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## **SPECIAL ECONOMIC ZONES AND THE PORT CITY:**

**Are they the panaceas for our ills?**

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### **A Comparative Review of SEZs: Demystifying Myths and Controversies**

*Dr. Kehinde Olaoye and Dr. Dini Sejko*

The authors provide a concise, comparative review of the special economic zones as legal and economic structures for national development.

It further analyses success stories and critically examines failures and media criticism to offer a more balanced and objective perspective to SEZ.

### **The Port City, Governance and the People**

*Professor Savitri Goonesekere*

The author, Prof Savitri Goonesekere addresses the Colombo Port City initiative in the light of governance and the future of Sri Lanka. Her analysis includes the Colombo Port City Economic Commission Bill, the public interest litigation contesting the constitutionality of the Bill in the Supreme Court and the Supreme Court judgment as well.

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## EDITORIAL

# Special Economic Zones and the Colombo Port City-

## Are these the panacea for Sri Lanka's protracted development crises?

The proliferation of Special Economic Zones, (SEZs) especially in Asia, Africa and the Middle East, was founded on the belief among policy makers that these SEZ were the engine of growth. In Sri Lanka too, the fascination with Special Economic Zones and the concept of the "megapolis" as the engines of growth permeates the mindset of the present government and the government that it replaced. In the 1980's, Free Trade Zones were presented as the seeds for Sri Lanka's potential economic growth. Three decades later the Colombo Port City Project was born out of this fascination. We in Sri Lanka should brace ourselves to see more projects on similar lines emerging in the years to come. The Belt and Road Initiative and the String of Pearls initiative sponsored by China may lead to the emergence of similar zones across those strategic pathways.

This edition of the LST Review focusses on Special Economic Zones and the Colombo Port City. While questioning if these are the panaceas for Sri Lanka's protracted development crises, it also begs the question how such initiatives fit within the framework of Sustainable Development Goals that are subscribed to by Sri Lanka. It is hoped

that this LST Review will foster a broader debate among the community to develop a realistic appraisal of the Port City initiative, a commitment to monitor its operations on an on-going basis and ensure that it will be implemented within the framework of Sri Lanka's human rights commitments and the sustainable development goals.

The LST Review invited academics Kehinde Olaoye and Dini Sejko, researchers from the City University of Hong Kong, to provide a comparative review of Special Economic Zones. The transformation of Shenzhen in the Guangdong coastal province into China's mega tech city speaks of one experience of Special Economic Zones in China and China's own experience as a partner in Special Economic Zones in other parts of South and South east Asia and Africa speak to another experience that is also discussed as an emerging development paradigm.

The LST Review also invited Prof. Goonesekere, Emeritus Professor of Law to address the Colombo Port City initiative in the context of governance and the future of Sri Lanka. Prof. Goonesekere analyses the Colombo Port City Economic Commission Bill, the public interest litigation contesting the constitutionality of the Bill in the Supreme Court, and the Supreme Court judgment as well. She also addresses the Bill from the perspective of the challenges that the Bill posed to the constitution and the possibilities of future constitutional issues that may arise from the Act, which hastily incorporated the changes proposed by the court but may still be plagued by issues that were not fully addressed and resolved by the courts and even judiciously avoided by it. The

Sri Lanka Constitution provides for a limited and unsatisfactory process by which Bills may be reviewed in terms of their constitutionality and an equally unsatisfactory process by which Courts may advise on the amendments that may be made to a Bill to ensure that it will not be in conflict with the constitution.<sup>1</sup> Parliament is required to make amendments in line with the Supreme Court's advice but the amended Bill is not returned to the court for a final review. There is no satisfactory mechanism to review the revised Bill and ensure that the changes made are indeed consistent with the constitution, besides the points that may be raised during the parliamentary debates. Parliamentary proceedings have become intensely partisan processes and few expect it to be the arena where bipartisan legislative review will take place and where legislation that is aligned with national interests will be passed.

Kehinde Olaoye and Dini Sejko, in their comparative study of SEZs recognize and address some of the fears associated with these zones and also seek to demystify some of the myths and controversies that are associated with such zones. They argue persuasively that it is not the concept or the entity per se that poses challenges but the enabling legislation and the context in which they are located. They express the view that the devil is in the detail.

There is a tendency to regard a transformed skyline as the hallmark of a vibrant economic hub. However, Olaoye and Sejko note that the Special Economic Zones are not magic pills for spurring economic growth. For a SEZ to achieve its objectives it requires sound, enabling legislation and agreements that

appeal to investors but most critical for the success of SEZs, is good planning, and good governance. This is reinforced in discussions with members of the business community in Sri Lanka too. The think tank Advocata conducted a commentary on the Port City Bill during the parliamentary debates on the Colombo Port City Economic Commission Bill held on 19<sup>th</sup> and 20<sup>th</sup> May 2021. Several business leaders commented that they were less impressed by the tax incentives dangled before them and were more focused on whether the SEZ was governed by a clear and consistent regulatory framework. The bottom line is that good economic governance is more attractive to investors than tax benefits. In the light of the several “scams” that have attracted attention (from the fabled Bond scam to the more recent sugar and garlic scams) Sri Lanka has yet to establish its credentials as a country that is focused on maintaining a scrupulous reputation and a commitment to good economic governance.

There is also the danger of confusing the SEZs as a catalyst for growth from regarding SEZs as the engine of growth. Where a SEZ is seen as the engine for growth all investments are made in the SEZ to the exclusion of other areas and sectors. The SEZ sucks up the oxygen as it were leading to economic and social distortions, to the neglect of other regions in the country and most definitely to the marginalization of national investors with smaller investment budgets who will not benefit from the waiver of many existing laws, preferential taxes, State-of-the-Art infrastructure, and the special mechanisms to ensure the speedy resolution of disputes.

The single-minded determination to make SEZs attractive for Foreign Direct Investments (FDI) has led to the creation of parallel and exceptional legal regimes and regulatory frameworks that disadvantages and leaves behind local investors, investing in other areas of the country and in sectors outside those that attract investment in the SEZs. The focus on creating efficiency, good services, swift legal remedies to address challenges in SEZs ignores the fact that other areas of the country and businesses also require such attention to create a thriving environment. Investment capital is investment capital, irrespective of whether it comes from a foreign investor or a local investor. The ultimate objective must surely be to improve the wider economic environment and not the special zones per se. To ignore the rest of the country is to acknowledge failure and reconcile oneself to the understanding that the rest of the country, the overall governance system and legal framework are beyond redemption and salvage.

