduct studies on the requirements for investment zones to facilitate the accomplishment of the goals in the national policies on investment, international trade, exports and investment zones formulated by the Economic Commission."*

As we referred to before, having decided the requirements for an investment zone, the Economic Commission will make the recommendation to the Minister. **Clause 15(1)** gives the power to the Minister to declare investment zones. This clause concerns only the declaration of the investment zone.

The aforesaid procedure could be summarized as follows;

1. Either State land or private land could be declared by the Minister as an investment zone.
2. Declaration of an investment zone by the Minister is subject to certain safeguards. They are;

a) The *Zones SL Board shall, in consultation with the Economic Commission, conduct studies on the requirements for investment zones.*

b) The Zones SL Board shall thereafter make recommendations to the Economic Commission for the establishment of investment zones based on findings of its studies. Such recommendations shall *inter alia* include; (clause 63(2))

    - the business justification for the establishment of any investment zones;
    - site selection and location;

c) It is *only upon the approval of the Cabinet of Ministers* for the of an investment zone, the Minister shall procure the vesting of such site to the Zones SL. (clause 81(3))

d) For all private lands acquired, the Land Acquisition Act shall apply.

e) All State lands that are transferred/vested with the Zones SL *shall not be alienated for private use except to the developers, operators or enterprises or other body of persons established within such Zone.*

f) Any land within any zone declared under subsection (1) of section 15 may be alienated or leased to any body-corporate only for the purpose of;

1. developing an investment zone *to achieve the objects of the Zones SL* AND
2. in accordance with any plans, programmes or schemes made under this Part. (Clause 63(2))

This alienation or disposition has to be made in accordance with the provisions of the Constitution and any written law.

The amendment sought to be made to recognize the power of the President to alienate or dispose of State land has to be moved at the committee stage in order to render this provision (Clause 15) consistent with the Constitution.

**Registration of Investments**

The Economic Commission approves or registers investments and enterprises in terms of Clause 13(h). This is an important function, as it clarifies which persons fall within the scope of this law. Failure to register under this part means that foreign investors (Clause 34) as well as local investors (Clause 35) will not obtain benefits. Registration is a prerequisite for accessing the facilitation services outlined in the Bill.

**Dispute Resolution Facilitation**

The Economic Commission is required to set up a **Grievance Committee** to deal with foreign investors (Clause 43). The learned Deputy Solicitor General brought to the court's attention an ICSID arbitration award in favor of Sri Lanka, yet the recovery of costs awarded has been unsuccessful as the investor is overseas. Clause 44 provides for dispute settlement mechanisms, including arbitration. Undoubtedly, alternative dispute settlement methods and other legal remedies have been made available.[36] These norms are essential for creating a conducive investment environment.

**Regulatory Oversight of Investment Zones**

The Economic Commission's role in this regard may be summarized as follows:

a) It recommends the creation (Clause 14(f)) and declaration of Investment Zones to the Minister (Clause 13(a))

b) Regulatory Oversight of Zones SL (Clause 12(b))

The Part (**Chapter IX - Clauses 35-44)** provides for investment guarantees such as fair and equitable treatment[37], full protection and security[38], national treatment,

[36] See proviso to Clause 44 of the Bill.
[37] See Clause 36 (2) of the Bill
[38] *ibid.,*

and most-favored-nation (MFN) treatment.[39] It also includes guarantees against expropriation except on recognized grounds[40], as well as provisions for dispute settlement.[41] The entire chapter virtually reflects the minimum standards of international investment law. It should be noted, however, that where bilateral or multilateral treaties exist, investment guarantees will be governed by those treaties.[42]

It is at this stage it becomes appropriate to discuss investment guarantees that are pledged to an investor by this legislation. The word "investor" itself is defined by Clause 59 (1) to mean *a natural person or an enterprise recognized as a legal entity by the applicable laws, that has made an investment in Sri Lanka in terms of this Part.* The term "foreign investor" means *a natural person or an enterprise recognized as a legal entity by the applicable laws of a foreign country, that has made an investment in Sri Lanka in terms of this Part.*

It is important to note that this Bill not only introduces new institutions but also repeals the primary Board of Investment Law, No. 4 of 1978, replacing it as the new investment law of Sri Lanka. This Bill aims to:

- Address the shortcomings of current investment policies
- Facilitate and promote investments
- Ensure legal protection for investments
- Expedite the provision of necessary information from government entities to avoid delays
- Clearly define investor obligations and responsibilities
- Accurately monitor foreign investments
- Foster the creation of an export-oriented digital economy

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[39] See Clause 37 (1) of the Bill
[40] See Clause 39 of the Bill
[41] See Clause 44 of the Bill
[42] See Clause 35 of the Bill

It is in such an investment friendly environment that investment guarantees have to be given as it has always been the norm for a host state to accord such guarantees to investors.

