

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

“COLOMBO PORT CITY ECONOMIC COMMISSION”

S.C.S.D.No. 04/2021 Petitioner

1. Centre for Policy Alternatives
(Guarantee) Limited,
No. 6/5, Layards Road
Colombo 05.

2. Dr. Paikiasothy Saravanamuttu
No. 03, Ascot Avenue
Colombo 05.

Counsel

Dr. K. Kanag-Isvaran, PC. with Shivan
Kanag-Isvaran, Lakshmanan Jeyakumar
Ms.Bhavani Fonseka and Aslesha
Weerasekera.

S.C.S.D.No. 05/2021 Petitioner

G. Kapila Renuka Perera
Engineer
No. 34/4, Parakrama Lane
Kalubowila, Dehiwala.

Counsel

Dharshana Weraduwage with Dhanushi
Kalupahana.

S.C S.D. No. 07/2021 Petitioner

1. Gamini Viyangoda
883/9, Flower Road,
Ethul Kotte.

2. Kotawila Withanage
Janaranjana
71/4, Jaya Mawatha,
Mampe, Piliyandala.

	Counsel	M.A. Sumanthiran, PC. with Dr. Gehan Gunatilleka and Ms. Divya Mascranghe.
S.C.S.D. 08/20201	Petitioner	Palitha Range Bandara No. 400 "Sirikotha" Kotte Road, Pitakotte.
	Counsel	Eraj de Silva with Manjuka Fernandopulle, Daminda Wijerathna, Janagan Sundhamoorthy.
S.C.S.D. 09/2021	Petitioner	Vagira Abeywardena No. 400 "Sirikotha" Kotte Road, Pitakotte.
	Counsel	Ronald Perera, PC. with Dinesh Vidanapathirana, Yasas de Silva and N. Fernando.
S.C.S.D. 10/2021	Petitioner	Rathnayake Mudiyansele Ranjith Madduma Bandara 31/3, Kandawatte Terrace Nugegoda.
	Counsel	Thisath Wijayagunawardane, PC, with Gihan Liyanage, Jithen de Silva and Amanda Abeysinghe.

S.C.S.D. 11/2021	Petitioner	Harshana Supun Rajakaruna “Siri Radha Bawana” Millethe, Kirindiwela.
	Counsel	Farman Cassim, PC. with Tharaka Nanayakkara, Budwin Siriwardena, Mithun Imbulamure, Vinura Kularatne.
S.C.S.D. 12/2021	Petitioner	Wasantha Samarasinghe. No. 224, New Town, Thambuththegama.
	Counsel	Shantha Jayawardane with Niranjan Arulpragasam and Chamara Nanayakkarawasam.
S.C.S.D. 13/2021	Petitioner	1. Lesley Shelton Devendra, 480/2, Avissawella Road, Mulleriyawa. 2. Warahena Liyanage Don Marcus 91/15, Melwatte Ekala, Ja-Ela. 3. Palitha Athukorale 69/B, Anderson Road, Kalubowila, Dehiwala. 4. Maxwell Sylvester Jayakody No. 3. Bala Thampoe Lane, Colombo 03. 5. Pulukkudiarachige Don Anthony Linus Jayathilake No. 17, Barracks Lane, Colombo 02.

	Counsel	S.H.A. Mohammed with Laknath Senevirathne.
S.C.S.D. 14/2021	Petitioner	Galgamuarachchige Sudharma Shyamali 26, Buthpitiya South, Buthpitiya.
	Counsel	S.H.A. Mohammed with Laknath Senevirathne.
S.C.S.D. 15/2021	Petitioner	1. Ven. Muruthettuwe Ananda Nayaka Thero, Chief Incumbent of the Sri Abhayarama Purana Viharaya President of the Public Service United Nurses' Union Sri Abhayarama Purana Viharaya Narhenpita, Colombo 05. 2. Nagashenage Dasun Yasas Sri Nagashena, No. 90/12, Gramasanwardana Road, Polwatta, Pannipitiya.
	Counsel	Dr. Wijeyadasa Rajapakshe, PC. with Mayura Gunawansa, PC., Gamini Hettiarachchi, Suraj Walgama, Rakitha Rajapakshe, Madhava Jayawardhana, Harsha Liyanaguruge and Dharani Pallewatte.
S.C.S.D. 16/2021	Petitioner	Rajika Kodithuwakku, AAL, No. 44, New Kolonnawa Road, Moragasmulla, Rajagiriya.

	Counsel	Chrishmal Warnasuriya with Ms. Wardani Karunaratne, Ms. Kumudu Hapuarachchi, Selvarajah Arjunkumar and Ms.Maduwanthi Konara
S.C.S.D. 17/2021	Petitioner	1. Dr. Ajantha Perera 16, Temple Road Rattanapitiya Boralesgamuwa. 2. H.D. Oshala Lakmal Anil Herath 22, Wata Mawatha Piliyandala. 3. Jeran Jegatheesan 155/8, 4 th Lane Dolalanda Gardens Thalawathugoda.
	Counsel	Chrishmal Warnasuriya with Ms. Wardani Karunaratne, Ms. Kumudu Hapuarachchi, Selvarajah Arjunkumar and Ms. Maduwanthi Konara.
S.C.S.D. 18/2021	Petitioner	Kandhana Archchige Bandula Charasekera No. 119, University Road, Rathanapitiya Road, Boralesgamuwa.
	Counsel	Shiral Lakthilake with Chathura Galhena, Ms. Manoja Gunawardane.

S.C.S.D. 19/2021	Petitioner	1. Transparency International Sri Lanka (Guarantee) Limited 5/1, Elibank Road, Colombo 05. 2. Ashala Nadishani Perera No. 31, Shalawa Road, Mirihana, Nugegoda.
	Counsel	Dr. K. Kanag-Isvaran, PC. with Shivan Kanag-Isvaran, Lakshmanan Jeyakumar, Ms. Sankhitha Gunaratne.
S.C.S.D. 20/2021	Petitioner	Nagananda Kodithuwakku No. 99, Subadrarama Road Nugegoda . Appeared in person.
S.C.S.D. 21/2021	Petitioner	Saliya Kithsiri Mark Pieris, PC President, Bar Association of Sri Lanka No. 153, Mihindu Mawatha, Colombo 12
	Counsel	Ikram Mohamed, PC. with A.M. Faaiz, M.S.A. Wadood, Roshan Hettiarachchi, Shivan Cooray.
S.C.S.D. 22/2021	Petitioner	Rajeev Amarasuriya Attorney-at-Law The Secretary The Bar Association of Sri Lanka No. 153, Mihindu Mawatha, Colombo 12.

Counsel
Uditha Egalahewa, PC. with N.K.
Ashokbharan, Vishva Vimukthi and
Niranjan Arulpragasam.

S.C.S.D. 23/2021

Petitioner

1. Raveena Gayendri de Silva,
50/12, 1st Lane,
Gemmunupura,
Kothalawela, Kaduwela.

2. Rafeek Mohamed Fathima Shahla
58/E, 9th Mile Post,
Alawathugoda.

Counsel

Rushdhie Habeeb with Azard
Musthapha, Sandeepa
Gamaathige, Ms. Samadhi
Lokuwaduge and Nayanathara
Mendis.

Vs.

1. Hon. Attorney General
Attorney General's Dept.
Colombo 12.

Respondent in all cases

2. Secretary General of Parliament
Parliament Complex
Sri Jayewardenepura, Kotte.

**1st Respondent in SC.SD.12/21
and SC.SD 15/21)**

Counsel for the State:

Ms. Farzana Jameel, PC. ASG.,
Milinda Gunathilake, SDSG.,
Nerin Pulle, SDSG., Dr. Avanti
Perera, SSC., Suranga Wimalasena, SSC.,
Suren Gnanaraj, SSC. and Ms. Kanishka
de Silva Balapatabendi, SSC.

Intervenient- Petitioners

Petitioner

Prof. G.L. Pieris

Counsel

Gamini Marapana, PC. with Navin
Marapana, PC., Nishanthi Mendis,
Kaushalya Molligoda, Uchtha
Wickremesinghe, Nandana Kumara
Thanuja Meegahawatta and Saumya
Hettiarachchi.

Petitioner

Dr. P.B. Jayasundera

Counsel

Romesh de Silva, PC. with Palitha
Kumarasinghe, PC., and Dhuthika
Wickramanayake.

Petitioner

Luxman Peiris Wickramarathna
Siriwardena

Counsel

Anura Meddegoda, PC, with Yasa
Jayasekera, Asela Muthumudalige,
Lakshman Siriwardane and Nadeesha
Kannangara.

Petitioner

S.R. Attygalle

Counsel	Sanjeewa Jayawardena, PC. with Lakmini Warusavithana, Rukshan Senadheera and Dr. Milhan Mohammed.
Petitioner	Donald Fernando
Counsel	Sanjeewa Jayawardena, PC. with Lakmini Warusavithana, Rukshan Senadheera and Dr. Milhan Mohammed.
Petitioner	Vidana Gamage Sampath Chaminda
Counsel	Nihal Jayawardene, PC. with Harsha Fernando, Shamalie Gunawardene and Gamunu Chandarasekera.
Petitioner	Sagara Kariyawasam
Counsel	Kushan D' Alwis, PC. with Kaushalya Nawarathne, Chamath Fernando, Prabuddha Hettiarachchi, Sashendra Mudannayake, Nuwan D' Alwis and Manil Madugalla.
Petitioner	H.M. Vijitha Herath.
Counsel	Kaushalya Nawaratne with Prabudda Hettiarachchi, Hansika Iddamalgoda, Manoda Mohotti and Jeewanthi Bodhinayake.
Petitioner	Ekanayake Walawwe Nalin Samarkoon

Counsel	Nishan Premathirathne with Nadun Wijesiriwardena and Krishan Fernandopulle.
Petitioner	Bataleeya Pathirannahalage Chathura Pravi Karunaratne
Counsel	Nishan Premathirathne with Nadun Wijesiriwardena and Krishan Fernandopulle.
Petitioner	Wijethunga Appuhamyge Herman Kumara
Counsel	S.N. Vijithsingh.
Petitioner	Rajapakse Mudiyansele, Chintaka Pradeep Rajapakse
Counsel	S.N. Vijithsingh.
Petitioner	Duminada Nagamuwa.
Counsel	Nuwan Bopage.
Petitioner	Athula Priyadharshana De Silva.
Counsel	V.K. Choksy, PC. with D.S. Ratnayake, Kamin Dissanayake and Minolie Alexander.

Before:

Jayantha Jayasuriya, PC, CJ
Buwaneka Aluwihare, PC, J
Priyantha Jayawardena, PC, J
Murdu N.B. Fernando , PC, J
Janak De Silva, J.

A Bill titled “Colombo Port City Economic Commission” was published in the Government Gazette of the Republic of Sri Lanka of 19th March 2021 and was placed on the Order Paper of Parliament on 8th April 2021.

Nineteen petitions were filed on 15th April 2021 invoking the jurisdiction of this Court in terms of Article 121 to determine whether the Bill or any provisions of the Bill are inconsistent with the Constitution. Upon receipt of the petitions, the Attorney-General was noticed in terms of Article 134(1) of the Constitution.