Olaoye and Sejko acknowledge the human rights abuses that have in fact taken place in many SEZs, specifically in Myanmar, Laos, Thailand, Cambodia and Gabon that have contributed to the feelings of ambivalence that many have toward SEZs. The controversies and abuses include environmental degradation, the stripping of protection for labour, human trafficking and the unequal and skewed development that SEZs spawn. Heavy and intensive investments in the SEZs are perceived as pushing countries into a debt trap and running counter to the more cautiously paced paradigms of sustainable development.

Strong evidence is cited to establish that solid regulatory frameworks and institutions that support good governance, and are consistent and transparent are essential. There is the expectation that there will be a predictable implementation of SEZ policies, and the establishment of SEZ authorities with strong management capacities and clearly defined responsibilities will be in place. If these are the requirements of a successful SEZ, then this will be the prism by which to analyse the Colombo Port City Economic Commission Act and determine whether Sri Lanka has the Act that it needs.

Professor Goonesekere, focuses on the Colombo Port City from the perspective of governance, constitutionalism, its impact on the sovereignty of the people and on the rule of law. She noted that the Port City initiative was mired in controversies from the inception. There was no public consultation on the project or on the costs. There were no environmental feasibility studies to assess the impact of reclaiming land from the sea, especially on the fishing industry. Little has been done to allay fears and convince the people that this project is a constructive element in Sri Lanka's development paradigm.

She also raises concerns that the Port City will have domestic implications – creating anomalies and stirring controversies.

Prof. Goonesekere analyses the Colombo Port City Economic Commission Bill, the public interest litigation contesting the constitutionality of the Bill in the Supreme Court, the Supreme Court judgment including its perspectives on the challenges that the Bill posed to the constitution. The judgement

proposed changes to the legislation that Parliament was required to incorporate to make it compatible with the Constitution of Sri Lanka if the Bill was not to be subjected to a referendum. The fact that the Supreme Court recognized these inconsistencies, pointing to 26 provisions that could be amended with a 2/3 majority in Parliament and 9 provisions that required a special majority in Parliament and a referendum is revealing in the context of the sanguine approach of the Attorney General's office that saw in the Bill no inconsistencies with the constitution. The Constitution of Sri Lanka does not permit laws to be challenged in the courts and the window of opportunity in which Bills may be challenged before the courts is a very limited. Despite this, energetic members of political and civil society mounted a legal challenge and thus forced the government to make some limited changes to the Bill.

The Supreme Court judgment had to address some complex legal and political issues. These included:

- The power of the President to lease or dispose of reclaimed land and to alter the definition of the Administrative District of Colombo;
- Whether the Colombo Port City Economic Commission Bill could substitute a Project Company to exercise the powers that were assigned to the Government;
- The exclusion of many important laws including land laws from application within the Ports City; and

- The relationship between the powers of the Port City Commission and the Provincial Councils and the status of Provincial Councils and their powers with respect to land.

Although the Supreme Court did compel the government to make some amendments to the Bill, the Court avoided addressing important questions relating to the powers of the Provincial Councils in relation to land. The Court's attitude towards the Provincial Councils and their constitutional powers to make laws for the provinces in relation to land and their right to be consulted on matters impacting the provinces is revealing. Taking refuge in the fact that the Provincial Councils were not constituted according to the law as elections had not been held, that Court expressed the view that the procedural step of consultations with the provinces could not be held and therefore non-consultation was not a violation of the constitution. The Courts have thus not contributed to providing clarity on the powers of the Provincial Councils in relation to land and this may well re-surface to bedevil the Port City Commission in years to come.

The Provincial Councils have lain semi-dormant for several years, as there are political controversies surrounding the holding of Provincial Council elections. Provincial Councils have also been contested by those who do not seek to permit the Councils to exercise powers in relation to land and police powers. However, at the time of publishing this LST Review, there are discussions that these elections will be held shortly. In the event that Provincial Councils will be constituted, how will the court's rulings on

land alienation in relation to the Port City be accepted by the Provincial Councils? What precedent does it set for future megapolises?

Prof. Goonesekere also highlights the tensions that may arise from the various development and governance models that the Colombo Port City Economic Commission Bill claims to support. Sri Lanka has committed to several international treaties that promote human rights-based development that underpin sustainable development. Unless laws that provide for the range of civil, political and economic and social rights including environmental rights are in place, sustainable development will not be realized. However, the Bill commits to promoting sustainable development and rapid economic development. These goals are inherently contradictory. In the pursuit of rapid economic development, violations of human rights conventions may occur and may lead to popular mobilization against the Port City project.

The Port City, located in the heart of Colombo may come to represent a haven for the affluent (both local and foreign elites) and become a symbol of privilege and a source of resentment. Although the state is committed to protecting the purse and person of foreign investors, it does not augur well for the continued success of the initiative if the Port City is to be located amongst a discontented and hostile population.

The creation of the Port City with special laws to enable a one stop shop for investors is a tacit recognition that investors in Sri Lanka are generally spun around and forced to navigate endless and unnecessary bureaucratic hoops

and hurdles. Each of these hoops and hurdles are opportunities for extortion. There appears to be no interest on the part of governments in ending this sad state of affairs. The recognition that special dispute resolution mechanisms are needed for investors in the Port City recognizes the appalling delays that litigants face in the Sri Lankan judicial system. This is a continuous subject for discussion but it may not be the focus of reforms when a parallel system is established for the benefit of a special class of investors.

A major concern is that the Port City and the extraordinary powers vested in the Commission are not confined to the reclaimed land that is referred to as the “Port City” but also extends to lands that exist outside that area. Buildings that lie within the historic Colombo “Fort” are deemed to be part of the Port City and there is considerable disquiet that there are no laws or regulations in place to ensure that they are preserved as heritage sites.

The Port City Bill gives the President, the Port City Commission and its Chair, plenipotentiary powers to achieve its objectives of rapid economic development. The Supreme Court was compelled to rule that the President’s powers to appoint members of the commission had to be in line with guidelines for appointment and that the arbitrary exercise of discretionary powers could be challenged in the Courts. However, in recent times, many appointments made by the President - including a trend of militarising public administration - has

gone unchallenged by a weary public and Parliament.

Prof. Goonesekere does not focus on the geo-political implications of the Port City but recognizes that the dependence on a single bilateral partner – the Chinese government, has also raised concerns. However, the Port City that aimed to be a strategic, regional financial hub may well turn into geo-political quagmire for Sri Lanka and also generate tensions due to unfulfilled expectations. Given the strategic location of Sri Lanka in the Indian Ocean and the tensions between India and China that are being played out over access to investment opportunities that Sri Lanka variously awards to these and other giant contenders, the Port City may become yet another arena of contestation. Managing these bi-lateral relations will require skilled and professional management of Sri Lanka’s foreign relations and a move away from the currently popular transactional approach to managing foreign relations.<sup>2</sup> Currently, career diplomats have been edged out of many important diplomatic postings and even where special appointments are made, they do not always include experts who can contribute significantly to that post. Even during the pandemic and agrarian and financial crisis, professionals with specialized knowledge in health and agriculture and monetary affairs have been bypassed. This does not augur well for the future.