**Investment Guarantees.**

These guarantees are enumerated in Chapter IX and as could be expected, these statutory investment guarantees are made inapplicable to an investment that is covered under bilateral and multilateral investment treaties.[43] This court will now discuss these guarantees, as two of them—specifically national treatment and most favored nation treatment—were challenged in these proceedings.

**Clause 36-Fair and Equitable Treatment**

The standard of treatment based on fairness and equity is reflective of modern international investment agreements and even pre-date them. These clauses are profusely used in Bilateral Investment Treaties (BITs) and noticeable in all the BITs to which Sri Lanka is a party.

Standards of treatment based on fairness and equity pre-date modern International Investment Agreements(IIAs). Fair and Equitable Treatment (FET) clauses used in BITs and other IIAs appeared in early international economic agreements such as the Havana Charter for an International Trade Organization (1948) and the Economic Agreement of Bogotá (1948), as well as in the United States Friendship, Commerce and Navigation (FCN) treaties. The first use of the FET clause in the IIA context can be traced back to Article I of the Draft Convention on Investments Abroad proposed by Hermann Abs and Lord Shawcross in 1959:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of

[43] See Clause 35 of the Bill

the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures" (Abs and Shawcross, 1960).

Clause 3 uses the unqualified form of the "fair and equitable treatment" standard and links it with the standard of "full protection and security" in the same clause. Both these two concepts are illustrated in clause 36 to of the bill as follows.

36 (2) for the purposes of this Part;

> *"Fair and equitable treatment" means the obligation to not to deny justice, in any criminal, civil or administrative proceedings in accordance with due process and the laws of Sri Lanka; and*
>
> *"Full protection and security" means the provision of protection for physical security of investments as required under the laws of Sri Lanka.*

The content of fair and equitable treatment could be summarized as follows;

According to World Bank guidelines;

- All States should extend to investments in their territories.
- Treatment should be as favourable as that accorded by the State to domestic investors in similar circumstances
- Includes non-discrimination of investors on the grounds of nationality
- Full protection and security should be accorded to investor's ownership, control and substantial benefits derived from the property.[44]

[44] See 'World Bank Guidelines on the Treatment of Foreign Direct investment', in *World Bank Legal* Framework for *the Treatment of Foreign Investment,* ILM 31 (1992) 1379, para V (1)4 See Clause 59 (1) 4 the interpretation of the word "Investor".

Sri Lanka relied upon the investment guarantee "*full protection and security*" in the first ever ICSID case of ***Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka.***[45]

Since these two guarantees are principles of International Investment Law, it is unsurprising that the proposed investment law extends the guarantees to all investors, whether it be domestic or foreign.

**Clause 37 – National Treatment and Most Favored Nation Treatment.**

Several Counsel called into question the constitutionality of Clause 37 of the impugned Bill.

Clause 37 (1) seeks to enact;

> *(a) Foreign investments and returns on investments of foreign investors shall be accorded treatment not less favourable than that accorded to domestic investors, in like circumstance, as regards acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *(b) For greater certainty "in like circumstances" shall be assessed based upon an objective assessment of all circumstances on a case-by-case basis, including the sector of investment, the location of the investment, the purpose of any act or measure complained of and the regulatory, governance or legal process generally applied in relation to the act or measure concerned. The assessment shall not be limited to or biased towards any one factor.*

Just like investment treaties, Clause 37(1)(a) provides for a comparative protection standard—standards that do not establish an independent standard of treatment but instead mandate treatment no less favorable than that accorded to nationals and companies of the host State (national treatment), or to nationals and

[45] Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka, decided by International Centre for Settlement of Investments Disputes Tribunal (Final Award) (Case No. ARB/87/3), published in 30 ILM (International Legal Materials) 580 (1991).

companies of any other State (MFN treatment). These investment guarantees ensure that more favorable treatment cannot be granted to another foreign investor or national in similar circumstances.[46]

The petitioners contended that the protection afforded under Clause 37 for the foreign investors is a violation under Article 12 of the Constitution because;

a) In terms of such clause, foreign investors shall be accorded treatment not less favourable than that accorded to domestic investors, and that would prevent the citizens of Sri Lanka being afforded any advantage/benefit over foreign investors;

b) Equal treatment should be afforded to those who are similarly circumstanced. Foreign investors and domestic investors are NOT similarly circumstanced and, therefore by placing them on an equal plane is a violation of Article 12.

