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Creation of New Urban Land by Reclaiming the Sea in Colombo Port City, Sri Lanka

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View to the seaside road in downtown Colombo, Sri Lanka @Shutterstock

Sri Lanka is a medium sized island state with approximately 22 million people. The island has a total area of 65,610 km², with 64,740 km² of land and 870 km² of water. The coastline is 1,340 km long. After nearly 500 years of colonial rule, Sri Lanka gained independence in 1948. Though the country is rich with natural resources, development initiatives by various successive governments in the post-independence era have not borne much fruit, mainly due to the civil and communal strife that has lasted more than 25 years.

The commercial capital, Colombo, is an overpopulated, unplanned old coastal city which badly needs expansion. If the declared ambitions of every elected government since 1977 are to be realized - i.e. to develop Colombo as a regional commercial hub - the expansion of the central business district is a must. It is against this backdrop that the idea of reclaiming land was first mooted and considered by the government almost 25 years ago.

The expansion of the Colombo central business district (CBD) by reclaiming land from the sea was originally proposed in 1991 by the then Sri Lankan Industries, Science and Technology Minister, Ranil Wickremesinghe (the current Prime Minister

of Sri Lanka). At that time, he presented a conceptual plan to develop the Western Province of Sri Lanka as a megapolis to the visiting Japanese Prime Minister, Toshiki Kaifu, with the aim of getting Japanese assistance. However, development of the concept came to a halt with the change of government in 1994. Subsequently, when the United National Party, then headed by Ranil Wickremesinghe, came back in to power and formed a government in 2001, the Singaporean Housing Development Board's (HDB) design subsidiary, CESMA, was invited to develop the Western Region Megapolis plan. A proposal based on the said plan was submitted to the Board of Investment of Sri Lanka (BOI) to call for expressions of interest by investors. Under the CESMA Plan, Colombo's CBD was to be expanded for real

estate development by reclaiming approximately 145 ha of land from the sea to the south of the proposed Colombo South Port breakwater by 2010. However, the fall of the government in April 2004 following a snap election called for by the then president, Chandrika Kumaranatunga, led to the project being shelved.

The new initiative to develop a port city in Colombo was declared in or about 2013 by the government led by President Mahinda Rajapaksa. It is important to note that this was a surprise move given that there had been no indication of any intent by the government to reclaim land to expand Colombo. In fact, the government policy statement entitled Mahinda Chinthanaya: A Vision for New Sri Lanka, which dealt with the government's intended development plans for the period 2006 – 2016, made no mention of such a development goal.

Following the government's declaration of its desire to reclaim land from the sea and expand Colombo's CBD, in 2014 an unsolicited proposal was submitted by the Chinese state-owned China Communication and Construction Company (CCCC). This was evaluated by a cabinet-appointed negotiation committee and, after negotiations which lasted approximately a year, a concession agreement was signed in September 2015 between the Sri Lanka Ports Authority, a statutory corporation, and the Chinese investor, CHEC Colombo Port City Private Ltd., a fully owned subsidiary of the CCCC, to develop the Colombo Port City. It was envisaged that a land area of 233 ha would be created by the reclamation, of which approximately 8 per cent was to be given to the investor on free-hold basis and about 40 per cent on a 99-year lease as consideration for the investment made.

At the time, the project was severely criticized. Some opposition parliamentarians said the project had been implemented without proper legal due diligence. The key criticisms were a) the signing authority for the government had no legal capacity to enter into the agreement; b) no adequate environmental impact assessment had been conducted before approving the project and c) that from an environmental perspective, the project could lead to disastrous consequences including inter alia, sea erosion, the destruction of marine life, harm to fishing communities and climate change.

In March 2015, a new government unilaterally suspended the project. However, after several months of negotiations and the completion of what was called a "supplementary" environmental impact assessment, or "SEIA", the new government signed a fresh agreement under which the area to be reclaimed was substantially increased.

Against this backdrop, the key aim of this case study is to answer the following questions:

1. Is there a genuine need for expanding the CBD area of Colombo?
2. Is the reclamation of land from the sea a viable and a sustainable solution?
3. What are the environmental risks associated with such land reclamation projects?
4. Were such risks adequately assessed?

5. Were the legal requirements fulfilled when procuring such a project and when assessing the environmental risks?
6. Are there any merits in the objections raised concerning the project?

1. INTRODUCTION

1.1 The country

Sri Lanka is a lower-middle-income country with around 22 million inhabitants. The island state's main economic sectors include: agricultural commodities (such as tea, rubber and coconut), gems, tourism, shipping and apparel manufacturing.

The country's abundance of natural resources and strategic location made it a target for colonization by European powers looking to take advantage of the Silk Road's wealth. From the sixteenth century, Ceylon, as it was formerly referred to, was ruled by the Portuguese, Dutch and British respectively for over four centuries. The country only officially regained its independence from the British in February 1948 and since then has enjoyed nation status with democratically elected governments.

Post-independence, the country was expected to flourish into a symbol of success in the region but, in large part due to civil and communal unrest that stunted economic growth and hindered development, it has fallen short of expectations. To be more specific, there were two major youth uprisings, the first in the early 1970s and the latter in the late 1980s by a left-wing political group known as the Janatha Vimukthi Peramuna (JVP). The official death toll in the first uprising was 1,200 but unofficial figures reliably estimated it to be between 4,000 and 5,000 (Fernando, 2013). The second insurrection lasted from 1987 to 1989 with the JVP resorting to subversion, assassinations, raids and attacks on military, civil administration and civilian targets. The official death toll is said to be around 25,000 (Gunaratna, 1998). The worst was the ethnic conflict between the majority Sinhalese community and the minority Tamil community which started in or about 1983 and lasted for approximately 30 years, causing the deaths of over 60,000 on both sides (LLRC, 2011; Gordon, 2011).

Since the elimination of the leadership of the Liberation Tigers of Tamil Eelam (LTTE), the separatist group largely responsible for the armed struggle which led to the civil war in 2011, Sri Lanka is currently in a period of peace and prosperity and is rebuilding its image and social and economic infrastructures. Despite the absence of war, some critics argue that the country is far from experiencing stable peace, especially given that there are over 350,000 internally displaced people in Sri Lanka (Muggah, 2013) and the Tamil diaspora and several Western nations still question the initiatives and motives of the Sri Lankan Government for establishing and maintaining lasting peace.

1.2 The capital and the CBD

Colombo is the largest city in Sri Lanka and is located on the western coast of the island in the District of Colombo. Formerly the country's official capital, it is now

referred to as the country's commercial and financial capital. Sri Lanka's legislative capital since 1977, Sri Jayewardenepura Kotte, is located approximately 11 km away from the city centre in one of Colombo's suburbs.

The District of Colombo is one of the 25 administrative districts of Sri Lanka. It is approximately 699 km² and has over 5.6 million inhabitants in the metropolitan area (World Bank, 2015), thus making it the most densely populated district in the country. The city of Colombo is approximately 37 km² in size and is home to over 750,000 people according to the 2011 census. The country's largest and busiest port (the Port of Colombo) is in Colombo Fort, the area that has been considered to be the CBD of Colombo since independence in 1948.

Colombo's CBD is a relatively small stretch of land that contains many important landmarks including the former parliament building, the World Trade Centre (WTC) and banking headquarters.

The strategic positioning of Colombo, which borders the Indian Ocean and is at the heart of East-West trade routes, made it an optimal location for the country's colonial rulers to establish a trading hub. To bolster trading activities, a port was built in the city's natural harbour, towards the south-western shores of the Kelani River. Prior to the Portuguese invasion in 1505, Colombo's harbour was already well established and had been used by silk-road merchants from China, Persia and India from as early as the fourteenth century. The city's name is derived from the Sinhala words *Kolon Thota*, which means "port on the Kelani River", and evidences the inextricable link between the city and its port.

Colombo's infrastructure has, by and large, been focused around the main port to facilitate the transportation of commodities to and from the hinterland through the development of railroad and canal networks. As trading increased, the city began to grow in size, population and density, with most of the colonial era development occurring in the area surrounding the port.

1.3 The need for expanding the CBD of Colombo

In 2011, Colombo was ranked among the world's 10 worst cities to live in by the Economist Intelligence Unit's (EIU) Liveability Survey. According to the survey, Colombo is ranked 131 out of 140 cities.

The current population of Colombo is estimated to be over 750,000. The number would increase to over 5 million if it included the surrounding metropolitan district. The rapid population increase, mainly the result of economic migration from less developed areas into Colombo, has contributed to the unplanned proliferation of slums, a lack of appropriate infrastructure and inadequate public utilities. As a coastal city lying only 1.5 metres above sea level, Colombo is at high risk of flooding and is prone to cyclones and the risk is intensifying as climate change increases the volatility and frequency of severe weather conditions.

There is limited land in Colombo, especially in the core CBD area. There are a few reasons for this. Firstly, the CBD is based in the former fort that was built by the Dutch in the sixteenth century and was limited in its expansion by the physical boundaries of the fort. Much of the commercial and business-related activities were concentrated around the narrow streets of the fort which, with modern traffic levels, are now un navigable. Secondly, due to Sri Lanka's archaic land acquisition laws that have largely remained unchallenged - such as the ordinances that were introduced during British rule - the majority of land within the CBD is held privately. Any moves to acquire land from private people has been unpopular with politicians who are hesitant to support decisions that could be unwelcomed by the electorate. It has been extremely cumbersome for the government to acquire prime real estate for commercial developments as, quite apart from lacking political support, any successful applications are vehemently opposed by litigants, leading to significant delays and making any efforts in this regard redundant.

To stimulate economic growth there is a need for quality real estate in the heart of the CBD and the most viable option to create this land and space for investors and businesses is through the expansion of the city. According to Sri Lanka's Ministry of Megapolis and Western Development, two decisive inter-dependent transformations are required in Sri Lanka's forward march to achieve the status of a high-income country. The first involves the spatial transformation of urban agglomerations in the western region of the country, where Colombo is situated and, secondly, the structural transformation of the national economy as a whole (Ministry of Megapolis and Western Development, 2015). The Expansion of the Colombo CBD is seen as an essential requirement under the ministry's Western Region Development Plan.

As discussed, the option of acquiring land from private citizens is burdensome, time consuming and is not feasible in Colombo. The most viable option to create this land and space, and one that has been contemplated since the 1990s, is through the reclamation of land from the sea, thereby extending the land area for development whilst also maintaining a close proximity to the current CBD.

1.4 The Colombo Port City Project: historical aspects

The first attempt to develop the CBD of Colombo by expanding the city limits through a port city built on reclaimed land, was made in the late 1990s when the government invited a Singaporean company, CESMA (now known as now Suburna), to study the Colombo Metropolitan Regional Structure Plan. The final plan, published in 2004 and developed by a cross-functional Sri Lankan and Singaporean team, proposed a western region "megapolis" by 2030. However, the concept plans could not be implemented due to the high cost of building the breakwater in deep water to protect the reclaimed land. The study concluded that a port city would become financially feasible if and when a breakwater was integrated with the Colombo Port Expansion Project.

2. THE DEVELOPMENT OF THE PORT CITY

2.1 The unsolicited proposal and the first project agreement

In April 2011, China Communications Construction Company Ltd. (CCCC), a Chinese state-owned public corporation, submitted an unsolicited proposal to the Sri Lanka Ports Authority (SLPA), a statutory corporation created by the Sri Lanka Ports Authority Act¹ to inter alia administer ports and declared port areas in Sri Lanka. The CCCC's vision was to make Colombo one of the region's leading maritime and logistics hubs, and to dynamically change the geography of Sri Lanka's primary trade gateways. This aligned the CCCC with one of the Sri Lankan Government's strategic aims: to develop the city as a regional and global hub. The proposal for the "Colombo Port City Project" also estimated a primary investment of USD 1 billion, making it the single largest direct foreign investment project in Sri Lanka, and suggested that the port would be built by reclaiming approximately 233 hectares of land from the sea.