Sri Lanka is embedded in a democratic governance culture and from time-to-time leaders are called to account for their actions. There is a need to balance a business

friendly and people friendly environment. The two should not be seen as incompatible objectives. The Port City Project intersects with issues of governance, of economy and of society. National resources have been heavily invested in it and it is a matter of equity that the people of Sri Lanka should benefit from it. People no longer have the patience to wait

for trickle down reforms in an environment that has the capacity to generate huge profits for the privileged few.

***DR SAKUNTALA KADIRGAMAR\****

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## Endnotes

- <sup>1</sup> The Constitution of Sri Lanka, Article 123 (1) (c).
- <sup>2</sup> Port City, Better economic governance, not giveaways should be focus of new governance zone, AdvocataInstitute, <https://www.lankabusinessonline.com/opinion-port-city-better-economic-governance-not-giveaways-should-be-focus-of-new-governance-zone/>

# A Comparative Review of Special Economic Zones: Demystifying Myths and Controversies

*DR. KEHINDE OLAOYE AND DR. DINI SEJKO\**

*The authors provide a concise, comparative review of the special economic zones as legal and economic structures for national development.*

*It further analyses success stories and critically examines failures and media criticism to offer a more balanced and objective perspective to Special Economic Zones.*

This article provides a brief comparative overview of special economic zones as legal and economic structures for national development. The creation and operations of SEZs usually triggers public scrutiny and attracts some what excessive but justified criticism. This contribution assesses success stories and critically examines failures and media criticism to offer a more balanced and objective picture of SEZs. Concurrently the article aims to provide a better understanding of SEZs. By drawing lessons on examples from Asia and Africa, we seek to provide lessons for the successful implementation and operation of the Colombo Port City.

## Introduction

In 1978, Shenzhen in the Guangdong coastal province of southeast China, was a small fishing village with a population of roughly 330,000 residents and a gross domestic product (GDP) of US\$2. 87 million.<sup>1</sup> Even though it was only 25 miles from what was still British controlled Hong Kong ‘financial hub’, it was poorly developed. Four decades after China first opened up to foreign investment through its “open doors policy” and established Shenzhen as its first

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special economic zone (SEZ), Shenzhen has transformed from a “small village” into a modern metropolis with a towering skyline. Its economy has grown 13,711 times, boasting a GDP of \$429 billion in 2020.<sup>2</sup> Shenzhen is now home to over 13 million residents and is dubbed as China’s mega tech city, most innovative and competitive city, hosting household names like Huawei, Lenovo and Tencent. Shenzhen is not only a symbol of China’s miraculous economic growth in the last four decades, but it has also become the paradigm for assessing the economic development that could result from SEZs.

Even though SEZs have a long history, the establishment of SEZs proliferated during the end of the last century in Southeast Asia. Governments and international financial institutions such as the Asian Development Bank (ADB) and the World Bank (WB) promoted the establishment of SEZs as tools for the economic development of poor performing regions. Over the last 25 years, the establishment of SEZs in Southeast Asia has received significant official development assistance from governmental agencies and multilateral institutions and attracted foreign direct investment (FDI) from regional and global economic partners, such as Japan, South Korea, China and member states of the European Union member. The official launch of the Belt and Road Initiative (BRI) in 2013, which aims to enhance connectivity among countries along the Silk Road and beyond,<sup>3</sup> and further improve the trade and investment relationship between China and participating countries, has also drawn more attention to the potential of land and maritime SEZs.

The Colombo Port City Special Economic Zone, which is the impetus for the 2021 Port City Commission Act, is just one of several SEZs that have been established around the world in the last few years. Against the background of heated debates which have surrounded the 2021 Colombo Port City Commission Act, this article provides a brief comparative overview of the critical social and legal issues that arise from the operation of SEZs and SEZ agreements around the world. We argue that even though SEZs are significant initiatives for spurring economic growth and development, they are not magic pills. Although SEZ legislation and agreements are critical for the success of SEZs, good planning and good governance are essential to their success.

## Geographical Defined Areas

SEZs can be defined as geographically defined areas that aim to attract foreign investment by offering special incentives and legal regimes that may not be available in other parts of a region/country. In the broadest sense, even though the term “SEZs” is also used interchangeably to refer to other economic zones like economic and technological development zones (ETDZs), free trade zones (FTZs), export-processing zones (EPZs), and high-tech industrial development zones (HIDZs), SEZs are distinct. They usually aim to promote exports, attract FDI, foster industrial development, generate employment, diversify economies, build productive capacity, and support global value chain (GVC) participation.

The essential characteristics of SEZs are the fiscal and non-fiscal incentives that they offer to investors. Although these incentives are as varied as the regions in which they are found, emphasis is placed on enabling business-friendly regulations, including easier access to land, infrastructure support, tax reliefs, faster dispute settlement, special business permits and licenses, or employment rules; and administrative streamlining and facilitation through one-stop services.

SEZs exist in various types and forms. In developing countries, SEZs are usually aimed at industrial development and can be multi-industry, specialised or focused. Traditionally, SEZs focussed on trade and manufacturing. However, in the last decade, there is a noticeable shift towards non-primary industries, such as high-tech, financial services and tourism. These new-age SEZs usually focus on commercialisation, development and urbanisation. The Colombo Port City is an excellent example of this observable trend.

According to a 2019 report of the United Nations Conference for Trade and Development (UNCTAD), nearly 5,400 SEZs can be found across 147 economies. It is remarkable that 1400 of these zones have emerged in the last five years and that more than 500 new SEZs are in the pipeline. The highest numbers of SEZs can be found in China, the Philippines, India, the United States, the Russian Federation, Turkey, Thailand, the Dominican Republic, Kenya and Nicaragua. Unsurprisingly, Asia is host to three-quarters of all SEZs in the world.

In the last decade, Chinese investors have established SEZs as a form of FDI, especially

in Asia and Africa, usually collaborating with local private and governmental partners. Examples of Chinese-backed SEZs include the China-Oman (Duqm) Industrial Park, Nigeria's China-backed Ogun-Guangdong Free Trade Zone (OGFTZ), the Rashakai Special Economic Zone, established under the China-Pakistan Economic Corridor (CPEC) in Khyber Pakhtunkhwa, and the Boten SEZ in Luang Namtha, bordering China. The Thai-Chinese Rayong Industrial Zone, which has been promoted as "a paradise for Chinese companies investing in Southeast Asia" because of its infrastructure and tax incentives, was established in 2006 as a partnership between a Chinese private owned company Holley Group (China), and the Amata Group (Thailand).