This argument is, in our view, devoid of any merit. The treatment accorded to a foreign investor should not be less favorable than that which is accorded to the investments or returns of its own nationals or companies, or to those of nationals or companies of any third State. The intent and purpose of Clause 37 is to place all investors on an equal footing regarding the acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Thus, this ensures equal treatment of all investors within the host State and is in accordance with Article 12(1) of the Constitution.

A level playing field and not a tilted playing field is created among the investors and is in accordance with Article 12 of the Constitution. There is no hostile discrimination at all in an all embracing standard which is uniformly applicable in

[46] Ickale Insaat Limited Sirketi v Turkmenistan, ICSID Case No. ARB/10/24, Award, 8 March 201, at (328)-(329); Parkerings-Compagniet AS, fn. 181, at (368); United Parcel Service of America Inc. v Government of Canada, UNCITRAL, Award, 24 May 2007, at (173)-(184)

all the BITs inclusive of those which have been entered into by Sri Lanka. Such a Clause incentivizes foreign direct investments and promotes the spirit of this investment law. In ***Re Inland Revenue (Amendment) Bill***[47] this court rejected a similar argument with regard to domestic debt restructuring and observed quite pertinently "*It is a given that external creditors would not countenance that they are less favourably treated than the domestic creditors of a nation which has embarked on a DDO. It is in this context that the plausibility of including the public debt owed to domestic creditors in the DDO has been advanced as a response. In other words, the external creditors would have their losses shared equally with domestic creditors and this becomes a compelling reason for pursuing domestic creditors in a restructuring program.*" In the circumstances we hold that the same principle will apply in relation to investors.

It is pertinent to observe that National Treatment is enshrined in the GATT 1947. Which was signed by 23 nations in Geneva on 30 October 1947 and Sri Lanka (Ceylon) was amongst those 23 initial nations who was a party to the GATT.

National treatment is an international law principle that mandates a state to extend the same rights and privileges it grants to its own citizens, to foreigners residing within its borders. This concept ensures that foreigners receive treatment equivalent to that of the state's nationals.

This concept can be found in all three of the main WTO agreements which are;

a) Article 3 of the General Agreement on Tariffs and Trade (GATT),

b) Article 17 of the General Agreement on Trade in Services (GATS), and

[47] SC/SD/63-64/2023

c) Article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

In the circumstances we determine that foreign investors cannot be discriminated against on the basis of their citizenship and it is contrary to international law standards to fall foul of Article 27 (15) of the Constitution which affirms respect for international law and treaties. It would also be offensive of Article 157 to enact a law to contravene long held principles that have assumed the sanctity of law. Therefore, no inconsistency with the Constitution is inherent in Clause 37 of the Bill.

**Clause 44 - Dispute Settlement**

Clause 44 which seeks to provide for dispute settlement imposes the requirement of a prompt an amicable settlement of investment disputes through consultations and negotiations between the parties. According to the World Bank Guidelines on the treatment of foreign direct investments, disputes between private foreign investors and the host state are normally settled through negotiations between them and it is unsurprising that clause 44(2) of the Bill restates this international norm and embraces within its reach even a domestic investor. If consultations and negotiations fail in regard to the settlement of investment disputes, clause 44(2) provides the investor shall have the right to use all other remedies under the laws of Sri Lanka. However, the grouse of the Petitioners was that the proviso to clause 44 (2) oust the jurisdiction of domestic courts in so far as the proviso enables the parties to privilege alternate dispute resolution over curial dispute resolution.

The impugned proviso to Clause 44 (2) reads as follows;

> *Provided that where the dispute relates to one between a foreign investor and the State, the parties may agree to seek settlement of disputes, through*

*alternate dispute resolution mechanisms including ad hoc arbitration and institutional arbitration.*

In our view the aforesaid proviso to clause 44(2) of the Bill does not oust the jurisdiction of Sri Lankan courts, leave alone access to justice through courts.

The proviso to Clause 44 (2) only connotes the conferral of a statutory right to invoke dispute resolution mechanisms such as ad hoc and institutional arbitrations and resolve investment disputes through them, since it is not uncommon in many an arbitration friendly jurisdiction to make provisions for arbitration. However, it has to be noted that if the governing law of arbitral procedure is consensually agreed to be Sri Lankan law, parties are at liberty to resort to a regular action in court provided no objection is taken to the exercise of jurisdiction by courts.5 The alternate dispute resolution of the investment dispute between the foreign investor and the host state of Sri Lanka is predicated only upon the consensual agreement of the parties. If there is no such consensual agreement one cannot preclude the likelihood of a court action.

Next, we address the granting of incentives and exemptions to prescribed investors/investments, which have been argued to be unconstitutional.