The Court assembled for the hearing on 19th, 20th, 21st, 22nd and 23rd of April 2021. The Court heard all the Petitioners, Interventient Petitioners and the Attorney General.

The preamble to the Bill reads as follows:

“WHEREAS in furtherance of the Directive Principles of State Policy enshrined in the Constitution of the Democratic Socialist Republic of Sri Lanka, which requires the State to ensure by means of public and private economic activity, the rapid development of the country, whilst co-ordinating public and private economic activity in the national interest, the Government of Sri Lanka has considered it necessary to establish a Special Economic Zone within which there is ease of doing business that will attract new investments primarily to facilitate the diversification of the service economy, to promote the inflow of foreign exchange into such Zone, to generate new employment opportunities within such Zone whilst facilitating the development of technical, professional, technological and entrepreneurial expertise and to facilitate the promotion of urban amenity operations within such Zone, through the settlement of a residential community:

AND WHEREAS it has become necessary having regard to the national interest or in the interest of the advancement of the national economy, to establish a Special Economic Zone to be called “the Colombo Port City Special Economic Zone” which will be an international business and services hub with specialized infrastructure and other facilities within such Zone, for the promotion and facilitation of economic activity including international trade, shipping, logistic operations, offshore banking and financial services,

information technology and business process outsourcing, corporate headquarters operations, regional distribution operations, tourism and other ancillary services.”

The Bill seeks to establish a Commission called the Colombo Port City Economic Commission (hereinafter referred to as the “Commission”) which is to be entrusted with the administration, regulation and control of matters connected with businesses and other operations in and from the Area of Authority of the Colombo Port City. The Bill provides for -

Part I - Establishment of the Colombo Port City Special Economic Zone and the Commission

Part II - Objectives and powers, duties and functions of the Commission

Part III - Composition of and the administration and management of the affairs of the Commission

Part IV - Fund of the Commission

Part V - The Director-General and the staff of the Commission

Part VI - Application for and approval as an authorised person, agreement required to be signed, single window investment facilitation, Sri Lanka citizens engaging in business, employment, purchasing, leasing or renting property or utilising facilities or services

Part VII - Offshore companies to operate within the Area of Authority of the Colombo Port City

Part VIII - Offshore banking business in and from the Area of Authority of the Colombo Port City

Part IX - Determination and grant of exemptions or incentives for the promotion of businesses of strategic importance

Part X - Applicability of the Condominium Management Authority Law and the Apartment Ownership Law

Part XI - Applicability of the Securities and Exchange Commission Act

Part XII - Estate Manager and provision of general services

Part XIII - International Commercial Dispute Resolution Centre

Part XIV - Priority in hearing legal proceedings

Part XV - Interim provisions and investment protection

Part XVI – Miscellaneous Provisions

This Court is exercising the jurisdiction vested on it in terms of Article 120 of the Constitution which requires it to determine whether the Bill in its entirety or any of its provisions is inconsistent with the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

“(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82;

or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and

approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.”

During the hearing, the Petitioners raised objections to several clauses in the Bill on its constitutionality.

In addition to those objections, Dr. Kanag-Isvaran, PC. appearing for the Petitioners in S.C.S.D. No. 4/2021 and S.C.S.D. No. 19/2021 challenged the legislative competence of Parliament to legislate for the Colombo Port City on two grounds.

His first ground was that as a matter of Municipal Law, Parliament does not have legislative power to pass the Bill since the Colombo Port City is not part of the territory of Sri Lanka. It was contended that Article 5 defines the territory of the Republic of Sri Lanka and that the Bill seeks to add, to this territory, an artificially created area.

Secondly, it was submitted that it is beyond the competence of the Parliament to enact this Bill into law as a matter of ‘Applicable Law’. Dr. Kanag-Isvaran, P.C. submitted that any claim of sovereignty to artificially created areas is governed by section 5(3) of the Maritime Zones Law read with Article 56 of the United Nations Convention on the Law of the Sea (UNCLOS) and that as a matter of Sri Lankan Law and International Law, an artificially created area of land cannot constitute sovereign territory.

Article 5 of the Constitution reads :

“The territory of the Republic of Sri Lanka shall consist of the twenty five administrative districts, the names of which are set out in the First Schedule and its territorial waters:

Provided that such administrative districts may be subdivided or amalgamated so as to constitute different administrative districts, as Parliament may by resolution determine.”

Dr. Kanag-Isvaran, PC. submitted that the Bill proposes to add to this territory an artificially created area of land in extent 446.6153 ha.. In this connection, he submitted that Clause 2 of the Bill provides:

“There shall be established a Special Economic Zone to be called the Colombo Port City Special Economic Zone (hereinafter referred to as the “Colombo Port City”). The Area of Authority of the Colombo Port City herein established shall consist of the boundaries as set out in Schedule I to this Act.”

Thus, it was submitted that the artificially created land described in Schedule I to the Bill is being added to the ‘*Western Boundary of the Colombo Divisional Secretary’s Division, Colombo District*’ at the connection points set out in the said Schedule I and thereby it is sought to confer on it, the status of ‘*sovereign territory of the Republic of Sri Lanka*’ in violation of Article 5 of the Constitution, and vitiates the Bill in its totality as a matter of Applicable Law.

Moreover, the learned President’s Counsel submitted that Clause 65(1) of the Bill states:

“From and after the date of commencement of this Act, all land comprising the Area of Authority of Colombo Port City, shall be vested with the Commission in the manner set out in subsection (3).”

Further, it was submitted that the Bill proceeds on the assumption that the artificially created area of land is "crown land" and therefore it is untenable in law.

At the outset, it is pertinent to note that the Bill does not make provision to add any artificially created area to the territory of Sri Lanka. As described in the preamble to the Bill, the object of the Bill is to establish a Special Economic Zone to be called “the Colombo Port City Special Economic Zone”. Clause 2 specifically makes provision to establish such Zone and when read with Schedule I, provides the boundaries of the aforesaid Zone. Therefore, this Bill seeks to establish this Special Economic Zone within the area of which the boundaries are defined.

Furthermore, in Schedule I, the extent and the location of this land is described as “...containing in extent of 446.6153 ha. situated in Colombo, in the Western Province...”. On 23rd July 2019, the Minister of Internal and Home Affairs and Provincial Councils and Local Government had

moved a resolution under section 3 of the Administrative Districts Act No. 22 of 1955 to alter the area of authority and the limits of the Administrative District of Colombo by the inclusion of the reclaimed area of land known as “Port City Colombo” and to annex the said area of land to the Divisional Secretary’s Division of Colombo in the Administrative District of Colombo. The extent and the boundaries of the relevant land are described in the schedule to the said resolution.

The resolution reads:

“That this Parliament resolves under Section 3 of the Administrative Districts Act, No. 22 of 1955 that: -

- (a) the area of authority and the limits of the Administrative District of Colombo specified in the First Schedule to the Administrative Districts Act, No. 22 of 1955 shall be altered by the inclusion of the reclaimed area of land known as “Port City Colombo” described in the Schedule hereto, within the area of authority and the limits of the Administrative District of Colombo; and
- (b) such reclaimed area of land shall be annexed to the Divisional Secretary’s Division of Colombo in the Administrative District of Colombo.”

The Minister of Internal and Home Affairs and Provincial Councils and Local Government by a notice under the Administrative Districts Act, No. 22 of 1955, published in the Gazette (Extraordinary) No. 2135/13 dated 5th August 2019, informed the public “that the area of authority and the limits of the Administrative Districts of Colombo specified in the First Schedule to the Administrative Districts Act, No. 22 of 1955 shall be altered by inclusion of the reclaimed area of land known as ‘Port City Colombo’ described in the Schedule hereto”, based on the resolution passed in Parliament on 23rd July 2019. Therefore, the alteration of the boundaries of the Colombo Administrative District had been made effective in the year 2019 through the process provided in the Administrative Districts Act, No. 22 of 1955.

It is pertinent to note that Article 5 of the Constitution read with First Schedule lists out the names of twenty five districts which forms part of the territory of the Republic but does not describe the extent or the boundaries of those specified districts. Furthermore, Article 5 makes

provision for subdivision and amalgamation of the existing districts to constitute different Administrative Districts. It is through section 2 of the Administrative Districts Act read with the Schedule of the said Act that established the Administrative Districts and describes their boundaries and the extent of such districts. Therefore, alteration of the limits of such districts as provided under section 3 of the said Act is lawful and is not inconsistent with the Constitution.

The Court also observes that the boundaries and the extent of the land described in Schedule I of the Bill and the Schedule in the aforementioned notice of the Minister as well as the Schedule of the resolution passed in Parliament on 23rd July 2019, refers to the same area of land and therefore, the contention that the Bill under consideration makes provision to add a reclaimed area of land to the territory of Sri Lanka is without merit.

The passing of the resolution referred to earlier by the Parliament and the consequential publication of the Order in the Gazette had taken place in 2019. The fact remains that this process has not been challenged in any court. Thus, its validity must be presumed.

Dr. Kanag-Isvaran, PC. drew the attention of Court in his written submissions to the words of Lord Denning in *Macfoy v. United Africa Company Limited* (1961) 3 All E.R. 1169 (PC) at 1172:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

However, Court observes that Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., South Asian Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):

*“The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problems arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. **Once its***

illegality is established, and if the courts are prepared to grant a remedy, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as incapable of ever having produced legal effects.” (emphasis added)

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*, 9th Ed., Indian Edition, page 281:

“...the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings.”

Prior to *Macfoy v. United Africa Co. Ltd.* (supra), this approach was reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* (1956) AC 736, 769-770 where it was held:

“An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

In fact, Wade and Forsyth (supra, page 305), states that the statement of Lord Denning in *Macfoy v. United Africa Co. Ltd.*(supra) is not the correct position of the law.

Wade and Forsyth, *Administrative Law*, (supra, page 304), after restating the above statement of Lord Radcliffe states as follows:

*“This must be equally true even where the ‘brand of invalidity’ is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. **The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.** Lord Diplock spoke still more clearly [F Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry (1975) AC 295 at 366], saying that;*

It leads to confusion to use such terms as ‘voidable’, ‘voidable ab initio’, ‘void’ or ‘a nullity’ as descriptive of the status of subordinate legislation alleged to be ultra vires for

patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction.” (emphasis added)

This approach is consistent with the ‘presumption of validity’ according to which administrative action is presumed to be valid unless or until it is set aside by a court [*Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry* (1975) AC 295]. However, this ‘presumption of validity’ exists pending a final decision by the court [Lord Hoffmann in *R v. Wicks* (1998) AC 92 at 115, Lords Irvine LC and Steyn in *Boddington v. British Transport Police* (1999) 2 AC 143 at 156 and 161, and 173-4].

Court observes that by this Bill, the Colombo Port City is not been made part of the Administrative District of Colombo. It became part of the Administrative District of Colombo by virtue of the steps taken under the Administrative Districts Act, No. 22 of 1955 described above. Its validity has not been challenged and the presumption of validity applies.

Furthermore, Dr. Kanag-Isvaran, PC. submitted that, artificially created area of land not being part of the territory of the Republic of Sri Lanka as set out in Article 5 of the Constitution, the President cannot ‘issue a Land Grant under the Crown Lands Ordinance’ since the said artificially created land does not form ‘Crown Land’. In the circumstances it was submitted that the aforementioned clauses are violative of Article 5 of the Constitution and null and void.