## SEZ Agreements and Legislation

SEZs are primarily established and regulated by national legislation, which may be acts, decrees, or regulations that set out the guiding rules for their operation. SEZ legislation is also as diverse as the countries where they can be found. These legislative instruments are often a reflection of the unique needs of the hosting state or region. More significantly, international commitments of states under international treaties such as the World Trade Organisation treaties, free trade agreements, international investment agreements, and double taxation treaties, which provide for specialised transnational economic law rules, protect foreign investors,<sup>4</sup> and strongly impact the operations and governance of SEZs.

SEZs are a paradigmatic example of how national legal systems interact in a globalised world through transnational legal processes involving diverse state and non-state actors. Even though there are mixed results, there is strong evidence for the claim that solid regulatory frameworks, solid institutions and good governance are critical to the success of any SEZ regime. The legal infrastructure of SEZs should ensure consistent, transparent and predictable implementation of SEZ policies. For these reasons, the responsibilities of SEZ governing authorities must also be clearly defined.

National SEZ laws which are applicable to all SEZs within a country are the most common SEZ policy instrument worldwide. However, some countries have adopted other approaches by establishing separate rules for each SEZ or delegating rulemaking powers to local governments. According to UNCTAD, at least 115 countries have adopted SEZ laws. These laws can be found mostly in developing countries.

International contracts that regulate the relationships between state authorities, the parties that manage and operate SEZs, are an essential instrument critical for the operations of the SEZs. These agreements which have not received sufficient attention in SEZ studies are usually development agreements and joint ventures signed between the host government

and companies operating in SEZs designating the regulators, owners, developers, and operators. A recent example is a 2020 joint venture between Chinese consortium CITIC Myanmar Port Investment Limited and the Myanmar government registered as Kyaukphyu Special Economic Zone Deep Seaport Co. Ltd.

The table below shows that Chinese state-owned enterprises usually hold a more significant percentage of the venture in Chinese supported SEZs. For example, in the Kyaukphyu Special Economic Zone, a 70-per cent stake in the CITIC consortium owns 51 per cent of the industrial zone while the Myanmar government owns 49 per cent. CITIC will lead the construction of the industrial zone, which will also involve 42 private Myanmar companies under Myanmar Kyauk Phyu Special Economic Zone Holding Public Company Limited. There has been an increase in this type of agreement, mainly because of Chinese partnerships. However, these agreements remain confidential, and the exact terms on which they are agreed to may never reach the public eye. Our research shows that bottlenecks and legal disputes in SEZ have not resulted from SEZ legislation but from SEZ agreements. These agreements have led to investment arbitration disputes between foreign investors and states. This may be because while SEZ laws define the general legal framework for establishing

SEZs, agreements between states and investors provide more specialised rules for specific SEZ-based projects.

**Table showing the ownership structure of selected SEZs**

**Myths and Controversies**

Year	State	SEZ	Area	Type	Ownership	Legal Agreement
2014	Sri Lanka	Colombo Port City	269 hectares	Services	43% of reclaimed land leased to China Harbour Engineering Company (CHEC) Port City Colombo	Public-private partnership between Sri Lanka and China Harbour Engineering Company (CHEC) Port City Colombo
2020	Myanmar	Kyaukphyu SEZ	1708 hectares	Industrial zone	51% and Myanmar (49%)	MOA between CHEC Myanmar and Kyauk Phyu Special Economic Zone Management Committee (30%)
2020	Pakistan	Rashakai SEZ	406 hectares	Industrial zone		DA between Khyber Pakhtunkhwa Economic Zone Development Management Committee (KPEZMC) and China Road and Bridge Corporation (CRBC)
2018	Djibouti	Djibouti International Free Trade Zone	4,800 hectares	Industrial zone		Chinese Consortium (60 per cent) and Djibouti (40 per cent)
2009	Ethiopia	JinFei Economic and Trade Cooperation Zone	211 hectares	Industrial	100% Chinese sponsored SEZs	Mauritius JinFei Economic and Trade Cooperation Zone Co. Ltd – Shanxi Coking Coal (30.2%), Taiyuan Iron and Steel Group Co. Ltd (50%) and Shanxi Tianli Enterprise Group (19.8%)
2003	Zambia	Zambia-China Economic & Trade Cooperation Zone	1158 hectares	Industrial		JVA between China Non Ferrous Metal (95%) and Zambia Consolidated Copper Investments (5%)
-	Bangladesh	Chittagong SEZ	303 hectares	-		JVA between China Harbour Engineering (70%) and Bangladesh Special Economic Zone Authority (30%)
2006	Nigeria	Lekki Free Trade Zone	16,500 hectares	Oil and gas and manufacturing		JVA between China-Africa Lekki Investment Ltd (80%), Lagos State and Investment Group (20%)
2005	Thailand	Thai-Chinese Rayong Industrial Zone	1,200 hectares	Manufacturing		JVA between Helssy Grave (75%) and Amata Group (Thailand) (25%)
2008	Egypt	Egypt Suez Economic and Trade Cooperation Zone	703.2 hectares	Industrial		JVA between China TEDA Investment Co Ltd. (75%), and Tianjin TEDA Suez International Cooperation Co. Ltd. (5%)

Source: Authors compilation (2021)

SEZs are steeped in myth and controversy. Newspaper headlines often publish stories about exploitation, debt traps, and neo-colonialism. Over the years, Chinese overseas investment has grown, further contributing to a more multipolar international economic order characterised by a race for overseas investment. SEZs are viewed with even more suspicion. In addition, because SEZs are usually based in developing countries with broader structural social and political crises, their operations could lead to more complexities. It is essential to clarify that even though recently, Chinese-backed SEZs are under the spotlight and receive more negative comments, controversies concerning SEZs operations are common in developing countries also in the case of non-Chinese sponsored SEZs. The main social-legal controversies surrounding the operation of SEZs are human rights violations, several human rights abuses have resulted from SEZ projects. Recently, there were allegations that India's Adani Ports and Special Economic Zone Ltd, which is building a \$290 million port in Yangon on land leased from the military-backed Myanmar Economic Corporation (MEC), maintained business ties with Myanmar's military, which is accused of human rights abuses. Some SEZ projects have triggered protests from local communities and civil society groups. In 2015, there were reports that farmers who traditionally farmed on land leased for the Chinese-backed Jinfei Special Economic Zone in Mauritius went on a hunger strike. More recently, in December 2020, locals opposed plans to build a

6,600-acre SEZ in Songkhla province in Thailand, claiming that the SEZ would harm the environment and disrupt their lives.