This proposal was reviewed in September 2011 by the Standing Cabinet Appointed Review Committee (SCARC) appointed by the Executive arm of the government (the Cabinet of Ministers) to consider public procurement proposals. Following a recommendation made by the SCARC, a cabinet decision was taken that a Memorandum of Understanding should be signed with CCCC by the SLPA to commence discussions concerning the feasibility of the proposed project.

The SLPA and the CCCC entered into a Memorandum of Understanding in September 2012. In October 2012, the CCCC submitted a detailed proposal pertaining to the Port City Development Project to the SLPA. After several rounds of clarification with CCCC, a government-appointed Technical Evaluation Committee (TEC) submitted an evaluation report to SCARC in January 2013. Thereafter, following nearly eight months of negotiation, the SLPA and the CCCC reached consensus on the key terms to be contained in a Concession Agreement under which the government, through the SLPA, would enter into a project development agreement with the CCCC.

In the meantime, SCARC submitted a report to the cabinet, recommending that the SLPA and the CCCC enter into the Concession Agreement after obtaining clearance from the Attorney General. The report also recommended that, subject to such approval, the project proceed as a Strategic Development Project under the Strategic Development Projects Act of Sri Lanka,² a statute passed by parliament to provide special investment promotion concessions to investors in projects considered by the government to be strategically important.

In January 2014, the cabinet approved the key terms of the Concession Agreement and further granted its approval for the project to proceed as a Strategic Development Project. However, the decision taken previously, to proceed with the

project through the SLPA as the public partner, was revoked following legal advice received from the Attorney General (AG) as well as the legal representatives of the CCCC (also referred to as the investor). The argument put forward by the AG and the other legal experts was that the SLPA, being a statutory corporation, was legally bound to act within the powers conferred on it by the Sri Lanka Ports Authority Act. Under this statute, a land reclamation project of the type contemplated, although concerning an area adjacent to the Colombo Port, would be ultra vires the powers and functions of the SLPA. Specifically, it was pointed out that Section 6 of the Act sets out the 'objects' and 'duties' of the SLPA, while Section 7 stipulates the powers of the SLPA. Both these sections do not empower the SLPA to engage in seabed reclamation for implementing commercial projects such as the Colombo Port City. Also, they do not empower the SLPA to engage in commercial city development and management projects.

Accordingly, in September 2014, the cabinet gave the approval to the Secretary to the Ministry of Highways, Ports and Shipping, acting for and on behalf of the government to enter into an agreement with the investor (or a subsidiary to be incorporated in Sri Lanka) on terms that are the same, in all material aspects, to a fully negotiated Concession Agreement. The cabinet decided that such an agreement between the government and the investor would remain effective until the date on which appropriate amendments to the SLPA Act had been enacted to ensure that the SLPA was given adequate powers and capacity to perform its obligations under the Concession Agreement. In other words, the decision taken by the government was that, since the SLPA did not have the legal capacity to participate in the development of the Colombo Port City Project given the scope of its powers and functions under the SLPA Act, until such time the Act was amended to enable SLPA to participate in the Project, the government would enter into a direct agreement with the investor through the Secretary, Ministry of Highways, Ports and Shipping, the chief administrative officer in charge of the ministry under which the SLPA operates.

Following the cabinet decision, an agreement was signed between the Secretary, Ministry of Highways, Ports and Shipping and a fully owned subsidiary of CCCC, which was by then incorporated into Sri Lanka under the name CHEC Port City Colombo (Pvt) Ltd. (known as the Project Company) on 16 September 2014 (which was named the Government of Sri Lanka Agreement). A fully negotiated Concession Agreement was annexed to the said GOSL Agreement as a binding annexure, making the government the direct obligor to the project company for inter alia granting permission to carry out the reclamation works, obtaining the necessary approvals and permits for the reclamation works, and for payment of the agreed consideration to the project company for investing in the project and for carrying out the reclamation works.

The GOSL Agreement also provided that the SLPA Act would be appropriately amended during the term of the GOSL Agreement (one year) and upon such amendment, the SLPA would have the right to step into the concession grantor's position in place of the GOSL.³

¹ Fij Act No.15 of 1979.

² Act No. 14 of 2008.

³ Clause 2 of the GOSL Agreement.

2.2 Key features of the agreement signed in September 2014

In the GOSL Agreement and the Concession Agreement annexed to it, it was agreed that the Project Company would be allocated 20 hectares of land reclaimed under the project on freehold basis, as constituting part-payment for implementing the project at a cost exceeding USD 1.4 billion. In addition, it was further agreed that 88 hectares of reclaimed land would be allocated to the Project Company for a lease period of 99 years.

In order to ensure that the Project Company would have an unrestricted opportunity to recover its investment, it was agreed that GOSL would not undertake any competing infrastructure development projects within a 20 km radius of the Colombo Port City Project until such time the Project Company has settled all its senior debt (borrowing from lenders for developing the project). It was also agreed that when developing marketable land, preference would be given to the Project Company, until the repayment of the senior debt, subject to the exception that GOSL would be entitled to develop public infrastructure projects.

The agreement also provided that the land would be reclaimed and the Port City would be developed based on a pre-approved master plan by the Urban Development Authority of Sri Lanka (UDA), the statutory entity created by the Act of Parliament No 41 of 1978. This was done with a view to promoting the integrated planning and implementation of economic social and physical development of the areas declared by the minister in charge of urban development, thus, being the entity empowered to function as the key urban planning and implementing agency of the country.

The agreement further made provision for the joint appointment of a quality controller, named the Jointly Appointed Quality Representative, to play the role typically played by a supervising engineer/architect in a construction project, subject to the limitation that instead of using his or her authority to give instructions to the contractor, she or he would only make recommendations for consideration by the GOSL and the project company.

The Project Company was also given the right to have the project be designed and built by an engineering procurement construction (EPC) contractor chosen by them, without having to call for competitive bids and following the typical guidelines and procedures applicable for public procurement projects. The Project Company accordingly appointed as the EPC contractor, M/s China Harbour Corporation, a fully owned subsidiary of the parent company of the Project Company, namely the CCCC.

3. PROJECT SUSPENSION

The Colombo Port City Project, although not legally challenged prior to March 2016, attracted severe criticism from opposition parliamentarians during the run up to the Presidential Election of January 2015 and during the run up to the General Election in August 2015. Several politicians, including the then opposition leader and the current Prime Minister of Sri Lanka, Ranil Wickramasinghe, were very critical and threatened to suspend the project soon after the formation of a new government. Some politicians even threatened to terminate the contract.

Following the Presidential Election in January 2015, and the formation of the new coalition government in March 2015, the GOSL unilaterally suspended the project alleging it had been implemented without the necessary regulatory permits and/or clearances. The key allegations that eventually led to its suspension in March 2016 are discussed below.

3.1 Public and political opposition based on legal and policy grounds

3.1.1 Unsolicited bid

The contract for the development of the Colombo Port City was awarded to the Project Company based on an unsolicited bid submitted by its parent company, the CCCC, in 2013. Those opposed to the Colombo Port City Project argued that the GOSL had accepted a one-sided proposal without understanding and/or evaluating the need for the project or the project's technical, environmental and financial feasibility.

Several members of the new government formed in March 2015, including the current prime minister Ranil Wickremasinghe, argued that even when an unsolicited bid was received, the GOSL should have followed the Government Public Procurement Guidelines (Procurement Guidelines). These are that when awarding the contract, the government should have called for other interested parties to bid for the project whilst offering a first right of refusal to the original proposer.

It is important to note that even though there is no specific public procurement law in Sri Lanka, the National Procurement Agency has issued guidelines which deal in general with the procurement of public projects. The Procurement Guidelines (2006) identify and recommend several methods of procurement, including International Competitive Bidding (ICB), Limited International Bidding and National Competitive

Bidding (NCB). According to the guidelines, unsolicited bids were not expressly ruled out and recommended procedures are to be followed in such cases. When an unsolicited proposal is received, the relevant government entity is expected to ascertain the technical and financial viability of the project, including information on the capacity of the party proposing the project to finance and develop it. Once such a preliminary review process is concluded, the government is required to publish an advertisement calling for proposals in connection with the proposal. The party who submitted the unsolicited bid is given a chance to match or improve on any competing bid received in response to the bid invitation.

The Procurement Guidelines provide for an exception to the general rule on unsolicited bids and a deviation from the prescribed procedure is permitted in urgent and exceptional circumstances, on the condition that specific cabinet approval is obtained for such a deviation. As far as the Port City Project is concerned, the unsolicited bid received from the investor had been accepted without following the recommended procedure.

3.1.2 Capacity of the actors

There was also some criticism of the legal capacity of an actor chosen by the government, namely, SLPA. The new government, especially Prime Minister Wickremasinghe, who is himself a qualified lawyer, argued that the specific power to reclaim any part of the foreshore or bed of the sea is vested with the president only in terms of the State Lands Ordinance No. 8 of 1947,⁴ and thus, the SLPA had no legal capacity to engage in the Colombo Port City Project.

There was some merit to this argument as in terms of Section 60 (3) of the State Lands Ordinance, which deals with administration of foreshore vested in the state, it is the president who has the power to reclaim any part of the foreshore or bed of the sea and to lease or otherwise dispose of any such reclaimed area. Section 61 of the State Lands Ordinance also states that the president may lease any part of the foreshore or bed of the sea provided that such a lease would not prejudice public rights. In terms of this statute, when land is reclaimed, the surveyor general will survey the land and draw survey plans to demarcate boundaries. Upon authorization by the president in terms of section 110 of the State Land Ordinance, the reclaimed land then becomes state land. However, the State Lands Ordinance did not prevent the president from engaging the services of any party to carry out the reclamation works. Thus, the counter argument was put forward that there was no legal impediment to awarding a contract to the project company for the reclamation works.

As far as the SLPA is concerned, it was argued that the SLPA lacked the legal capacity to proceed with the project as the SLPA Act does not empower the SLPA to undertake a commercial development as envisaged under the Port City Project. There was merit in this argument too, as according to Beasto et al, (2010):

“Any act done by a corporation incorporated by statute and outside its statutory powers is ultra vires and void. Since the corporation has no existence independent of the statute which creates the corporation or authorizes its creation, it follows that its capacity is limited to the exercise of such powers as are actually conferred or may be reasonably deduced from the language of the statute.”

Corporations incorporated by statute in Sri Lanka are subject to the common law doctrine of ultra vires, that is, what is not expressly or by implication authorized in the statute must be taken to have been forbidden. In the commercial context, this rule has been construed liberally, so that a company may participate in acts which it is not expressly authorized to, provided that they are reasonably incidental to its main objects and provided those main objects are still being pursued (Halsbury's Laws of England).

As far as the capacity of the Project Company was concerned, although there was criticism that the company was a single purpose company established merely to develop the Colombo Port City and thus lacked the necessary expertise, there was not much merit in that criticism. The CCCC is recognized as being one of the largest multinational companies with extensive experience in infrastructure development projects. In 2014, the CCCC was ranked 187 among the Fortune 500 companies in the world and is currently 135th in Forbes Global 2000 list of the world's largest public companies (Forbes.com, 2017).