It was further submitted that reclamation of land is statutorily provided for in the Sri Lanka Land Reclamation and Development Corporation Act, No. 27 of 1968 (as amended). Section 2(1) of the said Act provides *inter alia* that the Minister may where satisfied that ‘*any area of land is a low-lying, marshy, waste or swampy area...declare such area to be a Reclamation and Development Area for the purpose of this Act.*’ Therefore, it was submitted that it cannot be contended that the artificially created land is reclaimed land.

The learned Additional Solicitor General in response, drew the attention of Court to section 58 of the State Lands Ordinance which reads:

“The administration, control, custody and management of the foreshore are hereby declared to be vested in the State.”

Section 60 of the State Lands Ordinance, *inter alia*, states as follows;

“The President is hereby authorised -

(1) ...

(2) ...

(3) to reclaim any part of the foreshore or bed of the sea;

(4) to erect buildings on any areas of land reclaimed from the sea;”

Thus, it is the considered view of the Court that the State Lands Ordinance authorises the President to reclaim the foreshore or bed of the sea and to erect buildings on any areas of land so reclaimed from the sea.

Section 110 of the State Lands Ordinance as amended defines “State Land” to mean ‘*all land in Sri Lanka to which the State is lawfully entitled or which may be disposed of by the State and includes all rights and privileges attached or appertaining to such land.*’ Further, section 60(5) of the State Lands Ordinance confers power on the President to lease or otherwise dispose of any such reclaimed area.

Therefore, once a land is reclaimed it becomes State Land by virtue of the aforementioned sections in the State Lands Ordinance. Thus, once a land is reclaimed it becomes part of the territory of Sri Lanka by operation of law.

For the aforementioned reasons, Court holds that the Colombo Port City is part of the territory of Sri Lanka in terms of the law and Parliament has legislative power over the reclaimed area.

Mr. Dharshana Weraduwege and several other Counsel appearing for the respective Petitioners submitted that the Bill has been placed on the Order Paper of Parliament in breach of the provisions in Article 154G(3) of the Constitution inasmuch it was not referred to every Provincial Council for the expression of its views. It was their contention that the procedure set out in Article 154G (3) must be followed where the Bill is in respect of any matter set out in the

Provincial Council List. Furthermore, it was submitted that the Bill deals with matters such as land, planning, local government and betting which are matters falling under the Provincial Council List. Learned Counsel referred to Clauses 3(1), 6(1)(a), 6(1)(b), 6(1)(p), 6(1)(ga), 52, 53 and 73 of the Bill.

The attention of Court was drawn to the determination of this Court in *Land (Special Provisions) Bill* S.C.S.D. Nos. 01 to 05/2019 where it was observed:

“Non-adherence to the procedure stipulated under the Constitution in placing the Bill on the Order Paper of Parliament has been the preliminary ground of challenge. Accordingly, Court determines that, for the reason set out earlier, which led us to hold that the proposed Bill deals with the alienation of State land, and that the Bill should be regarded as one relating to a subject listed in the Provincial Council List insofar as the procedure to be followed is concerned, this Bill must be referred to Provincial Councils for the expression of their views, in terms of Article 154G(3) of the Constitution.”

Learned Additional Solicitor General submitted that in determining whether the Bill is in respect of any matter set out in the Provincial Council List, it would be necessary to consider the nature of the provisions contained in the Bill, its purpose and object as a whole and not to the particular words that are used in a section of the Bill which may correspond with an item in any of the three lists in the Constitution. It was further submitted that the approach adopted by Court in *Divineguma Bill* S.C.S.D. Nos. 01 to 03/2012, where the words contained in sections of the Bill were compared with items in List I of the Ninth Schedule to the Constitution, is not consistent with several other determinations of this Court on this issue. She drew our attention to the determinations in *Agrarian Services (Amendment) Bill* S.C.S.D. Nos. 02/91 and 04/91, *Microfinance Bill* S.C.S.D. Nos. 05, 06 & 08/2016, *Town and Country Planning (Amendment) Bill* S.C.S.D. No. 03/2011 and *State Land (Special Provisions) Bill* S.C.S.D. Nos. 01-05/2019 where Court adopted the purpose and object test.

Finally, learned Additional Solicitor General submitted that the Bill which relates to National Policy concerning economic development and planning, falls within List II (Reserved List) of the Ninth Schedule to the Constitution as it deals with National Policy. It was further submitted that the subject of “National Policy on all Subjects and Functions” is a matter that falls within the ambit of List II (Reserved List) of the Ninth Schedule to the Constitution. Reliance was placed

on the determinations of this Court in *Revival of Underperforming Enterprises and Underutilised Assets Bill* S.C.S.D. No. 02/2011, *Land (Restrictions on Alienation) Amendment Bill* S.C.S.D. No. 15/2018 and *Mutual Assistance in Criminal Matters (Amendment) Bill* S.C.S.D. No. 16-18/2018. Several of the Interventient Petitioners supported this position taken by the learned Additional Solicitor General.

Court will now consider the aforementioned objection raised by some of the Petitioners.

Article 154G(3) of the Constitution reads:

“No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference and (a) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or (b) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82: Provided that where on such reference, some but not all the Provincial Councils agree to the passing of a Bill, such Bill shall become law applicable only to the Provinces for which the Provincial Councils agreeing to the Bill have been established, upon such Bill being passed by a majority of the Members of Parliament present and voting.”

This requires any Bill in respect of any matter set out in the Provincial Council List to be referred to every Provincial Council for the expression of its views. Such reference has to be made by the President after the publication of the Bill in the Gazette and before it being placed on the Order Paper.

Provincial Councils were *established* in accordance with Article 154A(1) of the Constitution and they are *constituted* upon election of the members of such Council in accordance with the law relating to Provincial Council elections as provided under Article 154A(2).

The object and the purpose of the reference of a Bill to a Provincial Council is to obtain its views. This Court had observed that the views of the Governor of a Provincial Council does not amount to the views of the Provincial Council and therefore, the requirement in Article 154G(3) cannot be satisfied by referring a Bill to a Governor of a Provincial Council when such Council has not been constituted in accordance with the law. It is the view of the Provincial Council and the view of no other person or body will satisfy this requirement. [*Divineguma Bill* S.C.S.D. Nos. 04 to 14/2012].

In *Agrarian Services (Amendment) Bill* S.C.S.D. Nos. 02/91 and 04/91, Court opined that the words ‘every Provincial Council’ in Article 154G(3) of the Constitution “*may well mean every Council in existence, so that reference to a dissolved Council is unnecessary (unless perhaps such dissolution is being challenged as being a nullity).*”

However, in *Divineguma Bill* (supra), Court took a different view and held that the only workable interpretation that could be given to Article 154G(3) of the Constitution is that where the views of one Provincial Council cannot be obtained due to it being not constituted, the Bill could be passed only by the special majority required by the Constitution.

It is the view of the Court that the requirement to refer a Bill to every Provincial Council is a procedural step in the legislative process. However, in interpreting this provision (in a situation where a Bill has not been referred to a Provincial Council) it is necessary to consider the application of the maxim ‘*lex non cogit ad impossibilia*’ – law does not compel a man to do that which he cannot possibly perform.

Court has previously held in *Ananda Dharmadasa and Others v. Ariyaratne Hewage and Others* (2008) 2 SLR 19, that the principle *lex non cogit ad impossibilia* is applicable in interpreting procedural requirements in the Constitution.

The existence of a Provincial Council constituted in accordance with the law is a pre-requisite to decide whether there is non-compliance with this procedural step in a given situation. It is pertinent to note that at present, none of the Provincial Councils have been constituted in accordance with the law. Therefore, referring a Bill to Provincial Councils at this point of time, for the expression of its views is an act which cannot possibly be performed. Thus, non-compliance with this procedural step which cannot be performed, in the present circumstances,

should not adversely impact on the legislative power of Parliament, which is a part of inalienable sovereignty of the People.

Under Article 75 of the Constitution, Parliament has the power to make laws and Article 78 (2) provides that “The passing of a Bill or a Resolution by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament”. The requirement to obtain a special majority for the passing of a Bill forms a part of legislative process and therefore, has to be provided for in accordance with the provisions of the Constitution and Standing Orders. Articles 82(5), 83, 84(2), 154G(2)(b) and 154G(3)(b) identify situations in which a Bill has to be passed by a special majority. Article 154G(3)(b) recognizes the situation where such a special majority is required in relation to a Bill in respect of any matter set out in the Provincial Council List. Such requirement is confined to a situation where “*one or more Provincial Councils do not agree to the passing of the Bill*”. Any further extension of this requirement to other situations is in our view a fetter on the legislative power of the Parliament which would adversely impact on the sovereignty of the People.

In *Attorney General and Others v. Sumathipala* (2006) 2 SLR 126 at 143 this Court held as follows:

“.....A Judge cannot under a thin guise of interpretation usurp the function of the Legislature to achieve a result that the Judge thinks is desirable in the interests of justice. Therefore, the role of the Judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters. Referring to the function of a Judge, Justice Dr. Amerasinghe was

of the view that (Judicial Conduct, Ethics and Responsibilities pg.284),The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years’”

Considering the reasons set out above, this Court is not inclined to follow the determination in *Divineguma Bill* (supra) on this issue. Therefore, in the aforementioned circumstances non-reference of the Bill to Provincial Councils does not tantamount to a non-compliance with the procedural requirement stipulated in Article 154G(3) of the Constitution.

It is therefore not necessary for Court to decide the question, whether the Bill relates to any matter set out in the Provincial Council List.

The Court will now proceed to consider the objections raised by the Petitioners in relation to clauses of the Bill.

Several Petitioners submitted that the Commission to be established is vested with wide powers including executive and legislative powers sans any executive or Parliamentary control in areas such as public finance, granting of exemptions, licenses, authorisations and the making of subordinate legislation. It was also submitted that the Bill allows for the appointment of non-citizens as members of the Commission. It was further contended that the Colombo Port City is not subject to laws and regulations of the Municipal Council and Urban Development Authority. Further, no representatives would be elected from the Zone and thereby democracy is denied to the people in the Colombo Port City. It was further submitted that the compulsory requirement to refer disputes to arbitration ousts the jurisdiction of Courts.

In the context of the above submissions, in order to consider the constitutionality of the Bill, it is necessary to examine the clauses of the Bill individually as well as cumulatively.

Clause 7 of the Bill refers to the composition of the Commission and the appointment of its members. Members of the Commission are to be appointed by the President. Clause 7(2) provides for the criteria of such appointment and states that “in appointing the members of the Commission, consideration shall be afforded to ensure that the composition of the Commission is representative, in terms of knowledge, expertise and experience and national or international recognition”. Furthermore, Clause 7(1) mandates that “In making such appointments consideration shall be afforded to ensure that such members possess relevant knowledge, expertise and experience and national or international recognition in the fields of Investment, Finance, Law, Information Technology, Engineering, Business or Accountancy”.

Petitioners drew the attention of Court to the above clause and submitted that it paves the way for the President to appoint non-Sri Lankans to the Commission. It is their contention that appointment of non-Sri Lankans as members of the Commission is detrimental to national economy and would adversely impact on national security. On this basis, they contended that Clause 7 is inconsistent with Articles 2, 3 and 4 of the Constitution. In the course of the submissions reference was made to the determination of Court in *Sri Lanka Broadcasting Authority Bill* S.C.S.D. Nos. 1/1997 to 15/1997 where Court observed “these things may not happen, but they might happen because they are permitted”.