**Clauses 45 & 55 – Incentives and Exemptions.**

Clause 45 deals with incentives and exemptions and in the course of the argument it was pointed out the word "investor" should be amended to "investment" for purposes of clarity considering the importance attached to the term investment.

Clauses 45 and 55 of the Bill which empower the Minister to, on the recommendation of the Economic Commission, prescribe incentives and exemptions from the laws specified in the Schedule to Part II, were inconsistent with Article 75. It was sought to be argued that such power would result in the

Minister exercising a legislative power, whereas only Parliament is vested with such power.

The Petitioners relied on the Determination of the Constitutional Court with regard to the Greater Colombo Economic Commission Bill (GCEC) which vested similar powers in the Minister and it was determined that such power was in violation of Article 46 of the 1972 Constitution. Consequently, the GCEC Bill was passed by a special majority of Parliament. The aforementioned Article 46, corresponding with Article 76 of the current Constitution, led the Petitioners to draw a parallel and argue that Clauses 45 and 55 of the current Bill also require passage by a special majority of Parliament. However, the truth is to the contrary.

It has to be noted that under Article 76 (3) of the Constitution, Parliament can empower any person or body to make subordinate legislation for prescribed purposes. It is in this context that this legislation seeks to empower the minister to prescribe incentives and exemptions from the laws specified in the schedule to Part II. This power to prescribe incentives and exemptions by way of regulations is in conformity with Article 76 (3) of the Constitution and as such there would be no such inconsistency as was put forward by the learned counsel for the petitioners. The GCEC law had to be passed with a special majority as there was no delegation of legislative power under Section 46 of the 1972 Constitution. It was in those circumstances the power of the Commission to grant exemption under the Greater Colombo Economic Commission law was struck down. However, under Article 76(3) of the 1978 Constitution, Parliament has broad power to enact laws that empower any person or body to make subordinate legislation for specified purposes. Therefore, Clauses 46 and 55 of the current Bill do not require a special majority and can be passed by a simple majority.

This court also recalls the determination on the ***Colombo Port City Economic Commission Bill***[48] where this court determined that exemptions from provisions of specified enactments could be granted as incentives for investments, provided certain committee stage amendments were made and observed that "the requirements in Article 148 of the Constitution is satisfied when fiscal exemptions are granted in accordance with regulations made specifying the conditions under which exemptions can be granted and the approval of Parliament is obtained for such regulations".

In the circumstances the power of the Minister to grant investments, incentives and exemptions from the laws specified in the Schedule would not fall foul of Constitution and hence, would not require a special majority to pass into law.

En passant, we also draw attention to Clause 55 of the Bill which empowers the minister to make regulations in respect of all matters which are required by the Act to be prescribed or in respect of which are authorized to be made. It would appear that the proviso to Clause 55 (2) (b) (iv) would require an amendment as the terms and conditions of the employees of the BOI are not found in the BOI law and as such the reference to the BOI law in connection with the terms and conditions of employment entitlements have to be removed. The reference to entitlement will ensure that only legal entitlements are taken into account. The learned Deputy Solicitor General has undertaken to have the words "under the provisions of Board of Investment of Sri Lanka Law, No. 4 of 1978;' deleted during the committee stage.

The learned counsel for the petitioner in SC/SD/62/2024 called in question the power of the Minister under Clause 55 (2) (b) (v) to amend, add to or vary the Schedule to Part II of the Bill. In other words, the schedule contains a list of twelve laws which can be expanded by the Minister. In the course of the hearing, it was pointed out to the learned Deputy Solicitor General that this attempt may be an

[48] SC/SD Nos.4, 5 & 7-23/2021

intrusion on the legislative power and would accordingly render this provision incongruent with the Constitution. We opine that no such power is accorded to the Minister and suggest that this provision be deleted from the proposed legislation.

**Clause 46 and Clause 90 – Powers of Minister to reconsider denial of refusal of a request made to a specified institution by the Economic Commission or Zones SL on behalf of an investor.**

Clause 46 of the Bill deals with the special powers of the EC to expedite any approvals, authorizations or permits required by any Investor or Investment from Ministries, Government departments, agencies, corporations, regulatory authorities or bodies (Specified Institutions) specified by regulation. The Petitioners argue that clause 46(5) allows the Minister to override refusal or denial by the Specified Institution and this power is arbitrary and therefore violative of Article 12(1) of the Constitution.