As would befit a company of this size, the CCCC had sought the expertise of internationally reputed development consultancy firms such as AECOM (American's premier fully integrated infrastructure and support services firm), ATKINS (globally recognized United Kingdom-based design engineering and project management consultancy), SWECO (Nordic region's leading consulting engineering company in sustainable engineering and design), JLL (United States & India's Professional Services and Investment Management Company specializing in real estate services), legal experts attached to Pinsent Masons (United Kingdom) and the Colombo Law Alliance (Sri Lanka), to name a few, to assist its subsidiary, the Project Company, in connection with the project. Further, it is well-established practice by investors to set up single purpose vehicles for undertaking large-scale infrastructure development projects. Thus, the Project Company was well-suited to take on the project and had globally renowned experts supporting it.

⁴ The specific power to reclaim any part of the foreshore or bed of the sea is vested with the President of Sri Lanka in terms of Section 60 (3), Part VIII, of the State Lands Ordinance, which deals with administration of foreshore vested in the state. The said section authorizes the president to reclaim any part of the foreshore or bed of the sea and also to lease or otherwise dispose of any such reclaimed area. Section 61 of the State Lands Ordinance provides inter alia that the president may lease any part of the foreshore or bed of the sea provided that such lease would not prejudice public rights.

3.1.3 Fears relating to national sovereignty

Several ministers in the new government that was formed in 2015 were concerned that the reclamation of land under the Port City Project would extend the territorial boundary of Sri Lanka and it was argued that this extension would affect the sovereignty and territorial waters of the country. Some claimed that by agreeing to give 20 hectares of land on a freehold basis and approximately 80 hectares of land on a 99-year lease to the “Chinese investor”, the former government had enabled the creation of a sovereign Chinese territory in Sri Lanka, thus undermining the territorial sovereignty and independence of Sri Lanka.

On 17th March 2015, the Daily News, one of the most widely read daily newspapers in Sri Lanka, published an article entitled “Colombo Port City Project runs into fresh snag: Flying over Port City a taboo!”. This article said that the Civil Aviation Authority of Sri Lanka had pointed out that “the air space over the Chinese-held area will be exclusively held by China” according to Article 1 and Article 2 of the International Convention on Civil Aviation (1944) (Chicago Convention) thus, threatening the national sovereignty of Sri Lanka and creating security concerns for the South Asian region.

3.2 Resistance based on environmental and social concerns

3.2.1 Applicable law

Before the GOSL Agreement was signed in September 2016, the SLPA had commissioned an environmental study for the Port City Project as required by the National Environmental Act No. 47 of 1980 (NEA) and the Coast Conservation Act No. 57 of 1981⁵ (CCA). Accordingly, an initial environmental examination (IEE) and an environmental impact assessment (EIA) had been conducted.⁶

Under the provisions of section 23 Z of the NEA, the EIA process applies only to “prescribed projects”, which have been specified by the minister in charge of the environment in Gazette Extra-Ordinary No. 772/22 of 24th June 1993 amended by Gazette Extra Ordinary No. 1104/22 of 05th November 1999. The EIA process is implemented through designated project approving agencies (PAA) as prescribed by the minister under Section 23 Y of the NEA. Under Section 23 CC of the NEA, regulations have been made by the minister stating the procedures that should be followed in order to achieve the EIA requirements of the NEA.

The list of “prescribed projects” published under the NEA states that the CCA applies to those prescribed projects which are located wholly within the Coastal Zone. The CCA as amended by the Coast Conservation (Amendment) Act, No. 64 of 1988 and Coast Conservation (Amendment) Act, No. 49 of 2011 governs the Coastal Zone.

Coastal Zone is defined in the CCA as “the area lying within a limit of 300 metres landward of the mean high water line and a limit of two kilometres seaward of the mean low water line. In the case of rivers, streams lagoons or any other body of water connected to the sea, either permanently or periodically, the landward boundary shall extend to a limit of 2 kilometres measured perpendicular to the straight base line drawn between the natural entrance points identified by the mean low water line thereof”. In terms of Section 14 of the CCA, any person desiring to engage in a development activity within the Coastal Zone will be required to obtain a permit issued by the department prior to commencing the activity.

Accordingly, the EIA process for the Colombo Port City is part of the permit procedure mandated in Part II of the CCA. Section 16 of the CCA confers on the Director General of Coast Conservation and Coastal Recourse Management Department (CC&CRMD) the discretion to request a developer applying for a permit (to engage in a development activity within the Coastal Zone) to furnish an IEE or EIA relating to the proposed development activity. The CCA does not, however, specify how and when this discretion should be exercised. The CC&CRMD interprets this provision as requiring an EIA when the impacts of the project are likely to be significant.

The said IEE and the EIA for the Port City Project had been initially conducted for reclamation of approximately 200 ha of land in April 2011. However, when a decision was taken by the government and the Project Company to increase the reclaimed land area in order to increase the area for public use (public parks etc.), an addendum to the initial EIA was conducted in September 2013.

The EIA was opened for public consideration on 11 June 2011 and comments and responses were taken into consideration when granting the development permit to the Project Company, subject to several conditions (CECB, 2015). It should be noted that the addendum of 2013 was not opened for public consideration and this was referred to in the SEIA of 2015.⁷

⁵ The EIA process was first introduced to Sri Lanka through the Coast Conservation Act No. 57 of 1981. The provisions in this Act apply to projects which are implemented within the Coastal Zone. The EIA requirement for projects outside the coastal zone was brought in through an amendment to the National Environmental Act No. 47 of 1980 (Amendment Act No. 56 of 1988).

⁶ The National Environmental Act has identified two levels in the EIA process. The first level is the Initial Environmental Examination (IEE) and possible impacts of a prescribed project are assessed with a view to determining whether the impacts are significant or not. The second level is the EIA, which is more comprehensive. Alternatives to the proposed project are considered and the option with the least impact on the environment is identified as the viable option and assessed. Mitigation measures for the identified impacts is a significant part of an EIA report.

⁷ CECB (2015). SEIA Report, p. 4.

3.2.2 Objections concerning the EIA process

Although no legal steps were taken to challenge the Port City Project based on environmental concerns prior to the formation of the new government in March 2015, with the formation of the new government both ruling party politicians and several NGOs started to publicly criticize the Port City citing environmental concerns. Key among them were that:

- The EIA process that had been followed was not comprehensive;
- The addendum to the EIA was not made available for public review and comment;
- The project would result in sea erosion and would affect marine life; and
- The project would have an impact on climate change.

Those opposed to the project also argued that no social impact assessment had been conducted before approving the project and that, in particular, the adverse impact on the fishing communities whose livelihoods would be affected during the reclamation period had not been taken into consideration.

Two NGOs began legal proceedings in 2015 soon after the formation of the new government. The first was a Fundamental Rights Application (SCFR 151/2015) filed by the All Ceylon Fisher Folk Trade Union of Sri Lanka. They alleged that their fundamental right of engaging in their chosen livelihood (fishing) would be affected as a result of sea erosion and loss of marine life due to the dredging and land reclamation works carried out under the Port City Project. The second was a Writ Application (CA Writ 112/2015) filed by the Centre for Environmental Justice, challenging the validity of the EIA done for the Colombo Port City Project.

4. ANALYSIS OF THE GROUNDS FOR SUSPENSION OF THE PORT CITY PROJECT IN MARCH 2015

4.1 Legality of the suspension

Generally, construction and infrastructure development contracts require that the contractor progresses with the work regularly and diligently. However, in certain circumstances, there may be a need to suspend the work. The need to suspend a project can arise for various reasons; for example, the work under a contract may need to be suspended due to financial issues encountered by the parties, a breach

of the agreement, or as a result of an unexpected environmental issue emerging during the course of the construction project. This right, to temporarily halt the progress of the works, can be either:

- (a) granted through contractual provisions (specific clause in the contract which grants the parties or a defined party a right to suspend the works for various specified reasons); or
- (b) granted through a specific provision in a statute.

The GOSL Agreement makes no provision for either party to suspend the works to be carried out under the Port City Project. Further, in Sri Lanka there is no specific statute that regulates construction projects. As the contract is silent on the right to suspend the works and there are no statutory provisions which enable a party to suspend the works carried out under the contract, it is important to consider whether the works could have been suspended by the GOSL based on common law grounds.

The common law position is that unless there is an express term permitting suspension enshrined in the contract, parties do not have a right to suspend work under the contract.⁸ Thus, it can be concluded that there is no contractual or any other legal basis on which the Port City Project could have been unilaterally suspended by the government.

4.2 Could the Port City Project have been suspended on public policy grounds?

Given that there is no contractual, statutory or common law basis for suspending the Colombo Port City Project, the remaining issue to be considered is whether it could have been suspended by the government on public policy grounds, i.e. whether by operation of law, a clause could be read into the contract (implied) which would give the government the inherent authority to suspend a project based on public policy/public trust considerations. In other words, the issue is whether, irrespective of the legal validity of the contract, the new government could overturn a contractual commitment by its predecessor on the basis that such commitment is against public interest.

Some jurisdictions recognize an inherent right of the government to suspend or terminate a contract to which the government is party by the operation of law based on the existence of a significant public procurement policy of incorporating such mandatory clauses into government contracts. In the United States, for example, this is known as the "*Christian Doctrine*."⁹

The Christian Doctrine is not part of Sri Lankan Law. However, the Doctrine of State Necessity which was recognized by the International Court of Justice (ICJ) in the

⁸ Channel Tunnel v Balfour Beatty [1992] 2 Lloyd's Rep. 7

⁹ The scope of this doctrine is discussed in G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

¹⁰ S.C. Application No. 884/99, (2000) 3 Sri L. R. 243.

Dispute over the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (1997) seems to have been recognized in Sri Lanka. In the Gabčíkovo-Nagymaros dispute, the ICJ clearly established the rule that a state has the right to suspend contracts entered into by public authorities on the basis of “state necessities” (in the larger interest of nations).

The ICJ's view in this case was that, with regard to unilateral suspension of work, it is the existence of state necessity which, in the correct circumstances, would preclude the responsibility of wrongful acts. In support of this view, the ICJ cited the work of the International Law Commission which, in its Draft Articles on the Responsibility of States, upheld the notion of state necessity as grounds for precluding responsibility. The ICJ went on to say that safeguarding environmental concerns and ecological balances could be considered as an essential interest of all states.

In several judgments, the Supreme Court of Sri Lanka has concluded that the constitutional duty of the state is to “...protect, preserve and improve the environment for the benefit of the community”, Article 27(14) of the Sri Lankan Constitution, and could supersede contractual obligations of the state in the larger interest of the nation. In *Bulankulama v. Minister on Industrial Development (“Eppawala Case”)*,¹⁰ the Supreme Court held that the constitution recognizes duties on the part of parliament, the president and the cabinet of ministers, as well as duties on the part of “persons”, including juristic.

Article 28(f) of the constitution states that “the exercise and enjoyment of rights and freedoms... is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches”. Recognizing the said duty, the Eppawala Case held further that although the signing of an agreement may please, or even delight an investor, there is justification for examining the project as a whole when certain dangers in proceeding with the project are brought to the attention of the state by those adversely affected. It was held that fairness to all, including the people of Sri Lanka, rather than the company's “comfort”, should be the lodestar in doing justice.