The learned Additional Solicitor General submitted, that Clause 7 provides a clear criterion for the selection of members of the Commission and therefore, the President in making appointments is required to exercise his discretion within the parameters set out therein. Furthermore, Clause 13(1) of the Bill sufficiently provides for avoidance of any conflict of interest.

Whilst submitting that such appointments could be subjected to judicial review, the learned Additional Solicitor General contended that the Petitioners submissions are based on speculation and the constitutionality of any provision should not be decided on speculation. In this context the learned Additional Solicitor General referred to the determination of Court in the *Third Amendment to the Constitution Bill* S.C.S.D. Nos. 2/1982 to 5/1982, where this Court observed “a clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality.”

Court considered all submissions made in relation to Clause 7 of the Bill. We are of the view that Clause 7 sufficiently sets out the criteria for the selection of members to the Commission. Therefore, it does not lead to arbitrary exercise of discretion. Any appointment, that is not in accordance with the law is open for judicial review in appropriate legal proceedings. Hence, Court is of the view that Clause 7 is not inconsistent with any provision of the Constitution.

Court also gave its mind to several clauses of the Bill including Clauses 3(5), 3(6), 3(7), 6(1)(a), 6(1)(b), 6(1)(g), 6(1)(h), 6(1)(i), 6(1)(s), 6(1)(t), 28, 30, 31, 33, 55, 58 and the definition of the term “Regulatory Authority” as provided in Clause 74.

The long title *inter alia* recognises “To provide for the identification of a Single Window Investment Facilitator for the promotion of ease of doing business within such Zone” as one of the objectives of this Bill. Clause 30 of the Bill identifies the “Commission” as the Single Window Facilitator responsible for the consideration and determination of an application made for registration, licence, authorisation or other approval as may be necessary to engage in any business in or to invest in the Area of Authority of the Colombo Port City.

Clause 31 of the Bill makes provision relating to the issue or grant of the registration, licence or authorisation or other approval so applied. It is important to note, that the Commission when granting such licence, authorisation or approval should seek the concurrence of the respective statutory authorities as provided in Clauses 3(5), 6(1)(b), 55 and 58.

It was contended on behalf of several Petitioners that the relevant clauses in the Bill imposes an obligation on Regulatory Authorities to grant the required concurrence to the Commission as a matter of course and therefore infringe Articles 1, 2, 3, 4(d), 12(1), 27(2)(a) and 27(3) of the Constitution. Furthermore, it was contended that it is unreasonable and arbitrary to remove discretion and any meaningful decision-making power vested with statutory bodies by relevant laws. It was contended that the process of removal of the discretion of statutory bodies is arbitrary, capricious and unreasonable and is therefore inconsistent with Article 12(1) of the Constitution.

Clauses 3(5) and 3(6) of the Bill reads:

“(5) The Commission shall, in the exercise, performance and discharge of its powers, duties and functions, where so required by the respective written laws applicable to any Regulatory Authority, obtain the concurrence of the relevant Regulatory Authority in respect of the subjects vested in or assigned to, such Regulatory Authority and to the extent specifically provided for in this Act:

Provided that, the concurrence of the relevant Regulatory Authority sought shall be limited to the implementation, within the Area of Authority of the Colombo Port City, of the respective written laws applicable to such Regulatory Authority.

(6) The relevant Regulatory Authority from whom such concurrence is being sought by the Commission, shall as soon as practicable in the circumstances, as a matter of priority, provide such concurrence to the Commission.”

Examination of Clauses 3(6), 30(3), 55(2) and 58(1) of the Bill show that when the Commission seeks the concurrence from a Regulatory Authority such authority should ‘render such concurrence to the Commission’. Such a process takes away the discretionary power of the authorities and therefore is inconsistent with Article 12(1) of the Constitution.

Learned Additional Solicitor General during the course of her submissions submitted that the following amendments will be moved at the Committee Stage to Clauses 3(6), 30(3), 55(2) and 58(1):

Clause 3 (6)

Page 3, Line 33 - Delete the words “provide such concurrence” and substitute therefor the words “communicate its decision”

Clause 30(3), second proviso

Page 30, Line 15 - Delete the words “render such concurrence” and substitute therefor the words “communicate its decision”

Clause 55 (2)

Page 49, Lines 16 and 17 - Delete the words “provide such concurrence” and substitute therefor the words “communicate its decision”

Clause 58 (1)

Page 52, Lines 9 and 10 - Delete the words “render such concurrence” and substitute therefor the words “communicate its decision”

Upon an examination of the proposed amendments, Court is of the view that if the above clauses are amended as stated above they would cease to be inconsistent with Article 12(1) of the Constitution.

Several Petitioners further contended that the scheme provided under the Bill grants sweeping powers to the Commission including the statutory powers and functions that are vested on regulatory authorities such as Director General of Customs and Director General of Inland Revenue. Furthermore, it was contended that the discretion vested on such authorities have been compromised to a great extent by the provisions of the Bill.

The attention of Court was drawn by the Petitioners to Clause 74 of the Bill which defines “Regulatory Authority”. In terms of this definition “Regulatory Authority” includes “the Monetary Board of the Central Bank of Sri Lanka, the Registrar General of Companies, the Director General of the Central Environmental Authority, the Controller of Immigration and Emigration, the Director General of Customs, and such other regulatory authority or approving authority, and in whom the powers, duties and functions relating to the respective subjects which are dealt with in this Act are vested in or assigned to in terms of any applicable written law to the extent provided in this Act. The relevant Regulatory Authority shall be limited to the implementation of the respective written laws applicable to such authorities, within the Area of Authority of the Colombo Port City”.

The learned Additional Solicitor General in response submitted that the process of regulation entails several phases: a. licensing/granting permission; b. supervision and monitoring; c. enforcement and punishment for violations. It was her submission that the Bill creates a concurrent structure of regulation, where both the Commission and the existing Regulatory Authorities exercise concurrent power.

The learned Additional Solicitor General further submitted that Schedule II of the Bill seeks to identify the laws under which exemptions or incentives may be granted. Accordingly, it was submitted that the Bill does not suspend the operation of the Inland Revenue Act within the Area of Authority of the Colombo Port City. She drew the attention of Court to Clause 41(6) of the Bill which deems a company registered under Part VII to be a non-resident for the purposes of

the Inland Revenue Act, and therefore such companies will be subject to the provisions of Inland Revenue Act, dealing with non-resident company. It was contended that there are no other restrictions to the application of the Inland Revenue Act. Further, it was submitted that the Customs Ordinance continues to apply, and its inclusion in Schedule II is merely for the purposes of granting incentives under the strict regime specified in Clauses 52 and 53 for Businesses of Strategic Importance and that key authorities such as the Central Bank of Sri Lanka, Central Environmental Authority, Department of Customs, Department of Inland Revenue, the Department of Labour etc., will therefore be able to supervise and monitor the implementation of the respective laws within the Area of Authority to the extent required by the relevant written laws.

Further, learned Additional Solicitor General contended that such a structure is not repugnant to the Constitution and relied on the determination of Court in *Greater Colombo Economic Commission (Amendment) Bill* S.C.S.D. No. 01/1992 where the Greater Colombo Economic Commission was renamed as the Board of Investment. It was contended that Court did not find anything repugnant to the Constitution on the basis that the powers of the existing regulators ‘only enable the Board to exercise those powers concurrently’. It was further pointed out that Court observed in the said determination that granting such concurrent power to the Board of Investment would not permit the Board to exercise such powers arbitrarily or against the spirit of the Act.

The learned Additional Solicitor General further submitted that all the other laws of the country, other than the laws which are excluded by Schedule III of the Bill and any other provision of any law that has been excluded by the Bill, are in force within the Area of Authority of the Colombo Port City. It was further submitted that Clauses 3(5) and 3(7) of the Bill are overarching provisions which retain in full force the power of the Regulatory Authorities in respect of regulatory matters except where the powers of such authorities have been expressly restricted under this Bill.

Upon reading of the Bill, Court is of the view that the regulatory structure set out in the Bill lacks clarity and provides for the exercise of arbitrary power by the Commission and thus, inconsistent with Article 12(1) of the Constitution.

Furthermore, it is important that the relevant Regulatory Authorities are consulted when the President or the assigned Minister makes regulations in terms of Clause 71(1) of the Bill.

The learned Additional Solicitor General submitted that the following amendments will be made to Clauses 3(5) proviso, 6(1)(b), 30(3) first proviso and 74 of the Bill at the Committee Stage:

Clause 3(5) proviso

Page 3, Line 27 - Add the words “by the Commission” after the word “implementation”

Clause 6(1)(b)

Page 6, Line 27 - Delete the word “overall”

Page 6, Line 32 - Delete the words “as the Commission considers necessary”

Clause 30(3) first proviso

Page 30, Line 9 - Add the words “by the Commission” after the word “implementation”

Clause 71 (1)

Page 62, Line 7 - Delete the words “as is considered necessary”

Clause 74

Page 70, Lines 11 to 16 – Delete the words commencing from “to the extent” to “Colombo Port City”

In addition to the above mentioned amendments proposed by the learned Additional Solicitor General, Court is of the view that the following amendments must also be made to overcome inconsistency with Article 12(1) of the Constitution and ensure that the Commission in exercising regulatory powers vested in other Regulatory Authorities within the Area of Authority of the Colombo Port City, should always obtain the concurrence of the respective Regulatory Authorities and the powers of such Regulatory Authorities within the Area of Authority of the Colombo Port City will continue unimpeded.

Clause 3(7)

To be shifted after Clause 73 of the Bill and re-numbered as Clause 74. The new Clause 74 will now read as follows:

“74. Nothing in this Act shall, unless otherwise specifically provided for in this Act, be deemed to restrict in any way the powers, duties and functions vested in such Regulatory Authority by any written law in relation to the Area of Authority of the Colombo Port City.”

Clauses 74 and 75

Present Clauses 74 and 75 to be re-numbered as Clauses 75 and 76 respectively

The inconsistency with Article 12(1) of the Constitution described above will cease if Clauses 3(5) proviso, 3(7), 6(1)(b), 30(3) first proviso 71(1) and 74 are amended as described in the manner referred to above.

Several Petitioners further contended that the clauses of the Bill infringe the legislative power of Parliament. In particular they submitted that Clauses 3(4), 6(1)(u), 68(1)(f) and 68(3)(a) infringe Article 76 of the Constitution read with Articles 3 and 4 since the said clauses confer power on the Commission to legislate on certain matters contrary to Article 76 read with Articles 3 and 4 of the Constitution.

The Petitioners also drew the attention of Court to Clause 68 of the Bill which provides for the imposition of punishment for the violation of a rule, code, direction or guideline issued by the Commission. It was pointed out that although Clause 72 of the Bill requires rules made under the Bill to be published in the Gazette, there is, however, no requirement for its approval by Parliament. Accordingly, it was submitted that the said clauses are inconsistent with Article 4(a) of the Constitution.

Court observes that Clause 3 of the Bill deals with the establishment of the Commission and Clause 6 stipulates powers, duties and functions of the Commission. Clause 68 of the Bill refers to offences.