Clause 46 (2) of the Bill permits such Specified Institutions to refuse to respond to such inquiry or deny such requests provided written reasons for such refusal or denial are provided within a specified time period of 21 days from the date of such inquiry or request:

> *'Where the Economic Commission makes an inquiry or request to any Specified Institution for an approval, authorization, or permit in terms of subsection (1), such Specified Institution shall be obliged to respond to such inquiry or request either consenting to or objecting to such inquiry or request within fifteen days of such inquiry or request being made. If the Specified Institution refuses to respond to such inquiry or denies such request, written reasons for such refusal or denial shall be provided in writing within such period of twenty one days of such inquiry or request.'*

Clause 46 (5) provides thus:

> *'If a Specified Institution refuses, denies or fails to respond to an inquiry or request as per the regulations made under subsection (2) or (4), the Economic Commission shall if deemed appropriate by the Economic Commission, with its own recommendations, refer such refusal, denial or failure to the Minister who shall then make a determination on the matter in consultation with the Minister assigned the subject of Finance and inform the Cabinet of Ministers of the implementation of such decision.'*

It is apparent from the above that although subsection (5) permits the minister to reconsider the refusal or denial of a Specified Institution, the power to do so is circumscribed to the extent of any refusal or denial or failure to respond to an inquiry or request as per the regulations made under clause 46 (2) or (4). Therefore, it is patently clear that the minister cannot exercise his arbitrarily but such exercise would be limited to matters which are to be provided for by means of regulations as set out under clause 46 (4) which is limited to matters of collaboration between the Specified Institution and the Economic Commission:

> *'The Minister may, by regulations made under this Part, prescribe procedures for such collaboration, which shall be complied with by Specified Institutions in line with standing operating procedures on granting approvals for investment projects formulated by the Economic Commission through a consultative process.'*

The aforesaid provisions make it clear that the authority of the minister to reconsider such refusal, denial or failure to respond by a Specified Institution to a query by the EC on behalf of an Investor or Investment, is limited to any such refusal, denial or failure to respond to matters that have been regulated under clause 46 (2) and more specifically under clause 46 (4) i.e., matters of collaboration with the Specified Institution.

Thus, the provisions of section 46 and its sub clauses considered as a whole do not permit the minister to override or grant approvals arbitrarily when they have been refused by a Specified Institution. The Clause only allows the minister to reconsider same when there is non-compliance by the respective Specified Institution in terms of section 46(2) and (4) by virtue of regulations provided for in respect of such matters. Thus, it is abundantly clear that this clause is not violative of the Constitution.

In the course of the argument, it was alleged that there is no time limit given to the minister to make the determination expeditiously. In view of the time limits that have been put on the specified institutions, it becomes abundantly clear that if Clause 46 were to facilitate a single window for investment approvals to be granted expeditiously, a time limit must be imposed on the minister so that there will be finality to the approvals.

It was also suggested that there must be a cabinet oversight over the determination of the minister. In the circumstances it is imperative that time limits must be set on the minister for expeditious disposal of approvals.

Picking up this cue, the learned Deputy Solicitor has submitted the following formulation as an amendment to be moved at the committee stage.

> *'(5) If a Specified Institution refuses, denies or fails to respond to an inquiry or request as per the regulations made under subsection (2) or (4), the Economic Commission shall if deemed appropriate, refer such refusal, denial or failure to the Minister forthwith, who shall, within two weeks refer the matter to the Cabinet of Ministers for appropriate action.'*

In terms of the proposed amendment the final decision to be taken on approval stands transferred to the cabinet of ministers and such a decision making power being vested in the cabinet of ministers would be the right cause of action to be adopted.

It has been brought to the notice of this court a similar Clause of the same tenor has been proposed as Clause 90 (5) which goes as follows;

> *"If a Specified Institution refuses, denies or fails to respond to an inquiry or request as per the regulations made under subsection (2) or (4), the Zones SL shall if deemed appropriate, refer such refusal, denial or failure to the Minister forthwith, who shall within two weeks refer the matter to the Cabinet of Ministers for appropriate action".*

**Clauses 53, 93 and 183 – Reconstituted entities subject to judicial review**

The petitioners put forward an argument that the Bill is not consonant with Article 4 (c) of the Constitution in light of the Clauses 53, 93 and 183. The argument has been made the said Clauses oust judicial review in respect of matters that fall within the purview of the Bill. In view of the above petitioners contended that a specific reference or proviso should be included in the Bill stating that the said ouster of judicial review would not extend to Article 140 of the Constitution. In order to understand this argument, it is apposite to cite Clause 53 of the Bill that provides as follows in respect of the Economic Commission;

> *'No civil or criminal proceedings shall be instituted against any members of the EC Board, EC Director General, officer or employee of the Economic Commission or any member of the Invest SL Board, for any act which in good faith is done or purported to be done by him under this Act or on the directions of the Economic Commission or the EC Board, as the case may be, if he proves that he acted in good faith and exercised all due diligence, reasonable care and skill.'*