In *Environmental Foundation v. Urban Development Authority (Galle Face Case)*,¹¹ it was held that the Directive Principles of State Policy and the Fundamental Duties contained in chapter VI of the constitution suggest that, not only the state but also every person in Sri Lanka, including all bodies, institutions and organizations that have been invested with legal personality, are responsible for the protection and conservation of the environment. It is the state, in terms of international law as well as in national law, as the guardian or trustee of the country's natural resources that is primarily responsible for environmental protection and conservation, through its various agencies and actors. The Supreme Court has also stated that the organs of government are expected to act in accordance with the best interests of the people and that an individual can seek to hold public institutions accountable for the violation of the collective rights of the citizenry of Sri Lanka.

In *Sugathapala Mendis and Others v. C B Kumaratunga and Others, SC (FR) 352/2007*,¹² the Supreme Court recognized that large development projects do not manifest all their multifarious facets until long after the expiration of the window of opportunity for the public to object. It further noted that “the mere fact that the various environmental authorities said the project could be done, does not in itself suggest that it should have been done”. On the contrary, such external approvals are to be seen merely as conditions precedent to the commencement of analysis of the viability of any given project and not as the basis for any decision.

In these circumstances, even if the Project Company takes the position that the suspension of the project pursuant to a cabinet decision is a breach of the Concession Agreement and/or the GOSL Agreement, the government could argue that Article 27(14) of the constitution as well as the Doctrine of State Necessity entitles the government to suspend a project and review the procurement process, especially if doubts exist concerning the environmental viability of the project.

It is important to note, however, that when projects are developed on a public private partnership (PPP) basis, project-related risks are typically allocated between the project partners. If one peruses the project agreements signed between the GOSL and the Project Company for the Colombo Port City Project, it is clear that whilst the financial risk has been undertaken by the Project Company by agreeing to finance the entire reclamation project without any financial equity or debt obligation on the part of the GOSL, the regulatory risk of obtaining the necessary approvals and clearances for the project vests with the GOSL. Thus, one could argue that even if the GOSL (pursuant to a change of government) were to draw the conclusion that the Colombo Port City Project is against public interest as the necessary processes concerning public procurement and environmental viability have not been followed, they would still be required to compensate the Project Company for project suspension as the contractual obligation was with the GOSL to ensure that all necessary approvals and clearances for the project are obtained.¹³

4.3 Analysis of the other objections

4.3.1 Is the project company an entity blacklisted by the World Bank?

One of the allegations levelled against the Project Company by those who were opposed to the Colombo Port City Project was that the company was a subsidiary or an affiliate of a multinational company blacklisted by the World Bank for corruption.

Research done for this report shows that the China Road and Bridge Company (CRBC) was established in 1979 and was acquired by CCCC in 2005. Prior to becoming a subsidiary of CCCC, CRBC had been invited in 2002 to bid for a national

¹¹ SC(FR) No. 47/2004, (2009) 1 Sri. L.R. 123.

¹² SC(FR) No. 352/2007, (2008) 2 Sri. L.R. 339.

¹³ Clause 12 of the Concession Agreement annexed to the GOSL Agreement signed in September 2014 provides that SLPA shall obtain all applicable permits stated in Schedule 2 to be the ports authority's responsibility together with all other applicable permits necessary for the design, construction and completion of the reclamation works. Schedule 2 to the Concession Agreement amongst other things lists the completion of the EIA process as an obligation of the SLPA. Clause 3.1.2 of the GOSL agreement provides that all the rights, obligations and liabilities of the SLPA under the Concession Agreement shall have full force and effect as rights, obligations and liabilities of GOSL under the GOSL Agreement.

¹⁴ The Amendment (VIII) to the Criminal Law of the People's Republic of China was adopted at the nineteenth meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on 25 February 2011. It came into force on 1 May 2011.

road improvement and management project in the Philippines. During the bidding process, the World Bank announced sanctions on CRBC (World Bank, 2011).

Under these sanctions, even successor organizations (through purchase or reorganization) are subject to the same sanctions applied to the original firm. Thus, by purchasing the controlling shares of CRBC, CCCC attracted the same World Bank suspension in 2009.

Given that CCCC has never been directly sanctioned by any international and/or national entity for corrupt practices, there does not seem to be any justification for suspending the Port City Project based on the blacklisting of CRBC by the World Bank because the incident which led to the blacklisting occurred prior to the takeover of CRBC by CCCC. In any event, the Colombo Port City Project is being developed by CHEC Port City Colombo (Pvt.) Ltd, a company incorporated in terms of the Companies Act No. 7 of 2007 of Sri Lanka. Thus, although the Project Company is a fully owned subsidiary of CCCC, it is a company operating within the jurisdiction of Sri Lanka and is a single purpose vehicle engaged only in the Colombo Port City Project.

Another support for the argument that suspension of the project based purely on the aforesaid blacklisting is unjust is that, besides the Port City Project, there are several other infrastructure development projects which the Sri Lankan Government has awarded to CCCC or its subsidiaries, for example, the Airport Highway, the Hambantota Port and the Southern Highway Projects. If blacklisting of CRBC were to be a solid reason for suspending and/or terminating the Port City Project, then there is no justification for awarding CCCC or its subsidiaries contracts for other projects.

It is also important to note that the Eighth Amendment to the Criminal Law of the People's Republic of China¹⁴ specifically tackles the issue of corrupt practices by Chinese companies. This law makes it a crime to make payments to foreign government officials and to officials of international public organizations for any illegitimate commercial benefits. Thus, being a state-owned company, it is unlikely that the CCCC, or any of its subsidiaries, would act in violation of their own country's legislation.

4.3.2 Will the Port City Project undermine the sovereignty of Sri Lanka?

The fears around the sovereignty of Sri Lanka being undermined by the Port City Project seem to be largely unfounded. Reclaimed land does not detrimentally affect a neighbouring foreign coast, as it is accepted as a part of the state's coastline. In the case of the Port City Project, no foreign coastlines would be affected by the reclamation of land and, in particular, it would not affect the boundary between Sri Lanka and its neighbour, India.

In terms of the agreement between Sri Lanka and India on the Boundary in Historic Waters between the two Countries and Related Matters¹⁵:

"The boundary between Sri Lanka and India in the waters from Palk Strait to Adam's Bridge shall be arcs of Great Circles between the following positions, in the sequence given below, defined by latitude and longitude:

Position 1: 10° 05' North, 80° 03' East

Position 2: 09° 57' North, 79° 35' East

Position 3: 09° 40.15' North, 79° 22.60' East

Position 4: 09° 21.80' North, 79° 30.70' East

Position 5: 09° 13' North, 79° 32' East

Position 6: 09° 06' North, 79° 32' East."

Section 8 of the Maritime Zones Law (No. 22 of 1976) of Sri Lanka further defines the boundary between Sri Lanka and India from Palk Strait to Adam's Bridge; the boundary between Sri Lanka and India in the Gulf of Mannar; and the boundary between Sri Lanka and India in the Bay of Bengal. All such boundaries are in reference to an objective boundary, defined by latitude and longitude and not by reference to the geographical boundary of Sri Lanka. In the circumstances, the reclamation of coastal land would not have an adverse effect on the sovereignty of Sri Lanka, with specific reference to its territorial waters.

4.3.3 Will the Port City provide exclusive rights over the airspace of Sri Lanka?

Again, a sense of alarm and media fear-mongering seems to have disproportionately weighed on the side of regional security concerns. On close analysis of the relevant conventions, there seems to be no merit to the argument that the Port City Project would in any way bestow exclusive rights, indirect or otherwise, to the Chinese investors.

The article in the Daily News referred to earlier said that China will have exclusive rights over the airspace above the plot of land given on freehold basis (20 hectares) under the Port City Project. This is a baseless and a misinformed statement that demonstrates an absence of understanding of how the Chicago Convention operates. Firstly, under the Port City Project, no land had been allocated on freehold basis to China. The Project Company, to which the 20 hectares of land was to be allocated on freehold basis, and 88 hectares on leasehold basis, is a private limited liability company incorporated in Sri Lanka. Thus, despite its foreign shareholding, the project company is subject to the applicable laws of Sri Lanka.

¹⁵ The maritime boundary agreements between India and Sri Lanka were negotiated and agreed between 1974 and 1976. The first agreement was concluded in 1974 and it dealt with the maritime boundary in historic waters of Palk Strait and came in to effect on 8 July 1974. The second agreement dealt with the boundaries in the Gulf of Mannar and Bay of Bengal; it was signed on 22 March 1976 and came into effect on 10 May 1976. A third agreement for the extension of the maritime boundary in the Gulf of Mannar was signed on 22 November 1976 and came in to effect on 5 February 1977.

Secondly, the Chicago Convention provides no rights to state-owned or military aircraft over the air space of any other sovereign nation. Article 3 clearly recognizes that it does not apply to state aircrafts and military/police aircrafts; Article 3 (f) provides in particular that:

“No state aircraft of a contracting state shall fly over the territory of another state or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereto.”

Further, Article 9 of the convention says:

“Each contracting state may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over certain areas of its territory.”

It is clear that under the Chicago Convention, the sovereign rights of nation states to declare no fly zones over their territories is not removed or diminished.

Territorial waters, or a territorial sea, as defined by the 1982 United Nations Convention on the Law of the Sea, is a belt of coastal waters extending, at most, 12 nautical miles (22.2 km; 13.8 miles) from the baseline (usually the mean low-water mark) of a coastal state. Airspace is the portion of the atmosphere controlled by a country above its territory, including its territorial waters or, more generally, any specific three-dimensional portion of the atmosphere. Thus, even after the desired land area is reclaimed under the Port City Project, the GOSL will have full authority over its territorial waters. Any aircraft coming to the 20-hectare land given on freehold basis to the Project Company will have to cross Sri Lankan Airspace and Territorial Waters over which the Government of Sri Lanka has sole and absolute authority.

4.3.4 Is the waiver of sovereign immunity in the Port City Agreement bad for Sri Lanka?

Sovereign Immunity typically excuses states from liability based on the legal doctrine that a sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. However, in the Port City Agreement, the GOSL has waived such immunity.

Under international law and national law, it is universally recognized that the state (government) has no sovereign immunity when it concerns commercial contracts if the state (government) is acting more as a contracting body (example: making an agreement with a local party or an international investor for developing infrastructure). If this were not the case, then no person or entity (especially a foreign trader or investor) would want to enter into a commercial agreement with a state or a state entity. This is because, a state or a state entity could intentionally breach a commercial contract and then seek refuge under the doctrine of state immunity and claim that it is not under any obligation to compensate the other party

to the contract. No country, especially a developing country like Sri Lanka, would be able to survive, let alone chase billion-dollar infrastructure development projects, by taking such a stand given the reliance on foreign investment and foreign trade (exports and imports) which require the state and the state entities to enter into commercial contracts.

In connection with foreign investment, the concept of sovereign immunity is often misunderstood. Those who are not aware of sovereign rights of a state and contractual liability of a state, often think that it is important to state in commercial contracts that the sovereign immunity of the state is retained. They equally do not appreciate the unattractive nature of a commercial contract that leaves the investor without a remedy in the event of a breach of contract occurring. In other words, no foreign investor or a foreign lender would enter into a development agreement with a country, if they do not have the ability to sue for compensation in the event of a contractual breach by the state party to the contract.

It is also important to understand that by entering into a commercial contract, what is being surrendered by a state is not its sovereignty, but its right to do a wrong (i.e. breach a contract) and then avoid liability. This can be best explained by taking as an example a decision by a government to nationalize assets of a foreign investor (such decisions have been often taken by states, for example nationalization in Libya, nationalization of oil facilities in Iran, expropriation in Sri Lanka). Courts and tribunals have held that states in fact have the right to nationalize/expropriate, if they think fit, provided that timely and adequate compensation is paid to the victims of such nationalization/expropriation. The United Nations General Assembly (UNGA) Resolution on Permanent Sovereignty¹⁶ declares that investors *“shall be paid appropriate compensation ... in accordance with international law”* where their property, including by inference their contract rights, have been violated.