Clause 3(4) of the Bill reads:

“The Commission shall be responsible for preparing, developing, amending, updating, publishing and enforcing all Community Rules and Development Control Regulations applicable within the Area of Authority of the Colombo Port City”

Clause 6 of the Bill deals with the powers, duties and functions of the Commission and Clause 6(1)(u) of the Bill reads:

“to prepare, develop, amend, update, publish and enforce all Community Rules and Development Control Regulations as may be prescribed for applicability within the Area of Authority of the Colombo Port City”

Clause 68(1)(f) of the Bill reads:

“contravenes or fails to comply with any rule, code, direction or guideline made or issued in terms of this Act,”

Clause 68(3)(a) of the Bill reads:

“Notwithstanding the provisions contained in any other written law, any person who contravenes or fails to comply with any provision of this Act or any regulation, rule, direction, order or requirement issued or imposed thereunder commits an offence under this Act and shall be liable on conviction after summary trial before a Magistrate to a fine of not less than rupees five hundred thousand and not more than rupees one million or to imprisonment for a term of not less than three months and not exceeding one year, or to both such fine and imprisonment”

The submission that the said clauses are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution is based on the fact that the Commission is conferred with the power to make rules, codes, directions or guidelines without Parliamentary control and hence such rules, codes, directions or guidelines cannot then be the basis of any criminal sanction.

Upon a careful consideration, Court is inclined to agree with the said submission. It is the view of Court that Clauses 68(1)(f) and 68(3)(a) are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution.

The learned Additional Solicitor General submitted that the following amendments will be made to Clauses 68(1)(f) and 68(3)(a) of the Bill at the Committee Stage:

Clause 68 (1) (f)

Page 60, Lines 1 to 3- Delete in its entirety

Clause 68 (3)(a)

Page 60, Line 25 - Delete the words “rule, direction, order or requirement issued or imposed”

Court is of the view that if the above amendments are made the aforementioned inconsistency will cease.

Court observes that in terms of Clause 71(2)(a) of the Bill, it is the President or the assigned Minister who is conferred with the power to make Development Control Regulations which are then placed before Parliament for approval. The role of the Commission in this process is consultative as evinced by Clauses 71(1) and 74. However, Court further observes that contrary to Clause 71(2)(a) of the Bill, in terms of Clauses 3(4) and 6(1)(u) of the Bill, the Commission has been conferred with the power to prepare Development Control Regulations without any Parliamentary control. In these circumstances, Court is of the view that Clauses 3(4) and 6(1)(u) of the Bill are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution.

The learned Additional Solicitor General submitted that the following amendments will be made to Clauses 3(4) and 6(1)(u) of the Bill at the Committee Stage:

Clause 3(4)

Page 3, Line 14 - Delete the word “for” and substitute therefor the words “to facilitate”

Page 3, Lines 16 and 17 - Delete the words “and Development Control Regulations”

Clause 6(1)(u)

Page 10, Lines 14 to 15 - Insert the words “enforce the” before the words “Development Control Regulations”

The Court is of the view that the inconsistency with Article 76 read with Articles 3 and 4 of the Constitution will cease if the aforementioned amendments are made.

Court further observes that Clause 71(1) of the Bill confers power on the “President or in the event that the subject of the Colombo Port City is assigned to a Minister, such Minister” to make Development Control Regulations. However, in the definition of the term “Development Control Regulations” in Clause 74 of the Bill, reference is only made to the President. Therefore, Court is of the view that the word “President” in the definition clause of “Development Control Regulations” should be amended to read as “President or in the event that the subject of the Colombo Port City is assigned to a Minister, such Minister”.

Another submission on behalf of the Petitioners was that the Bill as a whole is inconsistent with Chapter VI of the Constitution dealing with the Directive Principles of State Policy and Fundamental Duties. It was contended that such duties include the realisation by all citizens of an adequate standard of living and the rapid development of the whole country, equitable distribution among all citizens of the material resources of the community and social product. It was further submitted that when the Bill seeks to give concessions by excluding 14 revenue laws to the Colombo Port City, the entrepreneurs in the rest of the country will be at a disadvantage and be adversely affected.

In the course of the submissions the attention of Court was drawn to the decision in *Haputhantirige and Others v. Attorney General* (2007) 1 SLR 101 at 118 where S.N. Silva C.J. held:

“The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the ‘Directive Principles of State Policy’ contained therein 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.’ Hence the restriction added at the end of Article 29 should not detract from the noble aspiration and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert.”

It was further submitted by the Petitioners that Part IX of the Bill is inconsistent with Articles 148 and 152 of the Constitution. It was contended that the tax exemptions or incentives are

sought to be given sans any approval from the Parliament and is in total violation of Articles 148 and 152 of the Constitution. A comparison was made between the Bill and the Strategic Development Projects Act No. 14 of 2008 under which the grant of fiscal exemptions must be placed before Parliament for approval.

It was further submitted that the provisions in the Bill dealing with tax exemptions is an abdication of powers of Parliament and violates Article 76(1) read with Article 148 of the Constitution.

In view of the above submission, Court considered whether the Bill as a whole infringes Articles 3, 4, 12(1), 76 and 148 of the Constitution.

Court observes that one objective of the Directive Principles of State Policy and Fundamental Duties is the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal.

As the preamble to the Bill states, it is an attempt by the Government to give effect to the above objective through the establishment of the Colombo Port City to attract new investments. It is universally accepted that one way of attracting foreign investments is to provide fiscal incentives to the investors.

Furthermore, Article 15(7) of the Constitution permits a restriction of the application of Article 12(1) of the Constitution in the interest of meeting the just requirements of the general welfare of the democratic society, through such measures as taxation.

Article 148 of the Constitution reads:

“Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.”

In *Development Councils Bill* S.C.S.D. No. 4/1980 this Court observed:

“A wide and sweeping power to impose taxes, rates and levies at will is an attribute of the Sovereign Legislature and the conferment of such power on any other body constitutes an abdication and alienation of legislative power. In the case of the Bill this is so only because the nature and kind of taxes, rates or levies that may properly be imposed by the Development Council have not been specified in any way. The conferment of an unrestricted power of imposing taxes, rates and levies effected by section 24, and the vesting of it in another body, is such a fundamental departure from what may be done under our Constitution that it both contravenes Article 76... and is inconsistent with Article 3.” (emphasis added)

Part IX of the Bill provides for the determination and grant of exemptions or incentives for the promotion of Businesses of Strategic Importance.

Clause 52(2) of the Bill confers power on the Commission in consultation with the President or in the event that the subject of Colombo Port City is assigned to a Minister, in consultation with such Minister, to identify and designate “Businesses of Strategic Importance”, which would ensure the success of the objectives in establishing the Colombo Port City, having regard to the national interest or in the interest of the advancement of the national economy. Upon a business being so identified as a Business of Strategic Importance, exemptions or incentives as provided in Part IX may be granted in so far as it relates to its operations in and from the Area of Authority of the Colombo Port City. In the case of tax related exemptions, such exemptions may be granted, either in full or in part, and from all or any of the enactments set out in Schedule II of the Bill.

This Court has on numerous occasions emphasised that in revenue matters, in making classifications for the purpose of granting concessions or imposing liability, there is a wide discretion. [*Inland Revenue Amendment Bill* S.C.S.D. No. 3/1980; *Finance Bill* S.C.S.D. No. 28/2004, *Value Added Tax (Amendment) Bill* S.C.S.D. No. 29/2004, *Value Added Tax (Amendment) Bill* S.C.S.D. No. 2/2005, *Finance (Amendment) Bill* S.C.S.D. No. 6/2005, *Inland Revenue (Amendment) Bill* S.C.S.D.No. 5/2005, *Default Taxes (Special Provisions) Bill* S.C.S.D. No.02/2009]. Such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory.

In terms of Clause 53(1) of the Bill, the Commission only makes recommendations to the President or the Minister in charge of the Colombo Port City to grant exemptions or incentives in terms of Clause 52 who will then seek the approval of the Cabinet of Ministers in consultation with the Minister assigned the subject of Finance.

If the Cabinet of Ministers approves the project, within two weeks of such approval, an Order in terms of Clause 53(3) of the Bill shall be published in the Gazette specifying the details mentioned in sub-paragraphs (a) to (d) thereof. After thirty days of its publication, the Order is required to be placed before Parliament for information in terms of Clause 53(4) of the Bill.

Upon consideration of the clauses referred to above, we are of the view that the submission that it is the Commission which grants fiscal exemptions or incentives is misconceived. The decision on the grant of exemptions or incentives is of the Cabinet of Ministers based on the recommendation of the Commission.

Court observes that Clause 52(5) of the Bill provides for the criteria of determining Businesses of Strategic Importance.

In *Appropriation Bill* S.C.S.D. Nos. 3 & 4/2008, this Court held that legislative power of Parliament includes the “full control over public finance” as stated in Article 148 which is a vital component of the balance of power firmly established by the Constitution in relation to the respective organs of government. Such “full control” was held to have three vital components *viz*:

- (i) control of the sources of finance *i.e.* imposition of taxes, levies, rates and the like and the creation of any debt of the Republic;
- (ii) control by way of allocation of public finance to the respective departments and agencies of Government and setting of limits of such expenditure;
- (iii) control by way of continuous audit and check as to due diligence in performance in relation to (i) and (ii).

This formulation has been adopted and followed by this Court in *Fiscal Management (Responsibility)(Amendment) Bill* S.C.S.D. No. 29/2016 and in *Foreign Exchange Bill* S.C.S.D. Nos. 01/2017 to 04/2017.

Clauses 52(3) and 52(5) of the Bill reads:

“(3) Upon a business being so identified as a Business of Strategic Importance, exemptions or incentives as provided in this Part may be granted thereto, in so far as it relates to its operations in and from the Area of Authority of the Colombo Port City. In the case of tax related exemptions, such exemptions may be granted, either in full or part, and from all or any of the enactments set out in Schedule II hereto.”

“(5) Regulations may be made prescribing any further guidelines as may be necessary on the grant of exemptions or incentives, as provided for in this Part of this Act.”

The Bill as it stands now does not provide for any guidelines in the granting of exemptions or incentives. Neither the individual exemptions nor incentives go before Parliament for approval. Clauses 52(5) and 71(2)(p) as it stands now presupposes that there are guidelines in the Bill for the grant of such exemptions or incentives when there is none. Accordingly, Clause 52(3) read with Clauses 52(5) and 71(2)(p) of the Bill are inconsistent with Articles 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

In *Finance Bill* S.C.S.D. No. 3/2013, Court considered Clause 19A (1) of the Finance Bill which empowered the Minister to make regulations in respect of all matters which are required to be prescribed and specify the conditions and exemptions in relation to local sales, the procedure to be followed in granting exemptions, and specify the monitoring authority and mechanism for monitoring the grant of concessions. The Court held that the structure put in place by the Bill would not amount to derogation from the control of Public Finance by Parliament under Article 148 of the Constitution.

Thus, the Court determines 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.

The learned Additional Solicitor General submitted that the following amendments will be made to Clauses 52(5) and 71(2)(p) of the Bill at the Committee Stage:

Clause 52 (5)

Page 44, Lines 29 to 31 – Delete in its entirety and replace with the following:

“Regulations may be made prescribing guidelines on the grant of exemptions or incentives, as provided for in this Part of this Act.”