The environmental impact of SEZs is a second major issue. In some SEZ projects, controversies surrounding the environmental impact of projects have led to significant delays and even cancellation of projects. A notable example is the controversial Dawei Special Economic Zone (DSEZ) in Burma, inaugurated in 2013, which has faced several hurdles, including funding shortfalls and local opposition due to concerns over environmental damage and forced evictions of farmers. Although the geographical location of an SEZ is instrumental to its success, for local communities, these ‘strategic locations’ can have adverse effects on their welfare and livelihood, especially in countries with poor governance. SEZs in Cambodia have been at the centre of some environmental violation reports. In 2016, it was reported that a garment manufacturer in Svay Rieng province of Cambodia was discharging untreated waste water from the Taiwan-backed Manhattan Special Economic Zone into a canal, causing the death of fish and livestock. In the same year, Cambodian environment officials found that the Chinese electronics manufacturer Kuan Tech had illegally dumped sewage into a stream in Takeo province.

In Cambodia, Laos, Thailand, and Myanmar, there are allegations that projects run by Chinese companies in SEZs have become a breeding ground for illegal activities, including non-compliance with labour standards, illegal immigration, and breach of environmental standards in some plants. Violation of labour rights and labour safety

norms are a crucial issue in several SEZs in Asia. Primary concerns include exploitation of workers in SEZs relating to wages, child labour, terms of employment, health, and safety and labour. For example, in 2019, the United Nations raised an alarm that Indian migrant workers working for an India-based timber company, in the Gabon Special Economic Zone in Nkok (GSEZ) were facing poor labour conditions, including human trafficking and forced labour.

In addition to the human rights violations examined above, other political controversies emerge from SEZs’ operation, which may result in the renegotiation of SEZ agreements, especially after changes in government. In 2015, shortly before Myanmar’s general election, the Kyaukphyu SEZ was delayed due to concerns that the agreement for the development of the SEZ would result in a “debt trap” with China. In January 2021, Myanmar announced that it was cancelling contracts with Thailand’s construction giant Italian-Thai Development due to repeated delays, and breaches of financial obligations. Under President John Magufuli, a 2013 agreement between Tanzania and China Merchants Holdings International to build an SEZ was stalled. President Samia Suluhu Hassan, who took over office after Magufuli’s death in 2021, is reconsidering the project.

## Success Stories

The above paragraphs paint a picture that SEZs in Asia and Africa have generally not done very well. There is still mixed evidence on whether special incentives granted in SEZs can drive significant FDI flows and on their

overall costs and benefits. However, there are several success stories, and in some instances, SEZs have lived up to their grand bargains and met the expectations of host states and foreign investors.<sup>5</sup> The Aqaba SEZ, which extends to the borders of Israel, Saudi Arabia and Egypt's territorial waters, was established in 2001 by the Hashemite Kingdom of Jordan. Since its inauguration, the SEZ has led to over 100 contracts worth almost \$500m in total investment, creating jobs for more than 2000 people. Established in 2010 by a joint venture involving Olam International Ltd (40.5%), the Republic of Gabon (38.5%) and Africa Finance Corporation (21%), the Nkok Special Economic Zone in Gabon has been successful. Even in Cambodia, despite the pandemic, exports from Svay Rieng, which used to be one of Cambodia's poorest regions, increased by \$237 million in the first quarter of 2020, primarily due to SEZs, which have made the region a manufacturing base for Chinese companies.<sup>6</sup>

The Dubai International Financial Centre SEZ, established in 2004 as a financial hub for the Middle East, Africa and South Asia, has successfully facilitated record levels of increased trade and investment flows. At the same time, the DIFC has also become an important regional centre for the solution of commercial disputes.

Good planning, and proactive inter agency and inter governmental coordination are crucial for the success of SEZs. The Eastern Economic Corridor (EEC), established in 2018 under the EEC Act by the Thai government to develop the provinces of Chachoengsao, Chonburi, and Rayong and boost economic growth by attracting foreign investors, is a good example of a well-planned economic zone. The EEC Act provides for a comprehensive, multilevel development plan to develop different economic sectors in the region to increase international competitiveness. The EEC plan also redresses the economic imbalance between the Bangkok area and other areas of Thailand.

The EEC Office and the Thai government have signed multiple memoranda of understanding (MOUs) with Chinese government departments and agencies to create a framework for private and state-owned investors in the EEC area. The MOUs help to create synergies and collaboration between the Greater Bay Area (GBA) and the EEC in areas of common interest such as the digital economy, automation, research and development, and innovation. The EEC Act gives legal authority to the EEC Office to override existing laws that are not updated to support the emerging nature of new economic sectors, creating the ideal framework for investors that are testing new products and services in the EEC area.<sup>7</sup> Overall, the EEC

provides lessons on how SEZs can successfully integrate domestic objectives with international initiatives which involve multiple partners.

## The Colombo Port City: Opportunities and Lessons

The Colombo Port City has attracted heavy criticism from civil society groups and the public. In May, individuals and organisations challenged provisions of the 2021 Colombo Port City Economic Commission Bill in a petition to Sri Lanka’s Supreme Court, arguing that the Bill would establish a powerful economic commission, violating provisions of Sri Lanka’s constitution. Commentators have argued that the Colombo Port City will increase Sri Lanka’s debt burden, make Colombo a money-laundering hub, and prohibit parliamentary oversight over taxation and financial measures. Commentators have also argued that the Act creates a Chinese colony within Sri Lanka. These controversies surrounding the Colombo Port City have not occurred in a vacuum but are linked to domestic and international debates regarding the Hambantota Port, another major Chinese-backed project.<sup>8</sup>

Notwithstanding, the Colombo Port City Bill has been passed, and the Colombo Port City Authority now has the authorisation to exercise oversight over the Port City. As the table below shows, while the 2021 Act bears similarities with SEZ laws enacted in other countries, it remains unique because it has been explicitly enacted for the Colombo Port City.

Table showing recent SEZ legislation

Year	State	SEZ Law	Main Objective	Main
2021	Sri Lanka	Colombo Port City Economic Commission Act	To establish a Commission empowered to grant registrations, licences, authorisations and other approvals to carry on Special Economic Zones	To provide development
2014	Timor-Leste	The Special Zone of Social Market Economy of Oecusse and Ataúro Law	Establishes the Oecusse and Ataúro, SEZ.	Establishment
2021	China	Hainan Free Trade Port Law of PRC	To build a high-level Hainan free trade port with Chinese characteristics.	To create provisions encourage
2015	Kenya	Special Economic Zones Act 2015	For the establishment of SEZs and the promotion and facilitation of global and local investment.	
2014	Myanmar	Myanmar Special Economic Zone Law	To promote the flow of domestic and foreign investment, the SEZs in the Port City could be a game-changer within the region if successful. In	
2015	Botswana	Special Economic Zones Act 2015	Make provision for the establishment, development and management of SEZs.	
2021	Venezuela	Venezuela Organic Law of Special Economic Zones	To regulate the creation, organisation, operation and administration of SEZs.	