Another important point is that, since independence, Sri Lanka has entered into several bilateral treaties, including with China. Article 157 of the Sri Lankan Constitution provides:

“Where parliament ... approves as being essential for the development of the national economy, any treaty or agreement between the Government of Sri Lanka and the government of any foreign state for the promotion and protection of the investments in Sri Lanka of such foreign state, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such treaty or agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such treaty or agreement.”

Given the aforesaid explanations, it is a misnomer that by entering into a commercial agreement such as the Colombo Port City Agreement, Sri Lanka is compromising its national sovereignty.

¹⁶ UNGA Resolution 1803 of 1962.

5. LIFTING THE SUSPENSION IN 2016 AND RECOMMENCING THE PORT CITY PROJECT

5.1 The supplementary environmental impact assessment

Following the suspension of the Colombo Port City Project in March 2015 by the GOSL, the Project Company commenced extensive discussions with the new GOSL to establish:

- Whether the EIA and the addendum to the EIA were sufficiently comprehensive and conducted by neutral experts at the invitation of GOSL and not on the invitation of the Project Company;
- Why most of the allegations made against the project's environmental sustainability were not raised during the EIA review process and prior to awarding the contract;
- That the reclamation works under the project commenced only after SLPA on behalf of GOSL confirmed that all relevant statutory clearances and permits were in place;
- The contractual obligation to obtain the relevant environmental approvals for the project (and therefore the associated risk) was with GOSL and SLPA and not the Project Company, and, hence, the legal liability for suspension of the project on the basis that the required statutory permits and/or clearances were not in place lies with the GOSL;
- Reclamation projects similar to the Port City Project have been successfully completed in other parts of the world, for example, in Singapore and in the Middle East, and there is no evidence of any permanent environmental harm such as sea erosion, increased risk of tsunamis, loss of marine life and climate change resulting as a direct consequence of reclamation of the sea, as alleged by those opposed to the Port City Project;
- The Project Company is a private limited liability company incorporated in Sri Lanka and thus subject to Sri Lankan laws. Further, the project agreements are governed by Sri Lankan laws. Thus, any fears concerning compromising national sovereignty are unfounded;
- If GOSL has any remaining environmental/social impact concerns, a supplementary environmental impact assessment (SEIA) could be conducted covering all such concerns;

- If the GOSL fails to lift the suspension and restart the project, the Project Company might not have any other choice but to refer the dispute to international commercial arbitration in Singapore under the Arbitration Rules of the United Nations Commission on International Trade Law as agreed in the Concession Agreement and claim damages including for loss of profit from the GOSL.

The Project Company drew attention to the legal obligations that the GOSL had breached as a result of the unilateral suspension of the project and the legal rights of the Project Company to seek compensation. Following this, in or about May 2015, the GOSL appointed a high-level committee comprising of secretaries to several ministries of the GOSL to explore the possibility of authorizing the continuation of the project. After rectifying identified shortcomings and procedures, the project was approved by the cabinet following the approval of a Cabinet Memorandum tabled to that effect by the prime minister in his capacity as Minister of Policy Planning, Economic Affairs, Child, Youth and Cultural Affairs.¹⁷

Lengthy negotiations followed during the period June 2015 – February 2016 between the Project Company and the high-level committee (the Committee of Secretaries) and the Cabinet of Ministers¹⁸ gave the greenlight for the recommencement of the Colombo Port City Project. Permission was given subject to the completion of a supplementary environmental impact assessment to address the various environmental concerns the GOSL had following the formation of the new government in March 2016, and the issuance of a development permit following substantial amendments to the Concession Agreement which was annexed to the GOSL Agreement signed in September 2014.

The supplementary EIA (SEIA) was completed in or about November 2015 and was made available for public comments for the mandatory period of one month, as specified in the relevant legislation. In particular, public comments were invited on 1 December 2015 under Section 16(2) (d) of the CCA by newspaper publication. In addition, a Gazette Notification was published on 30th November 2015.¹⁹

It is important to note here that the involvement of the public is one of the most crucial aspects of the EIA process. The provision for public participation is contained in the NEA. The notice of availability of the EIA report for public review must be published in all three official languages in Sri Lanka. Therefore, it was required that the notice be inserted into a minimum of one newspaper in Sinhala, Tamil and English. Further, the notice has to be published in the Government Gazette. Once the public comment period is over the project approving agency must decide whether the case warrants a public hearing.

The public comments received during the 30-day period must be sent back to the project proponent within six days for review and response in terms of Section 23BB(3) of the NEA. The project proponent must respond to such comments in writing to the project approving agency and make every effort to modify alternatives, including the proposed action, to develop and evaluate alternatives not provided, to give serious consideration to providing supplementary information in the document and to make factual corrections. All substantive comments received on the draft

¹⁷ Office of the Cabinet of Ministers of Sri Lanka (2015), Press briefing of Cabinet Decision taken on 27 May 2015.

¹⁸ Decision of the Cabinet of Ministers at the Cabinet Meeting held on 9 March 2016.

¹⁹ Gazette Notice No. 1943/8, 30 November 2015.

²⁰ Section 16 (2)(b) of the Coast Conservation Act No 57 of 1981.

²¹ Mundy vs. Central Environmental Authority and others, SC Appeal 58/03, SC Minutes of 20 January 2004.

should be attached to the final statement.

As stated above, the SEIA which was completed by November 2015 and went through the public consultation process in December 2015, notes that the CC&CRMD as the project approving agency (PAA) made the initial EIA report of April 2011 for reclamation of approximately 200ha of land by filling the seabed, and that the said EIA report was made available for public comments as required under CCA.²⁰ It further notes that although there is an addendum to the said EIA, proposing a reclamation area of 233 ha instead of 200 ha, the addendum report to the EIA was not opened for public comment as it was seen as an initiative taken to inform the PAA of a “*deviation which has taken place to expand the project from 200 ha to 233 ha...*”.

The SEIA further notes that a “Permit for a Development Activity under Part III – Section 14 of the Coast Conservation & Coastal Resource Management Act No 57 of 1981, for reclamation, dredging and construction of breakwaters, revetments” has been issued for carrying out the reclamation works under the project following the said EIA and the addendum to the EIA and the signing of the GOSL Agreement. This permit contains 42 conditions of which number 40 states “a separate approval should be obtained from the CEA for extracting sand from the offshore to be reclaimed the proposed near shore area and submitted to this department prior to the commencement of the construction” (CECB, 2015).

A careful review of the SEIA shows that although the word “supplementary” is used in its title, it is a comprehensive EIA that has been done taking into account the following:

- The shortcomings of the initial EIA done in 2014 so that the environment related concerns raised by the GOSL following the formation of the new government in March 2015 are addressed;
- Addressing the issues covered in the addendum to the EIA done in 2014 which was not opened for public comments;
- Addressing the environment related issues arising out of the conditions subject to which the Development Permit for the Colombo Port City Project had been granted under Section 14 of the CCA, in particular, the issues relating to sand extraction for the reclamation works.

It is important to note here that neither the NEA nor the CCA makes any provision for supplementary environmental impact assessment reports. However, given that no statutory bar exists for such SEIAs, the author is of the view that if the government forms the view that it needs an additional and/or a more comprehensive EIA before proceeding with a development project, there is nothing illegal and/or irregular in such a move. In fact, the Supreme Court of Sri Lanka considered an SEIA when the Southern Expressway Project was challenged in a public interest litigation case.²¹

5.2 Amending the Concession Agreement

Whilst the SEIA was being developed, negotiations commenced between the GOSL and the Project Company on the amendments proposed by the GOSL to the Concession Agreement of September 2014. Accordingly, a decision was taken to amend the Concession Agreement.

Because the SLPA lacked the legal capacity to enter into the Concession Agreement given its limited scope under the enabling statute, the SLPA Act, it was mutually agreed that the Concession Agreement should be converted into a Tripartite Agreement between the GOSL, the UDA, a statutory corporation created under Act No. 41 of 1978, and the Project Company. The GOSL, mindful that once land is reclaimed the development of the reclaimed area would necessarily be an urban development project, decided that instead of the secretary to the ministry in charge of the subject of ports who signed the GOSL Agreement of September 2014, the new Concession Agreement (Tripartite Agreement) should be signed on behalf of the GOSL by the secretary to the ministry in charge of the subject of urban development, namely, the Secretary, Ministry of Megapolis and Western Development.

The decision to add the UDA as a party was on the basis that, if the development activities undertaken under the Colombo Port City Project are to be considered urban development activities, then the most appropriate GOSL agency to take charge of the project would be the UDA. However, the GOSL and the Project Company agreed that as only the President of Sri Lanka has the power to authorize the reclamation of the seabed and/or foreshore of Sri Lanka under the State Lands Ordinance and further, as such reclaimed land becomes state land in terms of the State Lands Ordinance,²² until such time the reclaimed land is vested in the UDA, the GOSL should be a party to the Tripartite Agreement.

The understanding and the agreement reached between the parties was that the GOSL would be a party to the project agreement acting through the Secretary, Ministry of Megapolis and Western Development, the minister under whose purview the subject of urban development comes. Once the land is reclaimed, the same will be vested in the UDA and thereafter UDA would step into perform the obligations of the GOSL under the said tripartite agreement.

The UDA has been established to plan and implement development in areas designated as urban development areas under the UDA Act. In Terms of Clause 3 of the UDA Act, the UDA can exercise powers and discharge its functions only in areas declared by the minister as urban development areas/ development areas. Part II of the Act sets out the powers and functions of the UDA, and Section 8 of the Act specifies the following:

“8 the powers and functions of authority within any development area shall be –

²⁰ Section 110 of Ordinance No. 8 of 1947.

²¹ Recitals A – K and Clauses 2 and 24 of the Tripartite Agreement signed by the Secretary, Ministry of Megapolis and Western Development, the Urban Development Authority of Sri Lanka and CHEC Colombo Port City (Pvt.) Ltd.) on 11 August 2016.

²⁴ Chapters III and IV of the Constitution of Sri Lanka guarantees fundamental rights to the people of Sri Lanka. Under Article 126 of the constitution, the Supreme Court of Sri Lanka has the sole and exclusive jurisdiction to hear and determine cases relating to the infringement or imminent infringement of these fundamental rights. Such application could be proceeded with only with leave to proceed first had and obtained from the Supreme Court. An application should be filed in the Supreme Court within one month from the date of infringement or the alleged infringement. This time limit of one month will be ignored by the Supreme Court in the case of continuing violation of fundamental rights where the applicant may not have had access to the court within one month from the first date of infringement (for example, a person illegally detained may not have such access during the time of detention).

- (c) *to enter into, perform and carry out, whether directly or by way of a joint venture with any person in or outside Sri Lanka, all such contracts or agreements as maybe necessary for the purpose of carrying out any development project or scheme, as maybe approved by the government;*
- (d) *to undertake the execution of development projects and schemes as maybe approved by the government;*
- (e) *to enter into any contract with any person for the execution of development projects and schemes as maybe approved by the government;*

.....” [emphasis added]

Unlike the case of the SLPA, there was no doubt concerning the capacity of the UDA to engage in the Colombo Port City Project, once the land is reclaimed and declared an urban development area.