Clause 71(2)(p)

Page 65, Line 1, delete the words “any further”

Furthermore, the Court is of the view that the following amendment should also be made to remove the inconsistency identified above.

Clause 52(3)

Page 44, Line 20, Add the words “in accordance with the Regulations made under this Act...” after the words “granted thereto”.

The Court is of the view that the inconsistency with Articles 3, 4, 76 and 148 of the Constitution will cease if the proposed amendments are made.

Court further observed that Clause 53(2)(b) read with Clause 53(3)(b) of the Bill empowers the Cabinet of Ministers, on the recommendation of the Commission, to exempt enactments (listed in Schedule II of the Bill) being applicable to such Businesses of Strategic Importance. Court determines that this is inconsistent with Article 76 of the Constitution read with Articles 3 and 4 of the Constitution as it amounts to an abdication of the legislative power of Parliament.

The learned Additional Solicitor General submitted that the following amendment will be made to Clause 53(2)(b) of the Bill at the Committee Stage:

Clause 53 (2)(b)

Page 45, Line 20 - Delete the words “the specific enactments from those listed in” and substitute therefor the words “the specific exemptions from those enactments listed in”

Page 45, Line 22 - Delete the words “exempted from being”

The Court determines that Clause 53(3)(b) of the Bill should be also amended as follows:

Clause 53 (3)(b)

Page 46, Line 10 - Delete the words “the specific enactments from those listed in” and substitute therefor the words “the specific exemptions from those enactments listed in”

Page 46, Line 11 - Delete the words “exempted from being”

The Court is of the view that the inconsistency with Articles 3, 4 and 76 of the Constitution will cease if the proposed amendments are made.

The attention of Court was drawn by the Petitioners to Clause 6(1)(n) which empowers the Commission to charge fees and other charges as may be determined by the Commission and Clause 6(1)(p) which confers power on the Commission to identify local assessment rates and other levies and it was submitted by the Petitioners that they infringe Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

In so far as Clause 6(1)(n) of the Bill is concerned, the said provision empowers the Commission to charge “fees and other charges” for services and facilities provided directly by the Commission or through the Estate Manager within the Area of Authority of the Colombo Port City.

The Court is of the view that Clause 6(1)(n) of the Bill does not provide for collection of taxes or levies and as such does not attract Article 148 of the Constitution. In the course of the submissions, the learned Additional Solicitor General submitted that the clause in issue only empowers the Commission to charge fees and or other charges strictly for the services and any other facilities that the Commission would be providing. The learned Additional Solicitor

General further submitted that the said sub-clause will be amended at the Committee Stage for clarity as follows:

Clause 6 (1) (n)

Page 9, Line 16 - Insert the word “ancillary” before the word “services”

In so far as Clause 6(1)(p) is concerned, Court observes that the power granted to the Commission is to identify local assessment rates and any other levies at rates as shall be prescribed. Clause 71(2)(b) makes provision for the President or the Minister to make regulations for the purposes of Clause 6(1)(p).

Accordingly, Court determines that Clauses 6(1)(n) and 6(1)(p) are not inconsistent with Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution.

The Petitioners further submitted that Clause 40 is inconsistent with Articles 3, 4 and 148 of the Constitution since it requires a citizen to pay a ‘levy’ in respect of goods purchased at retail facilities “when leaving the Area of Authority of the Colombo Port City” without any control of Parliament.

Court observes that this objection is two-fold. Firstly, it raises the issue of infringement of Article 148 of the Constitution and secondly, it raises the issue of freedom of movement.

Clause 40(2) of the Bill reads:

“Any levy as may be required to be paid by a citizen of Sri Lanka or a resident on goods purchased at retail facilities as set out in subsection (1), when leaving the Area of Authority of Colombo Port City, shall be as prescribed.”

In so far as the collection of levies under Clause 40(2) of the Bill, Court observes that it will be as prescribed in terms of Clause 71(2)(l) of the Bill which needs the approval of Parliament and hence there will be no violation of Article 148 of the Constitution.

In so far as the freedom of movement is concerned, Court observes that, the levy must be paid, in terms of Clause 40(2) “when leaving the Area of Authority of the Colombo Port City” and in terms of Clause 71(2)(l) “at the time of leaving the Area of Authority of the Colombo Port City”.

It is pertinent to observe that Clauses 30(1) and 33(1) of the Bill require a person to obtain prior approval of the Commission in order to visit the Area of Authority of the Colombo Port City. In this regard Court observes that in terms of Clause 40(1) of the Bill, *inter alia*, a citizen of Sri Lanka is entitled to utilise any retail facilities or services within the Area of Authority of the Colombo Port City at restaurants, cinemas, entertainment facilities, shopping facilities, or parking facilities, upon making related payments, in Sri Lanka Rupees.

Court holds that when Clauses 30(1), 33(1), 40(2) and 71(2)(l) of the Bill are considered cumulatively, they are inconsistent with Article 14(1)(h) of the Constitution.

The learned Additional Solicitor General informed that the following amendments will be made to Clauses 30(1) and 40(2) of the Bill at the Committee Stage:

Clause 30 (1)

Page 29, line 24 - Delete the words “or to visit”.

Clause 40 (2)

Page 35, Line 37 - Delete the words “when leaving” and substitute therefor the words “to be taken out of”

In addition to the amendments proposed by the learned Additional Solicitor General, Court holds that Clauses 33(1) and 71(2)(l) of the Bill should also be amended as follows:

Clause 33(1)

Page 31, Lines 32 and 33, Delete the words “or to visit”

Clause 71(2)(l)

Page 64, Lines 11 and 12, Delete the words “at the time of leaving the Area of Authority of the Colombo Port City”

The inconsistency of Clauses 30(1), 33(1), 40(2) and 71(2)(l) of the Bill with Article 14(1) (h) of the Constitution will cease if all the above amendments are made.

Court observes that Clauses 60(c) and 60(f) makes provision for the Estate Manager to collect taxes imposed by the Commission. It is significant to note that Clause 6 of the Bill which sets out the powers, duties and functions of the Commission does not confer any power on the Commission to impose any form of taxes. However, Clause 6 read with either Clauses 60(c) or Clause 60(f) of the Bill implies a power in the Commission to impose taxes. Court holds that this is inconsistent with Article 148 of the Constitution.

The learned Additional Solicitor General submitted that an amendment will be made at the Committee Stage to Clause 60(c) of the Bill as follows:

Clause 60(c)

Page 53, line 14 - delete the word “taxes” and substitute therefor the word “rates”

However, in view of our observations above, Clause 60(f) should also be amended as follows at the Committee Stage:

Clause 60(f)

Page 54, line 2 - delete the word “taxes” and substitute therefor the word “rates”

The inconsistency of Clauses 60(c) and 60(f) of the Bill with Article 148 of the Constitution will cease if the above mentioned amendments are made.

It was also submitted on behalf of several Petitioners that in terms of Clause 15(1) of the Bill, the accounts of the Commission shall be audited in terms of Article 154 of the Constitution but that it goes further and provides that such auditor may be an international firm of accountants. It was submitted that this clause is inconsistent with Articles 3, 4, 12, 14 and 154 of the Constitution.

Clause 15(1) of the Bill reads:

“The accounts of the Commission shall be audited annually by a qualified auditor in terms of Article 154 of the Constitution. For the purposes of this section, the qualified auditor so appointed may be an international firm of accountants.”

The word “qualified auditor” has been defined in Article 154(8) of the Constitution to mean:

“(a) an individual who, being a member of the Institute of Chartered Accountants of Sri Lanka, or of any other Institute established by law, possess a certificate to practice as an Accountant issued by the Council of such Institute; or

(b) firm of Accountants each of the resident partners of which, being a member of the Institute of Chartered Accountants of Sri Lanka or of any other Institute established by law, possess a certificate to practice as an Accountant issued by the Council of such Institute.”

There is some merit in the submission that Clause 15(1) of the Bill may violate Article 154 of the Constitution if the two sentences therein are read disjunctively. It is the view of this Court that the two sentences in Clause 15(1) of the Bill must be read conjunctively to avoid any inconsistency with Article 154 of the Constitution and hence “an international firm of accountants” referred to in Clause 15(1) will become a “qualified auditor” only if it fulfills the criteria specified in Article 154(8) of the Constitution. For the reasons set out above, Court is of the view that Clause 15(1) of the Bill is not inconsistent with Article 154(8) of the Constitution.

It was also submitted on behalf of several Petitioners that Clauses 35(a) and 35(b) of the Bill provides that all employment income derived by both non-residents and residents (foreigners and locals) working at the Colombo Port City to be free from income taxes. It was contended that there is no rationale whatsoever for providing an unconditional and indefinite exemption from income tax for persons in employment in the Colombo Port City in the context of most of these employees likely being expatriates. Hence, it was submitted that these clauses in particular and the Bill in general are therefore entirely discriminatory in nature and not in the best interest of the national economy and is inconsistent with Articles 12 and 14 of the Constitution.

Furthermore, it was submitted that, since Clause 35 provides that all remuneration to employees shall be paid in the designated foreign currency other than in Sri Lanka Rupees, the Bill attempts to exclude the operation of Monetary Act, Banking Act and many other laws and is inconsistent with Articles 12 and 14 of the Constitution.

The learned Additional Solicitor General submitted that even under the existing laws, there is no prohibition on Sri Lankans being remunerated in designated foreign currencies. The attention of Court was drawn to *Appropriation Bill* S.C.S.D. No. 5/1989 (Special), and it was contended that Court implicitly took cognizance of the fact of Sri Lankan citizens being paid in foreign currency. When the Petitioner in that case argued that Sri Lankans paid in American Dollars would be at an advantage over those paid in Sri Lankan Rupees, due to depreciation of local currency and, as such, violative of Article 12 of the Constitution, Court observed that this violation would be a result of the depreciation of currency and not a consequence of the Bill.

Court observes that the rationale for granting income tax exemptions to employees in the Colombo Port City is a permissible classification. In any event, as correctly submitted by the learned Additional Solicitor General, the decision to grant tax exemptions is a matter of economic and fiscal policy and the State has a wide discretion in this area.

In *Inland Revenue (Amendment) Bill* S.C.S.D. No. 3/1980, Court held:

“It is a matter for the legislature to decide what consideration relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to. Presumably, this provision is sought to be enacted on the basis of economic consideration in respect of which the decision must be largely left to the Legislature in view of the inherent complexity of fiscal adjustment or diverse elements that requires to be made.”

Court is of the view that there is no merit in the submission that Clause 35 violates Article 12 or 14 of the Constitution.

The attention of Court was also drawn by several Petitioners to Clauses 65(3), 6(1) (c) to (f) and submitted that the clauses referred to amounts to a delegation of powers of the President in terms of Article 33(f) of the Constitution and are inconsistent with Article 33 read with Article 4(b) of the Constitution.

It was further submitted that Article 33(f) vests such power in the President to make grants and disposition of land and movable property vested in the Republic. Clause 65(3) of the Bill states that the President may issue a land grant under the Crown Land Ordinance in the name of the Commission in respect of land comprising the Area of the Authority of the Colombo Port City. Thereafter, the Commission is empowered to lease land in terms of Clauses 6(1) (c) and 6(1) (d) of the Bill and lease, or transfer condominium parcels on free hold basis in terms of Clauses 6(1) (e) and 6(1)(f) of the Bill and it was the contention of the learned counsel that this process amounts to delegation of the powers of the President.