There are projections that when the Port City is completed in 2041, it will contribute at least US\$ 740 million per year in terms of FDI to Sri Lanka’s economy. The implementation of the Port City will follow sustainable values that align with the shift towards smart and greener cities. These are laudable objectives which are consistent with global trends, but their effectiveness can only be assessed as time goes by.

## Conclusion

SEZs are long-term projects that require predictable government policies, good international economic relations management, and proper infrastructure. Other important considerations are strategic location, integration of zone strategy with the overall development strategy, understanding

the market and leveraging comparative advantage. Strong and resilient laws and regulations are integral to achieving these. As the world economy recovers from the COVID-19 pandemic, management of SEZs may prove even more difficult, but at the same time, even more important, as countries and producers are considering reducing their exposure to single sources and aim to shorten GVCs.

SEZs are not a 100 per cent guarantee for higher FDI inflows or a silver bullet for economic development and success. The complexity of SEZ projects and multi-layered issues involved require comprehensive multi-disciplinary analysis. In addition to legal analysis, involvement of economists and international relations specialists can provide a global overview of the geo-economic risks which arise from SEZs. Governments need to be cautious, open to obtaining expert

Objective
provide for the designation, promotion, development, operation and management of SEZs.
establishes the rules for the creation of free zones promptly as they arise.
create, develop and operate SEZs through the creation of a legal and regulatory framework to attract domestic and international investors.

advice and be ready to address potential issues that may arise. The long-term success of the Colombo Port City will be dependent on efficient laws, transparent SEZ agreements and its ability to attract new investors. Beyond economic indicators, the broader success and legitimacy of Colombo’s SEZ will depend on the ability of regulators to give equal importance to public concerns and human rights protection. The Authority, the Sri Lanka government, governmental agencies and project developers must all coordinate their activities to ensure that investments do not jeopardise the

protection of the environment. As the cases examined in this article, especially the EEC in Thailand, have shown, Sri Lanka must ensure that efforts are made to attract FDI from different regions and partners, in addition to the expected investment from Chinese partners.

## Endnotes

<sup>1</sup> Yiming Yuan, Hongyi Guo, Hongfei Xu, Weiqi Li, Shanshan Luo, Haiqing Lin and Yuan Yuan ‘China’s First Special Economic Zone: The Case of Shenzhen’ in Douglas Zhihua Zeng (ed), *Building Engines for Growth and Competitiveness in China Experience with Special Economic Zones and Industrial*

*Clusters* (The World Bank 2010)55, 57 (noting that Shenzhen's GDP was US\$2. 87 million in 1978).

- <sup>2</sup> Qianer Liu, Sue-Lin Wong and Jane Pong, 'Hong Kong v Shenzhen: The Battle for Supremacy' *Financial Times* (21 January 2020) <<https://www.ft.com/content/8cf60164-2209-11ea-92daf0c92e957a96>> accessed 15 July 2021
- <sup>3</sup> Bryan Mercurio and Dini Sejko, 'Holes in the Silk: Investor Protection under China's Belt and Road Initiative' (2019) 14 *Global Trade and Customs Journal* 5 (discussing the general impact of the BRI and risks related to BRI investment regime).
- <sup>4</sup> Julien Chaisse and Georgios Dimitropoulos, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law' (2021) 24 *Journal of International Economic Law* 229.
- <sup>5</sup> Top-performing SEZs are recognised by the Financial Times, FDI Intelligence Free Zones Awards. The United Nations has also established the SEZ Awards

which seeks to highlight SEZs that have succeeded in achieving good results.

- <sup>6</sup> Chhut Bunthoeun, 'Exports Through Svay Rieng Increase by \$237 million' *Khmer Times* (16 April 2020) <<https://www.khmertimeskh.com/713731/exports-through-svay-rieng-increase-by-237-million/>> accessed 16 July 2020.
- <sup>7</sup> For a detailed analysis of the significance of the EEC project see Dini Sejko and Albert Park, 'The Belt and Road Initiative in Asia: Thailand' (December 2020) Hong Kong University of Science and Technology Institute for Emerging Market Studies Research Paper <<https://cutt.ly/OmGCE3Z>> accessed 15 July 2021.
- <sup>8</sup> Holvert Hung, 'Sri Lanka's Hambantota Port: A Case of China's Debt Diplomacy' Institute for Public Policy, and Leadership and Public Policy Executive Education at the Hong Kong University of Science and Technology Research Report 2020026D (2021) <<https://cutt.ly/RmGMrXY>> accessed 15 July 2021.
- <sup>9</sup> Pranay Sharma, 'India's Concerns over China's Rising Influence in Sri Lanka Grow with Progress of US\$1. 4 Billion Port City Project' *South China Morning Post* (8 June 2021) <<https://www.scmp.com/week-asia/economics/article/3136486/indias-concerns-over-chinas-rising-influence-sri-lanka-grow>> accessed 16 July 2021.

# The Port City, Governance and the People

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*The author, Prof Savitri Goonesekere addresses the Colombo Port City initiative in the light of governance and the future of Sri Lanka. Her analysis includes the Colombo Port City Economic Commission Bill, the public interest litigation contesting the constitutionality of the Bill in the Supreme Court and the Supreme Court judgment as well.*

## 1. Introduction

An artificially created area of 446.6153 ha, including an area reclaimed from one of the most scenic sites in the city of Colombo, with a beautiful expanse of ocean and seashore, now constitute the Colombo Port City. This area will become a Special Economic Zone under the exclusive control and management of the Colombo Port City Economic Commission. The Special Economic Zone and the Commission have been established by the Colombo Port City Economic Commission Act No 11 of 2021, passed by the Parliament of Sri Lanka on 19<sup>th</sup> May 2021. The idea of establishing special economic zones is not a novel concept. Such zones are found in many parts of Asia and Africa.<sup>1</sup> Sri Lanka's Colombo Port City Special Economic Zone – or the “Colombo Port City” is an area set out in Schedule 1 of the Act (section 2). The Schedule clarifies the allotment of land allocated for the zone in Colombo in the Western Province, and includes both the reclaimed land, and other areas in that vicinity.