During the negotiations to recommence the project subject to amending the Concession Agreement, it was also agreed between the parties that the Project Company would withdraw its claim for compensation arising out of the unilateral suspension of the project by the GOSL. It was further agreed that the Project Company would surrender its contractual right under the GOSL Agreement of 2014 to receive 20 ha of freehold land. In consideration of the Project Company agreeing to the above, the GOSL agreed that the land area leased to the Project Company for a period of 99 years was increased from 88 hectares to approximately 113 hectares.²³

5.3 Analysis of the reasons compelling the GOSL to recommence the project

The two public interest litigation cases instituted against the relevant government agencies (SLPA, the Board of Investment of Sri Lanka, the Central Environmental Authority (CEA), the CC&CRMD, Secretary, Ministry of Highways and Ports) challenging the decision to develop the Colombo Port City Project were unsuccessful.

When the Fundamental Rights Application No. SCFR 151/2015 filed before the Supreme Court²⁴ was made for granting leave to proceed, the lawyers representing the GOSL (the Attorney General’s Department) and the lawyers for the Project Company successfully argued that there was no merit in the various allegations concerning the alleged environmental harm that the project is likely to cause. It was submitted that, whilst the GOSL had carried out a detailed EIA, an addendum to the

EIA and subsequently also a SEIA, all three reports having been compiled by high-level experts, the allegations that the project would result in erosion of the beach, loss of sea life, adversely affect the livelihood of the fishing community, the project would contribute to adverse climate conditions in Sri Lanka etc., were not supported by adequate scientific evidence.

It was also argued that the petitioner (an association representing a fishing community) had filed the fundamental rights application nearly two years after the initial EIA was conducted and was opened for public comment, and thus the petitioners were guilty of laches by not coming before the Supreme Court of Sri Lanka within the specified time limit of one month²⁵ from the alleged infringement of fundamental rights. It was submitted that the petitioners had not made use of the opportunity given to all those who were interested in and/or were opposed to the project to submit their observations on the EIA and the SEIA when they were opened for public comment as required under the NEA.²⁶

It was argued by the respondents that the petitioner had not named the correct parties in its application and had not challenged the correct contract. This argument was made on the basis that SLPA would no longer be a party to the operative agreement dealing with the project, namely the Tripartite Agreement that was by then finalized and approved by the Cabinet of Ministers to be signed by the GOSL, the UDA and the Project Company. Further, it was submitted that the GOSL Agreement challenged by the petitioner would no longer be operative when the parties to the project sign the Tripartite Agreement.²⁷

Eventually, the proceedings (SCFR 151/2015) were terminated by the Supreme Court on 7 July 2016 without granting leave to the petitioners²⁸ as the court concluded that it could not be found that the rights of the community had been violated as a result of the project.

The Writ Application²⁹ No. 112 of 2015 filed before the Court of Appeal by a non-governmental organization (NGO), the Centre for Environmental Justice, has had no success to date. Although this case too was filed in or about March 2015 (soon after the formation of the new government), the Court of Appeal noted that the petitioner has not taken into consideration the SEIA which was conducted by the GOSL to address its concerns prior to recommencement of the project.³⁰ Further, the Court of Appeal considered the preliminary objections raised on behalf of the Attorney General who appeared for the Secretary, Ministry of Ports and Highways, the SLPA, the Board of Investment of Sri Lanka and the CC&CRMD. It was held that the petitioner was guilty of laches, they had not named the correct parties as respondents as SLPA was no longer a party to the agreement, that the only operative agreement concerning the project at the time was the GOSL Agreement signed between the Secretary, Ministry of Highways and Ports and the Project Company, and that the petitioner had failed to raise its concerns during the public consultation process when the EIA and subsequently the SEIA was opened for public comment.

²³ Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

²⁴ Act No. 47 of 1980.

²⁵ The Tripartite Agreement was signed on 11 August 2016.

²⁶ The Sunday Times (2016). “Supreme Court terminates proceedings in the case against Colombo Port City Project”. 17 July.

²⁷ Writ Actions in Sri Lanka are regulated by Articles 140 and 141 of the constitution. Writs may be sought to obtain relief against a public body where it is acting ultra vires.

²⁸ SLPA News Letter, “Port City: several steps taken by govt. on good intentions – CA”, 30 July 2016.

On 28 July 2016, the Court of Appeal advised the petitioner to reconsider its application and to consider the preliminary objections raised by the Attorney General and the new information available by then concerning the approval by the Cabinet of Ministers to sign a new Tripartite Agreement pursuant to the completion of the SEIA, which had addressed the GOSL's concerns.

Accordingly, the petitioner said it would make an application to support the matter after filing an amended application, which was eventually done on or about 31 October 2016. The matter is still pending before the Court of Appeal.

It could be said that the concern, if any, that the GOSL might have had about the project being annulled by the Supreme Court or the Court of Appeal on the basis that the project was against public policy and/or public interest, was reduced to a large extent by the courts refusing to entertain the reliefs claimed for by the petitioners.

At the time the Tripartite Agreement was signed by the GOSL, the UDA and the Project Company on 11 August 2016, there was no adverse finding against the Port City Project, nor a pending application before any court in Sri Lanka.

It could also be said that the substantial financial risk of compensation being owed to the Project Company for the unilateral suspension of the project would have convinced the GOSL to lift the suspension and recommence the project. The Project Company had informed GOSL that as a result of the suspension it was incurring losses of approximately USD 380,000 per day. The Project Company argued that the suspension was unilateral and was based on the lack of environmental-related permits to commence the project, which was an obligation GOSL had to perform.

Another factor that may have convinced the GOSL to recommence the project is the lack of foreign direct investment inflows into the country, even after ending the three-decade long civil strife discussed earlier. According to the Central Bank of Sri Lanka, China is the biggest contributor to Sri Lanka's FDI with over USD 400 million in investment in 2014 (Central Bank, 2015). The Port City Project alone is expected to bring in USD 1.4 billion worth of investments during the reclamation period.

Given the global financial crisis during the current decade and the diminishing capacity of the Western nations such as the United States, United Kingdom and European Union countries to fund large-scale infrastructure development projects overseas and the lack of funds and/or capacity amongst the multilateral banks such as the World Bank and the Asian Development Bank to cater to the development needs of all the developing nations, it is likely that even the new Government of Sri Lanka realized that antagonizing perhaps one of the very few countries in the world willing to invest in Sri Lanka would not be a prudent move.

5.4 The Tripartite Agreement

Approximately 16 months after the Colombo Port City project was suspended, the new Tripartite Agreement was signed by the GOSL, the UDA and the Project Company on 11 August 2016. This followed the conclusion of the second EIA, referred to as the Supplementary Environmental Impact Assessment (SEIA), commissioned by the Ministry of Megapolis and Western Development and conducted by the Central Engineering Consultancy Bureau.

The 400+ page SEIA Report gives details of the agreements that were signed by the previous GOSL and the extent of the environmental assessment. It concludes that the project was feasible at an even larger scale than before, and recommended that the government reclaim 269 hectares of land (previous agreement being for the reclamation of 233 hectares) and that the associated risks would not cause significant damage to the environment or climate.

With the Tripartite Agreement in place, the GOSL has given the greenlight for the reclamation works. It appears that the new government formed in March 2015 is satisfied that the Colombo Port City Project is an environmentally, financially and socially feasible project that should be carried out and that the SEIA has addressed the doubts concerning the environmental viability of the Port City Project.

6. SUSTAINABILITY OF THE COLOMBO PORT CITY PROJECT

6.1 Have the project proponents identified the potential environmental risks?

6.1.1 Initial EIA Process

As noted above, many groups have questioned the sustainability of the Colombo Port City and the damage it may cause to the environment. Despite having carried out an IEE and EIA prior to the project's inauguration in September 2014, there were "grey areas" relating to the environmental, economic and social impacts that the project could have, that needed to be resolved. In particular, the sheer scale of the project (to claim over 200 ha of land from the sea) meant that an unprecedented level of depth and detail was required to satisfy opponents that the country would be better off after the project was completed.

The first EIA was commissioned by the SLPA and led by the University of Moratuwa, one of the top-ranking universities in Sri Lanka. Although the EIA detailed the scope of the Port City Project and some of the associated environmental risks, it was heavily criticised for failing to address a number of important issues, inter alia:

1. The exact dimensions and parameters of the project;
2. The specific activities that would be carried out to complete the project (at the reclamation stage);
3. The methodology and models that were used to derive the conclusions reached;
4. Graphical representations (including detailed maps) of the project and its parameters;
5. Data on marine biodiversity and the availability of sensitive areas;
6. Details on the supply and transport of raw materials, particularly quarry rock and granite;
7. Waste management and the disposal of wastewater;
8. The environmental impact of sand extraction; and
9. The environmental impact on Colombo and its surrounding suburbs.

It was also argued that, due to enormity of the project and the fact that no land reclamation had ever been undertaken in Sri Lanka on such a scale, the team, which was led by local university professors, would not have the necessary expertise or experience to conduct the EIA to the requisite standard. In addition, it was alleged by the Environmental Foundation Limited (Environmental Foundation, 2015) that the relevant local authorities had not been consulted during the EIA process:

“The existing document for the EIA carried out seemed to have no consultation from the Central Environmental Authority (CEA), Marine Environment Protection Authority (MEPA), Geological Survey & Mines Bureau (GSMB), Sri Lanka Land Reclamation and Development Corporation (SLLRDC) and the Hydrographic Division of National Aquatic Resources Research and Development Agency (NARA), who are the mandated government authorities for working on environmental issues, marine environment protection, offshore sand exploration and mining, land reclamation and the study of ocean currents.”

It is important to note that while it is reasonable to conclude that the IEE and the EIA done prior to the GOSL Agreement being signed in September 2014 was inadequate in some respects, not all of the criticism levelled against the EIA process has merit. For example, whilst it is true that no major sea reclamation project had been carried out in Sri Lanka prior to the commencement of the Port City Project, the consultants involved in the first EIA did have adequate qualifications and exposure. For instance, Professor Samantha Hettiarachchi, the Team Leader for consultants from the University of Moratuwa who completed the EIA, is a Professor of Civil Engineering of the University of Moratuwa and a former Chair of the UNESCO Indian Ocean Consortium on Risk Assessment.

He is an internationally renowned expert on the assessment of environmental harm due to reclamation works. It is pertinent to note that those who criticised the EIA process, including the two petitioners in the Writ Application filed in the Court of Appeal³¹ and the fundamental rights application filed in the Supreme Court,³² had no reliable scientific backing to substantiate their claims that the EIA was inadequate.

Another important point is that the Environmental Foundation Ltd.'s allegation that relevant stakeholders such as the CEA had not been consulted when completing the EIA process lacked merit. The CEA is the project approving agency (PAA) under the NEA.³³ In the case of the Port City, since the project involves coastal management, the PAA was the CC&CRMD and had been involved as required in terms of the CCA³⁴ in approving the EIA. Further, there is clear evidence in the EIA to show that all relevant stakeholders were involved in the EIA process; this is that the Terms of Reference for the EIA had been prepared by a Scoping Committee appointed by the CC&CRMD, comprising of the 16 regulatory agencies, which included: the Colombo Municipal Council, Colombo District Secretariat, Sri Lanka Navy, Colombo Divisional Secretariat, Ministry of Defence, Ministry of Economic Development, Department of Fisheries, UDA, Sri Lanka Tourism Development Authority, CEA, Road Development Authority, Marine Environment Protection Authority, Department of Archaeology, Geological Survey and Mines Bureau, and Sri Lanka Land Reclamation and Development Corporation.