Court observes that in terms of Article 33(f) of the Constitution, the President has the power to make such grants and dispositions of lands and immovable property of the Republic as he is by law required or empowered to do. As this Court has already observed, section 2(1)(a) of the State Lands Ordinance confers power on the President to make absolute or provisional grants of State land. Therefore, Clauses 65(3), 6(1)(c) to 6(1)(f) of the Bill does not contravene Article 33(f) of the Constitution and therefore Court is of the view that the said clauses are not inconsistent with Article 4(b) of the Constitution.

Several Petitioners submitted that Clause 37 of the Bill permits an ‘authorised person’ with the permission of the Commission to *‘engage in business in Sri Lanka, with a citizen of Sri Lanka or a resident, who is engaged in business in Sri Lanka, outside the Area of Authority of the Colombo Port City’*. It was further contended on behalf of the Petitioners that the ‘authorised persons’ who will be enjoying exemptions or incentives granted to them, would have an undue advantage over and above citizens of this country who are engaged in similar businesses outside the Area of Authority when such authorised persons are permitted to engage in business activity outside the Area of Authority of the Colombo Port City which will lead to creation of an “unequal playing field” as far as the conduct of such businesses are concerned. It was also

submitted that the situation thus created is a clear violation of Article 12(1) as well as Article 14(1)(g) of the Constitution.

The Court gave consideration to the submissions in relation to Clause 37 of the Bill and is of the view that there is merit in the contention that Clause 37(1) as it stands now, is inconsistent with Article 12(1) as well as Article 14(1)(g) of the Constitution. The Court further observes that such inconsistency would occur in the event an authorised person is permitted to make use of the exemptions or incentives granted to such authorised person in engaging in business outside the Area of Authority of the Colombo Port City to the detriment of the local business community who would not be enjoying such exemptions or incentives.

If exemptions or incentives given under this Bill is used outside the Area of Authority to the detriment of similar local industries and services, that would infringe Articles 12(1) and 14(1)(g) of the Constitution.

Although this Court does not see any reason to deprive an authorised person engaging in any business outside the Area of Authority of the Colombo Port City, what is obnoxious is the taking advantage of the exemptions or incentives granted to such authorised person in engaging in business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority within the territory of Sri Lanka. This inconsistency will cease if a new sub-clause is added to Clause 37 of the Bill restraining such authorised person making use of any exemptions or incentives granted under this Bill when conducting business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority but within the territory of Sri Lanka.

Part VII of the Bill deals with Offshore Companies to operate within the Area of Authority of the Colombo Port City.

Clause 41 of the Bill provides for the registration of companies as offshore companies for the purposes of the Bill. Clause 42 provides for the issue of licence to engage in offshore banking

business in and from the Area of Authority of the Colombo Port City whilst Clause 43 makes provision for its cancellation. In terms of Clauses 44 and 45, regulations can be made to give effect to the scope of the Bill and other matters specified therein.

Several Petitioners submitted that none of the regulatory obligations and duties mandated by the Companies Act No. 7 of 2007 such as filing of Returns and the need to comply with the duties cast upon directors is applicable to these offshore companies. It was further submitted that companies that do not require disclosing their shareholders and/or ultimate beneficiaries are often a vehicle for money laundering and financial crimes, the world over.

Further, the attention of Court was drawn to the preamble to the Bill which refers to the Directive Principles of State Policy enshrined in the Constitution and it has overlooked two crucial Directive Principles *viz.* Articles 27(2)(e) and 27(2)(f) which speaks of equal distribution and dispersal of '*material resources of the community*', '*the social product*' and '*the means of production, distribution and exchange*' among '*all the people of Sri Lanka*'. It was submitted that if the true beneficiaries of such offshore entities are not disclosed, and such companies engage in or facilitate illicit activities such as money laundering, bribery and corruption, insider dealings, tax fraud and terrorist financing, the purpose of the Bill is entirely vitiated and is inconsistent with Articles 3, 12 and 14 of the Constitution.

The learned Additional Solicitor General submitted that making special provisions for offshore companies is not something that is alien to the laws of Sri Lanka and drew our attention to Chapter XI of the Companies Act which provides for such registration. It was submitted that as the Bill seeks to create a Special Economic Zone, the application is routed through the Commission, as part of the Single Window Investment Facilitator, created by the Bill and that this is similar to an investment zone established under Board of Investment (BOI) Act where, licensed enterprises within the area of authority of the BOI is deemed to be a location offshore.

It was further submitted by the learned Additional Solicitor General that the contention that the exclusion of the provisions of the Companies Act, would create a foundation for fraud and money laundering is wholly devoid of merit. She pointed out that excluding companies

registered as ‘offshore’ companies, is not a new concept. The Companies Act No. 7 of 2007 provides for the registration of a company as a ‘off-shore company’ and upon such registration, in terms of section 262(2) of the said Act, ‘A certificate of registration issued to an off-shore company under this Part of this Act, shall exempt the company from complying with any other provision of the Act’.

It was pointed out by the learned Additional Solicitor General that in view of the provisions of Clauses 3(5) and 3(7) of the Bill, the power of the Registrar of Companies to supervise such company, in the manner it would a offshore company registered under Part XI of the Companies Act remains unaltered. Moreover, the learned Additional Solicitor General drew the attention of Court to the fact that Schedule III of the Bill lists out the laws that are sought to be exempted from the Area of Authority of the Colombo Port City.

Court observes that laws which seek to prevent money laundering and terrorist financing such as The Convention on the Suppression of Terrorist Financing Act No. 25 of 2005, Prevention of Money Laundering Act No. 5 of 2006 and the Financial Transactions Reporting Act No. 6 of 2006 apply within the Area of Authority of the Colombo Port City. It is to be noted that none of these Acts are included in Schedule II or III of the Bill.

The Court considered the clauses of Part VII of the Bill and is of the view that there is no merit in the submission that the purpose of the Bill is either entirely vitiated or is inconsistent with Articles 3, 12 and 14 of the Constitution.

The Petitioners also submitted that Part VIII of the Bill which provides for the operation of offshore banks within the Colombo Port City excludes the application of the provisions of Part IV of the Banking Act for such entities. They further submitted that the provisions of the Banking Act and the Companies Act have no application to such entities which is discriminatory between offshore banks operating within Sri Lanka and offshore banks (companies licensed in other countries) operating in the Colombo Port City. As a result it was submitted that Part VIII of the Bill in general and Clauses 42, 43 and 44 in particular are inconsistent with Articles 3, 4 and 12 of the Constitution.

Clause 42 of the Bill provides for the issuance of a licence to engage in offshore banking business whilst Clause 43 provides for the cancellation of such a licence. Clause 44 confers on

the President or the assigned Minister the power to make regulations and Clause 45 explains the matters on which such regulations may be made. The nature of business that may be authorised to be carried on by those engaged in offshore banking business is identified in Clause 46.

Having examined the above clauses carefully, the Court is of the view that the clauses in Part VIII of the Bill are not inconsistent with Articles 3, 4 and 12 of the Constitution.

Part XIII of the Bill deals with ‘International Commercial Dispute Resolution Centre’. Clause 62(2) of the Bill requires that any dispute that may arise, within the Area of Authority of the Colombo Port City, between (a) the Commission and an authorised person or an employee of an authorised person where relevant; and (b) the Commission and a resident or an occupier, provided that there exists in relation thereto, an agreement or other legally binding document as between the Commission and such resident or occupier, shall be resolved by way of arbitration conducted by the International Commercial Disputes Resolution Centre. Clause 62(3) requires every authorised person to ensure that all agreements entered into by such authorised person in terms of Clause 32 of the Bill, shall contain a provision requiring a mandatory reference of any dispute that may arise within the Area of Authority of the Colombo Port City under such agreement, to arbitration, in terms of this Clause.

On behalf of the Petitioners it was submitted that arbitration is consensual and cannot be the subject matter of mandatory reference or of compulsory submission, ousting access to judicial institutions of the country. It was further submitted that a person who would rather have his dispute resolved by the ordinary courts of Sri Lanka is denied the right to seek redress before the courts of law and is forced to arbitrate and that this is inconsistent with Articles 3, 4, 12 and 14 of the Constitution. It was also submitted that these provisions amount to a suspension ‘to such extent’ of Chapter XVI of the Constitution.

The learned Additional Solicitor General submitted that these clauses only require the Commission and an authorised person (the parties to a commercial agreement) to include a provision in the Agreement, that they agree to the resolution of any dispute under the Agreement by arbitration under Part XIII of the Bill and that it is not an “ouster clause” which precludes the courts of Sri Lanka from exercising judicial power according to law.

Court observes that arbitration is recognised by the law of Sri Lanka as a method of dispute resolution. The Arbitration Act No. 11 of 1995 is not an enactment excluded from application within the Area of Authority of the Colombo Port City in terms of Schedule III of the Bill. Thus, it will be applicable to all arbitrations commenced under the agreement between the Commission and an authorised person in terms of the Bill.

We further observe that an authorised person or one of his employees or a resident or occupier of the Colombo Port City is put on notice that arbitration is mandatory in given circumstances. When they make the choice of assuming such status as an authorised person or one of his employees or a resident or occupier, it is done through a choice they make and in that sense party autonomy is preserved. In any event, we observe that several provisions of the Arbitration Act, No. 11 of 1995 provides for the intervention of court in given circumstances. Accordingly, Court holds that Part XIII of the Bill is not inconsistent with Articles 3, 4, 12 and 14 of the Constitution.

The learned Additional Solicitor General, however, submitted that for the purposes of clarity, the following amendments will be made:

Clause 32

Page 31, line 21- Insert the words “concerning or” before the word “arising”

Clause 62 (5)

Page 56, Line 10 - Insert the words “or setting aside” after the word “enforcement”

Clause 63(1) of the Bill requires courts to give priority to any legal proceedings instituted on civil and commercial matters where the cause of action has arisen within the Area of Authority of the Colombo Port City. The Petitioners submitted that granting of such priority at the expense of other litigation is a clear violation of Articles 3, 4 and 12 of the Constitution.

Court is of the view that there is no merit in this contention. One of the main purposes of the Bill is to establish a Special Economic Zone within which there is ease of doing business that will attract new investments primarily to facilitate the diversification of the service economy and to promote the inflow of foreign exchange into such Zone. In order to achieve these objectives, a

conducive environment must be created for new investments. One critical concern to any investor is to ensure that disputes are resolved expeditiously. It is a permissible classification and there is no inconsistency with Articles 3, 4 and 12 of the Constitution.

Several Petitioners drew the attention of Court to Clause 63(2) of the Bill which states that *“the inability of a particular attorney-at-law to appear before the Court on a particular date for personal reasons (including engagement to appear on that date in any other court or tribunal) shall not be a ground for postponement of commencement or continuation of the trial or be regarded as an exceptional ground warranting such postponements.”*

Court after careful consideration is of the view that this clause is not inconsistent with any provision of the Constitution. However, we reiterate the observation of Court in the *Judicature (Amendment) Bill S.C.S.D. Nos.7-13/2018* that clauses of this nature should have *“sufficient laxity to allow the Judge to use his discretion when deciding what amounts to ‘exceptional circumstances’ ”*.