Clause 93 is similar in content to Clause 53 but deals with Zones SL and its officers. Clause 183 which falls under the 'Miscellaneous' head of the Bill (at Part VII) placing limits on institution of civil or criminal proceedings against members of the Institute Board, Advisory Committee Team of Instructors or an Operations Team:

> *'No civil or criminal proceedings shall be instituted against any member of the Institute Board, the Director, any officer or employee of the Institute or any member of the Advisory Committee, Team of Instructors or an Operations Team, for any act which in good faith is done or purported to be done by him under this Part or on the directions of the Institute or the Institute Board, as the case may be, if he proves that he acted in good faith and exercised due diligence, reasonable care and skill.'*

It is axiomatic that the aforesaid Clauses do not oust the jurisdiction of court contained in Article 140 of the Constitution. The Clauses only provide a defence to civil or criminal proceedings if it is established that a person acted in good faith. It has been the *cursus curiae* that an ordinary privative Clause such as the above Clauses will not oust judicial review under Article 140 of the Constitution. See – ***B. Sirisena Cooray v. Tissa Dias Bandaranayake and two others***[49]; ***Atapattu and Others vs. Peoples Bank and Others***[50]

**Treatment of BOI employees upon the establishment of Economic Commission and zones in Sri Lanka-Clause 194 (2) (m).**

It is a given that this legislation aims to replace the Board of Investment with two entities: The Economic Commission and Zones SL. The consequent placement of the employees of the BOI after the creation of these two entities is provided for in Clause 194 (2) (m) of the Bill.

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[49] (1991) 1 SLR 1
[50] (1997) 1 SLR 208

*'the officers and employees of the BOI holding office on the day immediately preceding the date of commencement of this Act -*

*(i) shall be deemed, with effect from the date of commencement of this Act, to be officers and employees of the Economic Commission, on terms and conditions not less favourable than the terms and conditions of employment to which they were entitled under the repealed Law; and*

*(ii) attached to licensed zones shall be deemed, with effect from the date of commencement of this Act to be officers and employees of the Zones SL, on terms not less favourable than the terms and conditions of employment to which they were entitled under the repealed Law;'*

We have already pointed out in our examination of the proviso to Clause 55 that the words "under the repealed law" would be inappropriate and accordingly for purposes of clarity, the words "" under the repealed law" that appear in (i) and (ii) of Clause 194 (2) (m) will have to be deleted and an amendment has to be moved to this effect at the committee stage to delete the references to the repealed law.

This reference to the repealed law has to be removed as the repealed law did not make any express reference to conditions of employment. It was suggested in the course of argument that in order to maintain the continuity of service of an employee for the purpose of calculation of statutory dues and payments, the period that an employee served with the BOI shall be taken into consideration when calculating the statutory payments that are payable to such an employee. The learned Deputy Solicitor General has undertaken to have this concern addressed during the committee stage amendments that would include a provision to cater to this position. In such a situation the amended Clause 194 (2) (m) will read as follows;

*'(m) the officers and employees of the BOI holding office on the day immediately preceding the date of commencement of this Act –*

*(i) shall be deemed, with effect from the date of commencement of this Act, to be officers and employees of the Economic Commission, on terms and conditions not less favourable than the terms and conditions of employment to which they were entitled; and*

*(ii) attached to licensed zones shall be deemed, with effect from the date of commencement of this Act to be officers and employees of the Zones SL, on terms not less favourable than the terms and conditions of employment to which they were entitled:*

*"Provided that the period that an employee served with the BOI shall be taken into consideration when calculating the statutory payments that are payable to such employee.'*

**Voluntary retirement scheme**

Some petitioners raised contentions in respect of the voluntary retirement scheme adumbrated at Clause 194 (2) (n):

*'the officers and employees of the BOI holding office on the day immediately preceding the date of commencement of this Act, who do not opt to join the service of the Economic Commission or to be attached to Zones SL, shall be paid such compensation which shall be paid in terms of a voluntary retirement scheme as shall be prescribed by the Minister.'*

Counsel on their behalf contended that the time period within which the voluntary retirement would become operative has not been lucidly set out in the legislation. This court brought home in the course of the hearing the necessity to set down a period within which the aforesaid voluntary retirement scheme would take effect. The learned Deputy Solicitor General has provided a formulation which he has undertaken to table as a proviso to Clause 194 (2) (n). The proviso reads as follows;

*'Provided that such voluntary retirement scheme shall be published on a date not more than one month after the commencement of this Act, and every officer or employee deemed to be an officer or employee of the Economic Commission or Zones SL under paragraph (m) of subsection (2) shall communicate his option within one month of the date of publication of the voluntary retirement scheme.'*

On an overall analysis of the transfer of employees of the BOI to continue in employment either as employees of the Economic Commission or the Zones SL on terms and conditions not less favourable than the terms and conditions of employment to which they were entitled reflects a "business judgment" which restructuring imperatives determine and applying the business judgement rule, this court does not second guess the efficacy of this reorganization and the provisions must pass muster on its own account.