Moreover, clause 12.1 of the Concession Agreement, which was annexed to the GOSL Agreement of September 2014, specifically provided that the GOSL shall obtain the applicable permits and consents necessary for the design, construction and completion of the Port City Project. This establishes the fact that the relevant agencies, in any event, would have had to carry out an independent evaluation of the EIA process before issuing permits such as:

- The environmental clearances pursuant to an EIA;
- Sand Mining Licenses for sand borrow zone from the Department of Coastal Conservation and Coastal Resources Management;

³¹ CA 112/2015.

³² SCFR 151/2015.

³³ Act No. 47 of 1980.

³⁴ Act No. 57 of 1981.

³⁵ The Central Engineering Consultancy Bureau (CECB) was established as a fully owned State Enterprise by the Government of Sri Lanka in 1973. It is currently attached to the Ministry of Mahaweli Development and Environment. It has been operating as a self-financed government corporation since inception and is primarily involved in providing engineering consultancy, construction and related services.

³⁶ The associated consultants were: GSMB Technical Services (Pvt) Ltd.; National Aquatic Resources and Research Agency; Lanka Hydraulic Institute Ltd.; Uni Consultants, University of Moratuwa; CDR International B.V, the Netherlands.

³⁷ Central Engineering Consultancy Bureau. Available at: http://cecb.lk/project/Completed%20Projects/completed_Ports%20and%20Coastal.html (Accessed 24 June 2017).

³⁸ SEIA, 2015, Executive Summary, p. 1.

- Permits for quarry operations;
- Approvals from the Department of Archaeology;
- Marine Environment Protection Authority (MEPA); etc.

6.1.2 The SEIA

As mentioned above, it was decided by the incoming administration after the March 2015 elections that a fresh EIA should be conducted to address the inadequacies of the first assessment and to account for an increase in the proposed area for reclamation. Accordingly, a ‘supplementary’ EIA (SEIA) was commissioned by the Ministry of Megapolis and Western Development and conducted by the Central Engineering Consultancy Bureau (CECB)³⁵ as the Lead Consultant.³⁶

The SEIA sets out a two-phased approach to the analysis in which it would cover the first phase of development, relating to the reclamation of the land for the Port City, including the “... reclamation, sand extraction and construction of coastal structures to protect the landfill and landscaping aesthetics for the proposed Colombo Port City” (CECB, 2015). The second phase of the EIA, which has yet to be commissioned, is a requirement in order for building to commence once the land has successfully been reclaimed and would cover the construction of buildings and infrastructure for the Port City (CECB, 2015).

According to the lead consultant, CECB, the SEIA aimed to fill the lacuna created by the EIA and IEE and was conducted by a team of experts with experience in consulting for large-scale ports and coastal projects both within and outside of Sri Lanka.³⁷ In the detailed 400+ page study, numerous potential environmental issues are identified and their respective risk levels are determined. Where relevant, measures and alternatives that would help mitigate the effects and alleviate any negative impacts caused by the construction of the Port City are suggested.

The SEIA explains its scope in the following words:

“This Supplementary Environmental Impact Assessment (SEIA) study is carried out for the expansion of the reclamation area of the Colombo Port City Project from an area of 200 ha, which was approved by the project approving agency, the Department of Coast Conservation and Coastal Resources Management, subsequent to an environmental impact assessment (EIA) study that was subject to public comments via a notice placed in newspapers on 11 June 2011, to an altered design comprising an area of 269 ha, together with the impacts of extraction of sand from the identified borrow areas and quarry material required for the entire landfill and protective works. The above-mentioned EIA for 200 ha did not cover environmental impacts of sand extraction as a separate and inconclusive initial environmental impact assessment (IEE) process was adopted by the Sri Lanka Ports Authority in this respect, and this lacuna is being addressed

via this SEIA study. Notwithstanding the EIA of 2011 for 200 ha being approved after the public review process, this SEIA study covers the entire reclamation footprint and the extraction of quarry material and sand required for the entire project.”³⁸

Thus, it would appear that, irrespective of the use of “supplementary” in its title, the SEIA is a comprehensive environmental assessment of the Port City Project.

The SEIA notes that the CCCC was regarded as a competent land reclamation specialist as it had undertaken several large land reclamation projects around the world.³⁹ Because of this, the initial EIA process for the Port City Project assumed that many of the environmental risks associated with dredging had been considered during the planning stages and, accordingly, these were not dealt with in adequate detail in the EIA. This approach, referred to as “mitigation by design”, has drastically reduced the need for considering specific mitigation measures during the EIA process.⁴⁰

According to the SEIA the objectives of Colombo Port City as formulated by the Project Company are:

- To foster integrated oceanfront living within the CBD to provide a high quality of life through world class office, residential and recreational spaces that will attract tourists, professionals, entrepreneurs, managers and retirees;
- Position Colombo as the most liveable city in South Asia;
- To create a regional business hub, a city with a distinct brand with high-quality public spaces and infrastructure facilities, attractive to local and international developers and investors;
- To create a tourism hub with a unique character that reflects the distinctive local culture and the existing urban fabric;
- To design and build a sustainable urban city space that is adapted to the local climate, creates a comfortable micro climate and makes efficient use of energy resources.

The SEIA notes that Colombo cannot become a destination that appeals to the international business travellers or tourists with ad hoc and fragmented developments and without distinct positioning. Therefore, Colombo Port City provides an opportunity for the old and historic part of Colombo’s central business district to seamlessly interface with a modern planned metropolis like no other in South Asia.

With this background, the SEIA shows that it is the end product of a comprehensive review of the modelling work and preliminary designs carried out for the Feasibility Study of Port City. The studies, which have been reviewed, contain comprehensive

³⁹ According to the information available on the CCCC website, the company has undertaken several land reclamation and related infrastructure development projects in Mexico, Mauritania, Pakistan, Hong Kong, Malaysia, Ethiopia, Indonesia, Macao, Sudan and Uzbekistan. See <http://en.cccctd.cn/business/overseas/index.html>. (Accessed 20 August 2017).

⁴⁰ SEIA, 2015, pp. 29-30.

2D and 3D physical model test studies and numerical modelling studies, which include: an interpretation of coastal evolution and siltation due to the proposed development; sediment transport modelling considering dredging and reclaiming; and an interpretation of contaminant concentration at the Beira Lake outfall with the proposed mitigation measures. Further, ground investigations have been carried out to better understand the technical requirements to be considered in the implementation of the project.

The SEIA lists the following engineering studies that were carried out during the feasibility and environmental study phase of the Port City Project and which have been reviewed in developing the SEIA report:

- Wave climate modelling
- Hydrodynamic modelling
- Wave disturbance modelling
- Sediment transport modelling
- Sediment dispersal modelling
- Shore profile survey
- 2D stability physical model test on offshore breakwater and revetment for a marina;
- 3D physical model study test;
- Analysis (numerical modelling) of coastal evolution and siltation;
- Numerical modelling of water exchange;
- Ground investigations;
- Water quality sampling and analysis;
- Assessment of inland quarry material availability, permits, transport routes, impacts etc.;
- Model and ecological studies at reclamation area;
- Impacts on Beira Lake outfall and storm water drain outlets impacts due to the proposed development, including 3D numerical model.

The table below shows the key environmental risks identified in the SEIA and the conclusions reached and/or recommendations made in connection with the same ⁴¹:

Potential Risk	Conclusions/Recommendations
Coastal erosion to the north of the Colombo Port.	The Colombo South Port breakwater which extends 2 km in length perpendicular to the coast protects the land to be reclaimed for the Port City. It has increased the wave shadow, extending it northwards. As a consequence, wave conditions in this area had become calmer and the shoreline between the Colombo South Port and the Kelani River has remained stable. Monitoring over the last four years has confirmed that erosion has not taken place due to the breakwater. The sediments from the Kelani River discharged north of the Colombo Port have also contributed to this effect. Port City is in the shadow of the Colombo South Port breakwater. Therefore, it has no impact on coastal erosion north of Colombo Port.
Erosion due to dredging.	When dredging is taking place for sand, material must be taken away from the active dynamic zone, where waves do not have an influence on the seabed. In the case of Port City, dredging areas have been identified on this basis.
A total of 2.83 million cubic metres of quarry material and 65 million cubic metres of dredged sea sand will be required for the Port City. Making these available for the project would cause environmental harm.	For the Port City, quarry material will be obtained from existing, licensed quarry suppliers. These quarries have been already screened for environmental concerns when granting licences. Sand is to be extracted from two areas designated by the Geological Surveys and Mines Bureau. Licences for these sites have been already issued. The available sand in these two sites is almost double the requirement for the Port City.
Environmental damage (danger to marine life) from dredging activities.	The approved methodologies for dredging have taken this aspect into consideration to ensure that there will be no impact on coastal erosion.
Adverse effect on the livelihood of the fishing community.	Measures have been recommended to allow fishers to engage in fishing within the allocated dredging sites by giving proper notice in advance and after dredging work is done to recommence fishing. This will be in accordance with COLREG regulations. ⁴² Recommendations have been made to implement an income support and benefits programme to fishermen. ⁴³

⁴¹ For a more detailed analysis of all the identified risks and the recommended mitigation measures, please see chapters 4, 5 and 7 of the SEIA, 2015.

⁴² The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) published by the International Maritime Organization (IMO).

⁴³ SEIA, 2015, Chapter 5.

<p>Loss of marine life</p>	<p>There will be no reduction in fishing grounds in the reclamation area since this is not an ideal habitat for fish breeding due to already silted conditions.</p> <p>In any event, the dominant fish resources in the area are pelagic, transient species that are likely to avoid unsuitable environmental conditions and return once normal conditions are established in the long term.</p> <p>There will be some beneficial effects from the project. The use of granite boulders and concrete elements for protection works will serve as suitable habitats for fauna and flora. These will provide shelter for benthic animals that inhabit reefs such as lobsters and some fish. In addition, these boulders will serve as habitats for coral organisms as observed in the newly constructed breakwaters of the Hambantota port. Therefore, the populations of such animal may increase.</p> <p>Sand dredging is expected to cause some temporary impacts by removing benthic fauna and increasing turbidity as a result of an increase in suspended particles in the water column. However, the restriction of the dredge depth is expected to mitigate these impacts.</p>
<p>The influx of demand for power and sewerage could negatively impact the surrounding communities and the city as a whole.</p>	<p>Under the terms of the Agreement, the GOSL bears full responsibility for the provision of utilities (including water, power and sewerage) to the entire Port City. The project is to be developed in phases, thus giving adequate time for GOSL to implement the necessary support infrastructure projects.</p> <p>The SEIA covers in detail how sewage will be disposed of both during and after the reclamation phase is completed. It also used a specifically tailored numerical model to assess the impact on the discharge from the Beira Lake outfall and suggests a comprehensive plan for “improving dispersion and preventing any obstruction”.</p>

Chapter 7 of the SEIA outlines an environmental management plan (EMP), the terms of which form a part of the contract between the Project Company and the GOSL. The EMP is described as a “tool for the management of the environmental performance of the project and it is developed as an important component of the project activity”.

According to the SEIA, the EMP will be overseen by an environmental monitoring committee (EMC) which will ensure the project’s compliance and adherence to the EMP. The EMC will be chaired by the CC&CRMD and will include membership from a broad spectrum of stakeholders including the CEA, National Aquatic Resources Research and Development Agency, Department of Fisheries, Department of Archaeology, as well as the EIA consultants and the contractors. This diverse membership is likely to allow a balanced approach to the management of various challenges presented by the Port City and will also give the opportunity for multiple parties to weigh-in on issues that may affect particular groups, communities or environmental causes. Accordingly, it can be said that the project proponents have identified the risks that the first EIA failed to address. In addition, they have suggested practical solutions to diminish the impact that they could have had on the environment and a feasible way to monitor the results through a cross-functional EMC.