This Special Economic Zone is expected to function in the manner of a “diversified service economy” supporting “service-oriented industries.” The Colombo Port City Economic Commission (CPCEC) is described in the Preamble of the Act and section 6 as a “single window investment facilitator for the promotion of ease of doing business within the zone.” The Commission's mandate

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is to use its extensive rights and powers to facilitate foreign direct investment, operating as an “international hub” in areas such as international trade, shipping, offshore banking and financial services, IT outsourcing, tourism and entertainment. According to the Preamble to the Act, the Colombo Port City Project has been undertaken by the government to fulfill its commitment to further rapid national development “by means of public and private economic activity.” Promoting further investment, generating new employment opportunities within the zone, facilitating the development of “technical, professional and entrepreneurial expertise” are highlighted as related objectives.

The Colombo Port City initiative has been controversial from the inception of reclamation activities. The role of the Chinese Government in the project, the impact of this partnership, and threats to national sovereignty have been part of the discussion and debate. The possible negative environmental degradation has caused concerns on the long-term impact of the project.

Supporters have argued that the Colombo Port City can be managed as a separate business enclave that will bring significant dividends, and have a positive trickle-down impact on the economy and the people. 200,000 jobs will be created in the next five years, and Sri Lankan employees will be paid in foreign currency. The chief partner in the operation of the zone, China, is a global economic power. Such a partnership is not a transfer of sovereignty to a foreign power, but constructive cooperation in foreign relations, that harmonises with Sri Lanka’s traditional policy of non-alignment.

The Act was challenged in the Supreme Court in its passage through Parliament by a range of political and non-governmental organisations as petitioners, and 14 intervenient petitioners. The Attorney-General advised the government that the draft Bill was not in conflict with any provisions of the Constitution. Yet the Supreme Court Determination held that 26 of the provisions in the legislation could be enacted only with a special majority of 2/3, and 9 provisions with a special majority and referendum.<sup>2</sup> The Bill was amended and the legislation enacted with a simple majority. The Colombo Port City Economic Commission Act is now the law of the land.

Two key issues that were argued in the litigation on the Colombo Port City Economic Commission Bill related to some important legal and political issues. These were the authority of the President to transfer the management and control of the newly reclaimed Colombo Port City area to the Commission. Another issue was the authority of the executive to alter the definition of the Administrative District of Colombo, by including the reclaimed area of the Colombo Port City within the limits of this administrative district. Both these issues will be considered in the next sections.

## 2. The Territorial Status of the Land called the Colombo Port City

Counsel for one of the petitioners argued that the artificially created area of land in the Colombo Port City was not part of the territory of Sri Lanka as defined in Article 5 of the Constitution. He said that the

President could not issue a land grant to the CPCEC under the Crown Lands Ordinance since the artificially reclaimed land was not “Crown Land.” The Supreme Court accepted the contrary argument of the Additional Solicitor General and held that section 58, section 60 and section 110 (1) of the Crown Lands Ordinance (1947) (now renamed the State Lands Ordinance) clearly indicated that the Colombo Port City is a reclaimed area that is part of the territory of Sri Lanka. The Court referred to the above sections of the renamed State Lands Ordinance and held that they authorise the President “to reclaim the foreshore or bed of the sea and to erect buildings on any areas of land so reclaimed from the sea.” Their Lordships concluded that the Ordinance empowers the President (who has now replaced the Crown) to lease or otherwise dispose of such reclaimed area.<sup>3</sup>

The Crown Lands Ordinance 1947 was enacted by the British colonial government “to make provision for the grant and disposition of Crown Lands in Ceylon for the management and control of such lands and sea foreshore” (long title). The Governor General could “in the name and on behalf of Her Majesty” make absolute or provisional grants of Crown land, and sell, lease or otherwise dispose of Crown land” (S. 2 (1), (2)). The revised legislative enactments of 1980 prepared after the 1978 Constitution came into force, substitute the words “President” for the executive authority, and “State lands” for “Crown lands. The Constitution now specifically refers to the Presidential power to make grants of land in Article 33 (f) as amended by the 20<sup>th</sup> Amendment, (previously Article 33(2) (f) of 19<sup>th</sup> Amendment). Their lordships’ opinion, clearly conforms with the provisions of the

State Lands Ordinance on the definition of State lands, and Presidential powers on State land in the Ordinance and the Constitution.

It is unfortunate however that Counsel and the Court missed an opportunity to analyse the provisions taken from a colonial statute, and its implications for the new norm of the Sovereignty of the People enshrined in Article 3 of the 1978 Constitution, and the People’s rights in an important resource like land.

When the Crown Lands Ordinance was enacted in 1947, it was part of a colonial legislative agenda of the British Empire to entrench government control of land, a critically important economic, social and political asset. A series of other laws from 1840–1947, including the controversial Crown Lands Encroachment Ordinance, dealt with and regulated acquisition of title to land by the colonial government, and the power of the executive head of State, the Crown. The stated policy rationale was utilisation of land for the benefit of the community, even though the local people lost their rights in their lands.

The concept of the Crown, or the State holding this important resource of land as a trustee for the people and in the public interest, continued to be referred to in land policies and legislation throughout the colonial period. Crown Land, according to the first Colonial Land Commission (1927 – 1929) “did not imply that such land vested in the Crown for the personal benefit of the Sovereign or even for the benefit of the Government, but as a convenient term to designate all land, which, not being vested in any individual, ought to be held by the Crown as trustee for the general community.”<sup>4</sup> Indeed the British

colonial government referred to this rationale in enacting the Crown Lands Ordinance of 1947. The objective was to “clarify the ownership rights of the Crown as custodian for the public.” The British colonial regime even cross-referenced the norms and concepts of the Roman Dutch law, which is a major source of the land law in Sri Lanka. The Crown Lands Ordinance therefore recognised that in Roman Dutch law one species of property “res communes” was property such as the sea, and belonged to all the inhabitants, and another “res publicae” or property belonging to the State such as public rivers and streams, public roads and the seashore, were held by the State for the benefit of the People.<sup>5</sup>

The concepts of Roman-Dutch Law and British colonial law, as reflected in the Crown Lands Ordinance, have been connected with indigenous legal, social and economic values in the judgment of A.R.B. Amerasinghe J. in the *Bulankalama* (Eppawala Exploitation of Mineral Resources) *Case*. His lordship also expressed the view that the Constitution provided a basis for “the legal ownership of the natural resources of the State being vested in the Executive to be held in trust or used for the benefit of the People,” and that “the exercise of Executive power is subject to judicial review.”<sup>6</sup>

An analysis of the provisions of the State Lands Ordinance from the perspective of State lands held in trust for the people could have contributed to a deeper analysis of Constitutional implications of the Presidential power to vest Colombo Port City land in the Commission, and concepts like “Government Marketable land” and “Project Company Marketable land” incorporated in the Act. Also the exclusion of important legislation

on land use like the Urban Development Authority Act, the Municipal Council Ordinance, and the Town and Country Planning Ordinance from “written laws” of Sri Lanka applicable within the Colombo Port City.<sup>7</sup>

### 3. The Port City as part of the District of Colombo in the Western Province

In August 2019, the Minister of Internal and Home Affairs and Provincial Councils issued a gazette notification under the Administrative Districts Act of 1955 declaring that, based on a Resolution of Parliament, the limits of the Administrative District of Colombo specified in the first Schedule to this Act had been altered to include the reclaimed area of land called the Colombo Port City. The validity of this procedure was challenged by the petitioners in the Colombo Port City Bill litigation. However, the Supreme Court decided that the validity of the procedures had not been challenged previously in Court, and the Colombo Port City had become part of the Administrative District of Colombo, according to the procedure under the Administrative Districts Act of 1955.