This discussion of the organization and placement of the employees brings to the fore the complaint of petitioners in SC/SD/71/2024 wherein Sanjeeva Jayawardena, PC who appeared on their behalf called in question the treatment of the officers of the Department of Commerce.

**Office for International Trade and the Department of Commerce.**

The complaints springs from the establishment of the Office for International Trade (OIT) that is sought to be effected by part IV of the Bill with a view to promoting and developing international trade as the key strategy to strengthen the economic base of the country in terms of Clause 101 (d) of the Bill The OIT shall carry out all the International trade negotiations including bilateral, regional and international trade negotiations approved by the Cabinet of Ministers. The Ambassador of International Trade who is the Chairperson of the OIT shall be the chief negotiating officer.

Clause 102 of the Bill vests the administration and the management of the OIT with a Board of Management which shall consist of:

> (a) the Ambassador for international trade appointed under section 114 who shall be the Chairperson of the OIT Board and Chief Executive Officer of the OIT;
>
> (b) the Secretary to the Treasury or his representative; and
>
> (c) five other persons who possess knowledge and experience in the field of international trade, appointed by the President with the concurrence of the Constitutional Council

The employees of the Department of Commerce who have challenged the instant Bill in SC/SD/71/2024 argue that the tasks that are to be allocated to the Office for International Trade, are currently exercised by the officials of the Department of Commerce, and the Department of Commerce will be made redundant by removing such tasks from the mandate of the Department of Commerce.

It was also further argued on behalf of the employees of the Department of Commerce that their seniority and pension rights would be affected if they were to be appointed to the OIT. This was a contentious issue that was raised by the employees but the learned Deputy Solicitor General submitted that the Bill does not seek to liquidate the Department of Commerce, and in fact the Bill permits the absorption of officers of the Department of Commerce to the OIT without any disruption to their seniority and pension rights. It was submitted that the officials of the Department of Commerce would continue to carry out many duties in addition to the duties they may be called upon to perform within the OIT. We have been provided with the excerpts of a cabinet memorandum dated 8 January 2023 wherein it is stated, "In this backdrop, it is essential that officers with suitable multidisciplinary capabilities/expertise in trade are serving at OIT to conduct its operations. Already, action has been taken to mobilize officers from the relevant technical institutions such as the Department of Commerce, the Export Development Board and the Board of Investments to serve at the OIT on a full-time basis. The majority of cadres will be mobilized from the existing public service on secondment basis."

We have also been furnished with a Note of His Excellency the President to the cabinet dated 30 May 2024 which is to the effect that the Department of Commerce shall continue. Paragraph 3 of the said Note to the cabinet states the following;

> *"Accordingly, the Department of Commerce will continue to perform the rest of the functions under the purview of the Ministry of Trade, Commerce and Food Security, and thus will not be abolished as mentioned in the Cabinet Memorandum referred in (I) above."*

All this goes to show that the Department of Commerce will continue to stay and its officials and employees do not face the likelihood of being rendered redundant. It was also pointed out that the Director General of the Department of Commerce or his nominee will continue to be an ex-officio member of Food Advisory Committee established by Section 8 of the Food Act, No. 26 of 1980.

It would appear that the Office for International Trade is sought to be established with a view to taking over certain aspects of the functions performed by the Department of Commerce but it is abundantly clear that the Department of Commerce will not be replaced by OIT but would continue to exercise its functions under the Ministry of Trade, Commerce and Food security.

We have in the course of making this determination suggested amendments and in addition we would like to point out further amendments that would need to be passed at the committee stage. These amendments to the Bill would be set down as follows;

**Amendments that should be moved to the Bill**

1) Clause 8 of the Bill should be amended by deleting Article 4 contained therein, as parliamentary supervision is adequately covered by Articles 43 and 148.

2) Clause 13 (b) requires to be deleted as the creation of an independent regulator could be established by an amending legislation.

3) Clause 13 to be amended to empower the legal entity "Economic Commission" to purchase, hold and sell shares, stocks, debentures and similar assets.

4) Clause 15 is inconsistent with the Constitution and can only be passed with a two-thirds majority and a referendum. But if amendments recognizing the power of the President in regard to alienation or disposition of State land are passed in the manner and form as discussed by this Court, the provision can be passed with a simple majority.