The learned Additional Solicitor General submitted that for the purposes of clarity, Clause 63 of the Bill will be amended as follows at the Committee Stage:

Clause 63

Page 56, lines 21 to 38 – Delete in its entirety and replace with the following:

“In order to foster international investor confidence in the ease of doing business and in the enforcement of contracts, in the national interest or in the interest of the advancement of the national economy, priority shall be given by courts in relation to any legal proceedings instituted in civil or commercial matters, where the cause of action has arisen within, or in relation to any business carried on in or from, the Area of Authority of the Colombo Port City, to hear such cases expeditiously on a day-to-day basis, unless in the opinion of court, exceptional circumstances warrant postponement of commencement or continuation of trial, for reasons which shall be recorded by court.”

Clause 73 of the Bill excludes the operation of several laws listed in Schedule III within the Area of Authority of Port City. The basis for such exclusion as set out in Clause 73 is “the subjects dealt with in such enactments have been, *mutatis mutandis*, set out in this Act, or alternate legal

arrangements have been specifically set out in this Act or such enactments are not relevant and are not required to be applicable within the Area of Authority of the Colombo Port City”.

Petitioners contend that Clause 73 read with Schedule III of the Bill is inconsistent with Articles 2, 3, 4 and 12(1) of the Constitution.

The Area of Authority of the Colombo Port City is devoid of a ‘community’ at present and it is envisaged that the provisions of the Bill would become applicable to the ‘community’ in such area once the development work is completed. Upon an analysis of the clauses of the Bill, it is apparent that alternate legal arrangements are specifically provided for in the Bill that largely covers the subjects dealt with in the enactments that are excluded from the operation of the Area of Authority of the Colombo Port City in terms of Schedule III of the Bill.

Constitutionality of a similar provision was examined by the Constitutional Court in its decision relating to the *Greater Colombo Economic Commission Bill* (Decisions of the Constitutional Court of Sri Lanka, Vol. 6, page 5) and it was observed, *“This clause gives the power to the Commission to make any such law applicable to an enterprise. This power as the four laws have not been made applicable to the area is clearly legislative in nature. Secondly, it is within the Power of the Commission to make a law applicable to one enterprise and not to the others.”* The Court therefore determined that the said clause contravenes Sections 5, 45 and 18(1)(a) of the Constitution(1972). The Constitutional Court recognised that the power to exclude the operation of certain laws ‘in the area’ as a legislative power. However, the inconsistency with the Constitution arose due to the vesting of such power with the Greater Colombo Economic Commission.

As opposed to the powers that were sought to be vested in the Greater Colombo Economic Commission, Clause 73 of the Bill does not confer any such legislative power on the Commission to make any of the laws in Schedule III applicable to any of the authorised persons. No power is vested with the Commission to amend Schedule III either. The exclusion of the specified laws as envisaged takes place through the exercise of its legislative power by Parliament.

Court is of the view that Clause 73 of the Bill read with Schedule III is within the legislative power of Parliament as set out in Article 75 of the Constitution and is not inconsistent with any of the Articles in the Constitution.

In response to submissions made by several Counsel on behalf of the petitioners relating to rest of the clauses of the Bill, the learned Additional Solicitor General submitted that amendments will be made to the following clauses of the Bill at the Committee Stage:

Clause 6(1)(n)

Page 9, Line 16 - Insert the word “ancillary” before the word “services”

Clause 7(1)

Page 13, Line 15 – Insert the words “while ensuring that the majority are Sri Lankans” after the word “President”

Clause 9(4)

Page 15, Line 4 - Delete the words “such Minister”

Clause 32

Page 31, Line 21- Insert the words “concerning or” before the word “arising”

Clause 45

Page 41, Line 4 - Insert the words “offshore banking business, reserve and” before the words “capital requirements”

Clause 46(g)

Page 41, Lines 34 and 35 - Delete in its entirety

Clause 62(5)

Page 56, Line 10 - Insert the words “or setting aside” after the word “enforcement”

Clause 63

Page 56, Lines 21 to 38 - to be deleted and replaced with the following:

“In order to foster international investor confidence in the ease of doing business and in the enforcement of contracts, in the national interest or in the interest of the advancement of the national economy, priority shall be given by courts in relation to any legal proceedings instituted in civil or commercial matters, where the cause of action has arisen within, or in relation to any business carried on in or from, the Area of Authority of the Colombo Port City, to hear such cases expeditiously on a day-to-day basis, unless in the opinion of court, exceptional circumstances warrant postponement of commencement or continuation of trial, for reasons which shall be recorded by court.”

Clause 72

Page 66, Lines 4 and 5 - To be deleted and replaced with the following:

“All rules made under this Act shall be published in the Gazette within three months of the formulation thereof.

Clause 74

Page 71, Line 2 - Delete the word “judicial” and substitute therefor the word “juristic”

Schedule 2, Item 6

Page 73 - Delete reference to the “Debit Tax Act, No 16 of 2002”

General Amendment

The reference to “in the national interest and the interest of the advancement of the national economy”, wherever it occurs in the Bill, be amended to read as “in the national interest or in the advancement of the national economy”.

The Determination of the Court:-

The determination of the Court as to the constitutionality of the Bill titled “Colombo Port City Economic Commission” is as follows:

(i) The provisions of Clauses 3(6), 30(3) second proviso, 55(2) and 58(1) of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(6)

Page 3, Line 33 - Delete the words “provide such concurrence” and substitute therefor the words “communicate its decision”

Clause 30(3), second proviso

Page 30, Line 15 - Delete the words “render such concurrence” and substitute therefor the words “communicate its decision”

Clause 55(2)

Page 49, Lines 16 and 17 - Delete the words “provide such concurrence” and substitute therefor the words “communicate its decision”

Clause 58(1)

Page 52, Lines 9 and 10 - Delete the words “render such concurrence” and substitute therefor the words “communicate its decision”

(ii) The provisions of Clauses 3(5) proviso, 3(7), 6(1)(b), 30(3) first proviso, 71(1) and 74 [interpretation “Regulatory Authority”] of the Bill are inconsistent with Article 12(1) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(5) proviso

Page 3, Line 27 - Add the words “by the Commission” after the word “implementation”

Clause 6(1)(b)

Page 6, Line 27 - Delete the word “overall”

Page 6, Line 32 - Delete the words “as the Commission considers necessary”

Clause 30(3) first proviso

Page 30, Line 9 - Add the words “by the Commission” after the word “implementation”

Clause 71(1)

Page 62, Line 7 - Delete the words “as is considered necessary”

Clause 74

Page 70, Lines 11 to 16 – Delete the words commencing from “to the extent” to “Colombo Port City”

Clause 3(7)

To be shifted after Clause 73 of the Bill and re-numbered as Clause 74. The new Clause 74 will now read as follows:

“74. Nothing in this Act shall, unless otherwise specifically provided for in this Act, be deemed to restrict in any way the powers, duties and functions vested in such Regulatory Authority by any written law in relation to the Area of Authority of the Colombo Port City.”

Clauses 74 and 75

Present Clauses 74 and 75 be re-numbered as Clauses 75 and 76 respectively

(iii) The provisions of Clauses 3(4), 6(1)(u), 68(1)(f) and 68(3)(a) are inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 3(4)

Page 3, Line 14 - Delete the word “for” and substitute therefor the words “to facilitate”

Page 3, Lines 16 and 17 - Delete the words “and Development Control Regulations”

Clause 6(1)(u)

Page 10, Lines 14 to 15 - Insert the words “enforce the” before the words “Development Control Regulations”

Clause 68 (1)(f)

Page 60, Lines 1 to 3 - Delete in its entirety

Clause 68(3)(a)

Page 60, Line 25 - Delete the words “rule, direction, order or requirement issued or imposed”

(iv) The provisions of Clause 52(3) read with Clauses 52(5) and 71(2)(p) of the Bill are inconsistent with Article 148 of the Constitution read with Articles 3, 4 and 76 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 52(3)

Page 44, Line 20 - Add the words “in accordance with the Regulations made under this Act...” after the words “granted thereto”

Clause 52(5)

Page 44, Lines 29 to 31 – Delete in its entirety and replace with the following:

“(5) Regulations may be made prescribing guidelines on the grant of exemptions or incentives, as provided for in this Part of this Act.”

Clause 71(2)(p)

Page 65, Line 1 - delete the words “any further”

(v) The provisions of Clauses 30(1), 33(1), 40(2) and 71(2)(l) of the Bill are inconsistent with Article 14(1)(h) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 30(1)

Page 29, Line 24 - Delete the words “or to visit”.

Clause 33(1)

Page 31, Lines 32 and 33 - Delete the words “or to visit”

Clause 40(2)

Page 35, Line 37 - Delete the words “when leaving” and substitute therefor the words “to be taken out of”

Clause 71(2)(l)

Page 64, Lines 11 and 12 - Delete the words “at the time of leaving the Area of Authority of the Colombo Port City”

(vi) The provisions of Clause 53(2)(b) read with Clause 53(3)(b) of the Bill is inconsistent with Article 76 of the Constitution read with Articles 3 and 4 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 53(2)(b)

Page 45, Line 20 - Delete the words “the specific enactments from those listed in” and substitute therefor the words “the specific exemptions from those enactments listed in”

Page 45, Line 22 - Delete the words “exempted from being”

Clause 53(3)(b)

Page 46, Line 10 - Delete the words “the specific enactments from those listed in” and substitute therefor the words “the specific exemptions from those enactments listed in”

Page 46, Line 11 - Delete the words “exempted from being”

(vii) The provisions of Clauses 60(c) and Clause 60(f) of the Bill is inconsistent with Article 148 of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistencies will cease if the clauses are amended as follows:

Clause 60(c)

Page 53, line 14 - delete the word “taxes” and substitute therefor the word “rates”

Clause 60(f)

Page 54, line 2 - delete the word “taxes” and substitute therefor the word “rates”

(viii) The provisions of Clause 37 of the Bill is inconsistent with Article 12(1) and 14(1)(g) of the Constitution and could be validly passed only with the special majority provided for in Article 84(2) of the Constitution.

However, the said inconsistency will cease if a new sub-clause is added to Clause 37 of the Bill restraining such authorised person making use of any exemptions or incentives granted under this Bill when conducting business outside the Area of Authority of the Colombo Port City to the detriment of similar businesses conducted outside such Area of Authority but within the territory of Sri Lanka.

We have examined the rest of the clauses of the Bill and determine that they are not inconsistent with the Constitution.

We determine that upon the amendments suggested by this Court, referred to in paragraphs (i)-(viii) under “the determination of Court” being effected, the Bill and its provisions will cease to be inconsistent with the Constitution.

We place on record our deep appreciation of the assistance given by all learned Counsel for the Petitioners and Intervient Petitioners and the learned Additional Solicitor General.

Jayantha Jayasuriya, PC.
Chief Justice

Buwaneka Aluwihare, PC.
Judge of the Supreme Court

Priyantha Jayawardena, PC .
Judge of the Supreme Court

Murdu N.B. Fernando, PC.
Judge of the Supreme Court

Janak De Silva
Judge of the Supreme Court