6.2 Balancing the economic interest and the environmental concerns

As with any large infrastructure project on the scale of the Colombo Port City Project, there are costs, risks and benefits to be weighed against each other. These must be viewed with regard to the current status of Sri Lanka, as a post-war country that has grand aspirations of becoming a dynamic commercial and financial hub. To achieve this end, and position Colombo as the “go-to” destination in the South Asian region, a significant financial investment is required to fund large-scale development. However, this must be carefully balanced against the social, environmental and humanitarian impact that achieving such a feat could entail.

The main environmental costs identified by the EIA and SEIA, for the entire project are: potential losses to archaeological and cultural aspects (Sri Lankan Rupees LKR 1.2 million), accidental damage or injury costs (LKR 178.5 million per year during reclamation), mitigation costs (LKR 63.5 million) and monitoring costs (LKR 261 million). This does not include the LKR 1,000 million that has been allocated as part of the benefits programme designed to compensate local fishermen for loss of revenue and earnings as a result of the Port City’s construction. Thus, the approximate environmental cost of the Port City Project in monetary terms would be LKR 1,504.2 million (approximately USD 10 million). This should be weighed against the agreed foreign direct investment of USD 1.4 billion for developing the project.

It is also important to note that the development of the Port City Project will not require any local capital, resulting in a drastic reduction in the amount of tax payers’ money being used to support the project (at the reclamation stage). Apart from the opportunities for foreign companies to take advantage of Colombo’s unique strategic location, the project will also directly lead to the creation of jobs and entrepreneurship opportunities for local Sri Lankans. The SEIA estimates that each year will bring approximately 15,000 new jobs, totalling 150,000 jobs for the first 10 years of business operations. Other benefits include land sales, valued conservatively at USD 6 billion, for the land allocation to the GOSL, over a period of 20 years. In addition to all this, there will also be a FDI inflow to develop the reclaimed land.

In the aforesaid premises, it could be said that as long as the identified environmental risks are adequately addressed, and efficient and effective mitigation measures are put in place, the Colombo Port City Project does not have to be another white elephant.

8. LEGAL MEASURES AVAILABLE TO DEAL WITH FUTURE ENVIRONMENTAL HARM FROM THE PORT CITY

Sri Lanka has developed a significant body of legislation that protects the environment and the public's freedom to enjoy nature. In fact, environmental protection is enshrined in the constitution: "the state shall protect, preserve and improve the environment for the benefit of the community" (Article 27 (14)). An important piece of legislation that could be invoked in any future legal challenges is the NEA, a violation of which may lead to a prison sentence.

For severe environmental harm that falls outside the scope of the EIAs, litigation is an option for those affected, although the process can be long and drawn out.

There are broadly speaking three main channels for a legal challenge against the Port City: criminal action, administrative action and civil action.

Section 261 of the Penal Code details "public nuisance" and the specific behaviour/conduct that would constitute an offence. There are two main requirements, namely, a common injury, danger or annoyance, either to the public or the people who dwell or occupy property in the vicinity, and an injury, danger, or annoyance to persons who may have occasion to use a public right. The principal form of relief granted to those who have been affected by a public nuisance is an abatement, or removal of the nuisance caused.

If any future environmental harm were to occur due to the Port City Project, a public nuisance claim could be brought against the Project Company and/or its EPC contractor. Whilst it could be argued that as the project has been identified as beneficial to Sri Lanka's growth and develop, it should not be classified as a "public nuisance". However, Section 261 of the Penal Code provides for such situations and clearly states that such an offence may not be excused solely on the basis that it may have a positive or advantageous impact.

In addition to criminal action, those affected by the Port City Project could also file administrative action against the relevant public-sector entities involved in regulating the project, for example, the CEA, CC&CRMD, and the UDA. Such actions may be filed in the form of a Writ Application as provided for in Article 140 of the constitution or in the form of a Fundamental Rights Application as provided for in Article 126 of the constitution. In addition to such actions against the state, those affected may also pursue civil actions for damages arising out of negligent construction and/or environmental management. Where the complained effect/impact is severe and irreparable, it may also be possible to obtain injunctive relief.

It is also important to note that, apart from the rights the third parties may have to challenge the Port City Project, the Tripartite Agreement signed between the GOSL, the UDA and the Project Company has also several inbuilt checks and balances to ensure that the development activities do not cause environmental harm. For example, clauses 8 and 9 of the agreement specify the functional and design

requirements which have to be met by the Project Company. Clause 13 of the Tripartite Agreement ensures that the project proceeds according to a Development Master Plan approved by the UDA. This clause also ensures that the reclamation works are carried out subject to the required statutory clearances being in place. Clause 16 requires the Project Company to keep the GOSL updated on the progress of the works and to comply with all the agreed construction tests. Clause 17 provides for the joint appointment of an employer's quality representative, who will report to the GOSL on the quality of construction by the Project Company. Further, Clause 6.1 of Schedule 3 (functional requirements) to the agreement provides that:

"Environmental Management Plan (EMP) - 2016 was prepared to cover all the mitigatory measures proposed in EIA (2012) and SEIA (2015) and the permit conditions imposed by CC&CRMD [...] The Port City Project developer should work proactively to avoid similar adverse environmental and social incidents. All potential environmental and social impacts will be mitigated to acceptable levels by the implementation mechanism of the EIA via the EMP under the guidance of the environmental monitoring committee (EMC), which will be established by the CC&CRMD."

Moreover, Clause 6.2 of Schedule 3 (functional requirements) to the Tripartite Agreement provides that: "The Port City Project developer should work proactively to avoid similar adverse environmental and social incidents. All potential environmental and social impacts will be mitigated to acceptable levels by the implementation mechanism of the EIA via the EMP under the guidance of the environmental monitoring committee (EMC), which will be established by the CC&CRMD."

Thus, it is clear that the Tripartite Agreement has adequate provisions to ensure that the parties comply with the agreed mechanisms to minimize environmental harm from the project.

9. CONCLUSION

The entire purpose of conducting the EIAs is to evaluate "the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse" (CBD, 2017). Thus, it can be inferred that the present, as well as the "likely" future environmental harm, must be considered in order to complete such an assessment.

The reclamation stage of the Port City Project is covered by not one, but two EIAs, which have both been rigorously scrutinized, opened for public comment and evaluated by the relevant decision makers, prior to being approved. Any environmental harm that has been identified under the EIAs must be considered in light of the laws and regulations of Sri Lanka, and their approval is only given on the basis that any harm or damage does not outweigh the socio-economic benefits of the project.

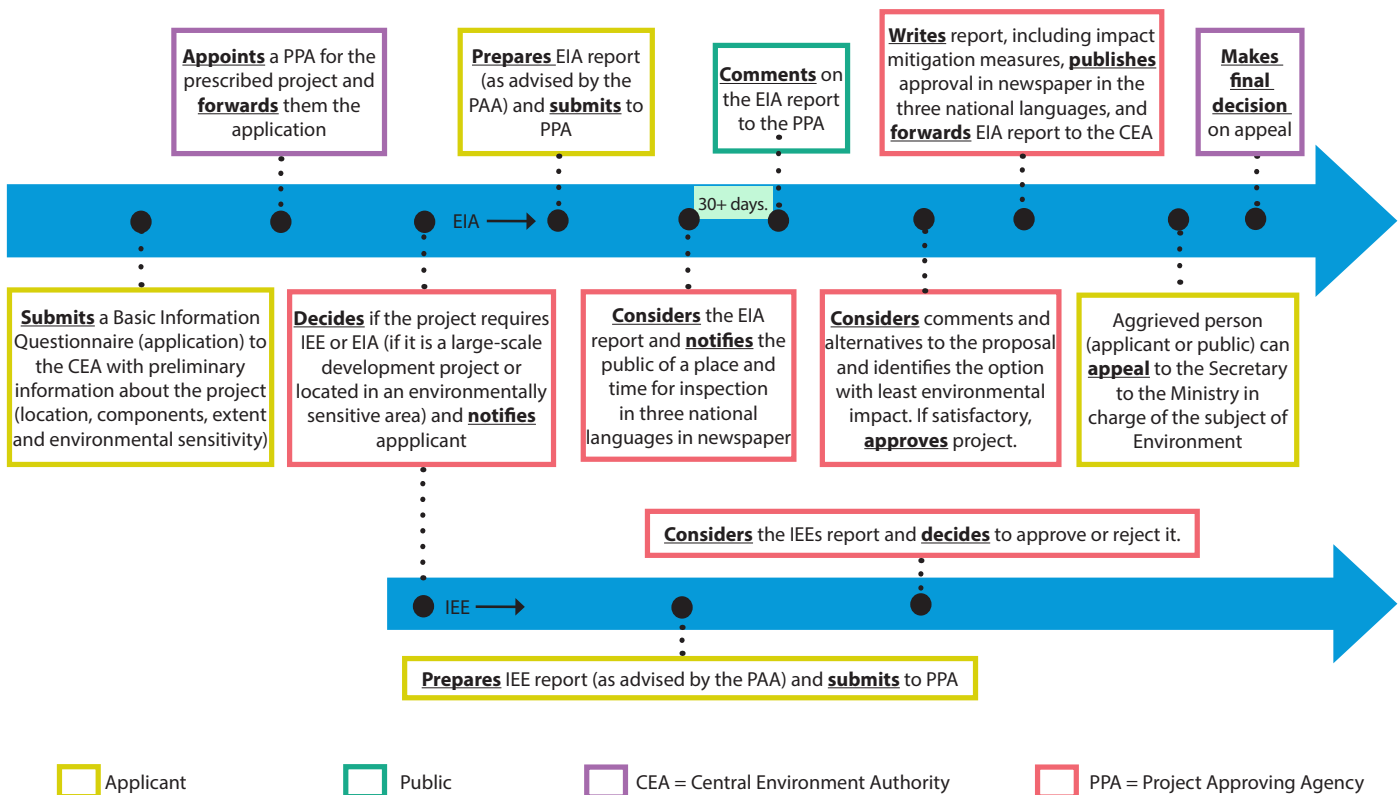
The Port City project will be overseen by a committee that will ensure that the views and rights of multiple parties are protected during the reclamation phase, as recommended by the SEIA. If any environmental harm is identified, it will be the responsibility of the EMC and contractor to seek an open and transparent dialogue

with the affected local community and public, with a view to “manage, investigate and act upon, any issues raised” after works have commenced. This will reduce the prevalence of litigation and will allow the parties themselves to come to a resolution on any issues that may arise during the course of construction.

The second phase of development on the reclaimed Port City is likely to bring new environmental concerns and to address those properly the project proponents must satisfy a new EIA to cover the environmental risks that will arise post-reclamation, during the construction phase. As with the first EIA and Supplementary EIA, the planned development will be opened for public scrutiny, at which point affected communities would be able raise their concerns and seek remedies directly with the Project Company, the GOSL or other relevant third parties.

All that said, it is reasonable to conclude that with the completion of the SEIA to address lacunas in the previous EIA for the Port City Project, the environmental management plan introduced by the SEIA to mitigate the adverse impacts of the project and the checks and balances put in place in the Tripartite Agreement, the Port City Project no longer looks the ill-defined and badly planned project it was alleged to be at the time it was unilaterally suspended by the GOSL.

SRI LANKA Initial Environmental Examination (IEE) and Environmental Impact Assessment (EIA) Process Based on National Environmental Act Amendment No. 56 of 1988, Part IV C



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