5) Clause 26 requires to be amended to prescribe the qualifications, experience and the terms and conditions of employment of the EC Director General through regulations for the purposes of clarity and transparency.

6) Clause 45 to be amended to replace the term 'investor' with 'investment' for purposes of clarity, highlighting the importance of the term 'investment' within the context therein.

7) Clause 46(5) should be amended to specify a timeframe for the Minister to refer to the Cabinet of Ministers any refusal, denial, or failure by a Specified Institution to respond to an inquiry or request under subsections (2) or (4), thereby mitigating unnecessary delays.

8) Clause 48 (2) shall be revised to remove the requirement for consultation with the Secretary to the Department of Treasury regarding the appointment of members to the Invest Sri Lanka Board.

9) Clause 55(2) (b) to be amended to remove all references to the repealed law in the aforementioned clause.

10) Clause 57 to be amended to include a requirement that every Order made under this section to be laid before Parliament for approval within three months of its issuance.

11) Clause 64(d), granting Zones SL the power to acquire properties for establishing investment zones, is to be deleted. This amendment reflects that Zones SL's authority is limited to recommending lands required for investment zones to the Economic Commission, and does not extend to land acquisition.

12) Clause 75 to be revised to specify that the qualifications, experience, and terms and conditions of employment for the Chief Executive Officer of Zones SL shall be prescribed by regulations. This provision aims to ensure the appointment of individuals with adequate qualifications and experience, thereby preventing appointments of unqualified individuals to higher positions such as Chief Executive Officer.

13) Clause 90(2) to be amended to extend the period for Specified Institutions to provide written reasons for refusal or denial from fifteen days to twenty-one days, ensuring enhanced procedural fairness and transparency in the approval process.

14) Clause 90 of the bill to be amended to include a new sub-clause stipulating that if a Specified Institution declines, denies, or fails to respond to an inquiry or request, Zones SL must promptly notify the Minister. Within two weeks thereafter, the Minister shall escalate the matter to the Cabinet of Ministers for appropriate action. This amendment is aimed at ensuring timely resolution and accountability in cases of denied information requests.

15) Clause 94(2)(5) of the Bill requires to be amended to delete the words "under the provisions of the Board of Investment of Sri Lanka Law, No. 4 of 1978;" because any terms and conditions relating to employment have not been laid down in the BOI Act.

16) Clause 96 should be amended to require that every Order issued under this section be submitted to Parliament for approval within three months of its issuance. The Order shall only take effect upon Parliament's approval. The amendment shall be incorporated to ensure consistency with other clauses of the Bill where orders made under the Bill are referred to Parliament for its approval.

17) Clause 147 to be amended to include that the qualifications, experience and the terms and conditions of the Executive Director of the Productivity Commission to be prescribed by the regulations.

18) Clause 175 is to be amended to specify that the qualifications, experience, and terms and conditions of the Director of the Institute of Economics and International Trade shall be prescribed by regulations.

19) Clause 192 (1) and (2) are required to be removed in their entirety.

20) Clause 194 (2) (m) to be amended to remove references to the repealed law in consistency with the amendment proposed at Clause 55. Furthermore, a proviso to be added which states that the period that an employee served with the BOI shall be taken into consideration when calculating the statutory payments that are payable to such employee.

21) Clause 194 (2) (n) to be amended to incorporate specific time periods in respect of the operation of the voluntary retirement scheme.

22) Clause 195, the interpretations clause, to be amended in respect of the placement of the acronym 'BOI' and the interpretation of the word 'Minister'.

23) Clause 196 to be amended to rectify the reference to 'any other written law' and it to be read as, "In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail".

24) Proviso to Clause 55 (2) (b) (iv) has to be amended by deleting the reference to the Board of Investment Sri Lanka Law, No.4 of 1978 as such a reference would not reflect the true position

25) Clause 55 (2) (b) (v) has to be deleted to render the rule making power consistent with the Constitution.

Having considered the totality of the provisions in the proposed Bill we determine that the above amendments to the Bill have to be moved at the committee stage. We have pinpointed the Clauses that are inconsistent with the Constitution and accordingly upon a careful consideration we have suggested amendments that will render the provisions of the Bill consonant with the Constitution. If these necessary amendments are made, the Bill and its provisions will become consistent with the Constitution and could be passed with a simple majority.

We wish to place on record our deep appreciation of the assistance given by the learned Deputy Solicitor General and all other learned counsel who made submissions on the Bill.

Hon. S. Thurairaja, PC

**Judge of the Supreme Court**

Hon. A. H. M.D. Nawaz

**Judge of the Supreme Court**

Hon. A. L. Shiran Gooneratne

**Judge of the Supreme Court**