A further argument of the Petitioner was that land was a subject that was included in the Provincial Council List (Item 18, list I). These Provincial Councils can enact laws regarding land, land transfer and use of land. Counsel argued that Article 154 G (3) of the Constitution requires consultation with the Provincial Councils, when the President exercises powers of alienation and transfer of such lands. Failure to refer the Colombo Port

City Bill to the Provincial Councils therefore was a violation of the Constitution. The Supreme Court decided that since none of the Provincial Councils had been constituted, reference to Provincial Councils for their views had become impossible. The Court concluded that the failure to refer the Bill to the Provincial Councils in these circumstances did not prevent Parliament enacting this legislation. This was not considered non-compliance with the required procedures, and a violation of the Constitutional provisions on the legislative power of Parliament in relation to Provincial Councils. Court stated that “the existence of Provincial Councils which is in accordance with the law is a pre-requisite to decide whether there is non-compliance with a procedural step” (p. 23).

The Supreme Court also considered the divergent views in case law and jurisprudence on the issue of a Provincial Council’s powers in relation to land. The Court decided that it would not follow the interpretation in the *Divineguma Bill* (2021)<sup>8</sup> where the Supreme Court held that land was a Provincial Council subject, and failure to obtain the views of a Provincial Council that was not constituted was in conflict with the Constitution, and had to be passed by a special 2/3 majority in Parliament. The rationale for rejecting the earlier decision of the Supreme Court was the impossibility of performance of the procedural step of consultation, due to the non-constitution of Provincial Councils according to law. However, the Court did not consider the substantive issue - of Central government and Provincial government powers in relation to land. This can be a continuing issue if Provincial Councils are constituted and alienation of land within the Colombo Port

City and in the provinces is done by the President, exercising executive powers under the State Lands Ordinance.

Academic writing<sup>9</sup> has suggested that the reference to Provincial Council powers in land in the Provincial Council list item 18 List I cannot be interpreted as a reference to State land as defined in Section 110 (1) of the State Lands Ordinance. Such land continues to be vested in the Central government, after the 13<sup>th</sup> Amendment, and is also a matter within the mandate of the National Land Commission.

The status of a Provincial Council in relation to land within the province has been a matter of political controversy, connected to the principle of power sharing between the Central and Provincial Governments. It is ironical that the Colombo Port City Economic Commission Act may authorise the President to vest land within Provinces in the Commission, with full power of control and management. “Devolution” of these wide powers in this important area called the Colombo Port City will take place, even though more effective power sharing with Provinces in response to the national question has been rejected by successive governments for decades.

#### 4. **Implications of the Colombo Port City for Governance and the People**

The geopolitical implications of the Colombo Port City will not be considered in this paper. The domestic implications of the Commission’s administration for the country in light of our current system of governance and regulation of

public institutions are a matter of importance for constitutionalism, public administration, and the rule of law in Sri Lanka.

### (a) Constitutionalism and the Rule of Law

Constitutionalism and the Rule of Law are ideas embedded in Sri Lanka's system of parliamentary democracy. These concepts seek to recognise that State power must be exercised and State institutions must function within the parameters and limits in our Constitution (1978). The Constitution limits the exercise of State power and scrutinises functioning of public institutions to prevent abuse of power and infringement of the fundamental rights and freedoms of the People. An elected government that holds office for a specified period must conform to norms on limitations of State power and accountable governance set by the Constitution

Global responses to the Covid pandemic have demonstrated that countries with different systems of governance, as in China and East Asian countries, have achieved targets of impressive economic growth, while giving broad based access to health and education as economic and social rights. Sri Lanka shares this tradition of governance, policy making, and allocation of national resources. Our Constitution (1978) does not recognise social and economic rights as enforceable claims of the people. Yet decades of public policy have provided our people access to health and education as a dimension of the people's right to satisfaction of basic needs for human development.

Chinese governance and regulatory systems applicable to public administration do not

recognise the concept of limiting State power that results in violation of civil and political rights as enshrined in major international treaties on human rights. These rights are recognised as aspirational standards that cannot be enforced through legal procedures. Civil and political rights are however recognised in our Sri Lankan Constitution and are enforceable through legal procedure in our courts. Even the controversial 20<sup>th</sup> Amendment to the Constitution, strengthened the concept of Presidential power, but did not remove the changes made by the 19<sup>th</sup> Amendment that made the President of the country accountable for violation of fundamental rights, during the time he/she holds executive office.<sup>10</sup>

Critiques of the Colombo Port City project sometimes demonise the engagement of China in this initiative. Recognising some positive aspects of the Chinese system of governance is legitimate. Yet it is important to acknowledge that the ethos of governance and administration of the Colombo Port City, even in partnership with China, cannot and must not undermine the current system of parliamentary democracy that has prevailed for seven decades in this country. There must be Presidential and public institutional accountability for violation of our domestic Constitution and law, including fundamental rights, and particularly the rights, to freedom of speech and expression and the right to information. Non-State actors are not directly accountable for violation of fundamental rights under our Constitution. But there is clear jurisprudence in the Supreme Court recognising that the State is accountable for inaction in preventing violation of fundamental rights by Non-State actors.<sup>11</sup>

There is an evidence base of research on Special Economic Zones in Africa and East Asia including China. This clarifies that the success or failure of such zone depends on the effectiveness of the regulatory framework and institutions established to manage and administer these zones. Typically ease of doing business to encourage investment is the main objective, with fiscal and non-fiscal incentives such as tax relief and preferential policies for investors, and permission to hire and fire workers in the Zone.<sup>12</sup> Provisions in the Colombo Port City Economic Bill clearly indicated that this perspective was embedded in the draft Bill. The drafting was probably done by a foreign consultant familiar with East Asian Special Economic Zones. The Supreme Court decision subjected the Bill to judicial review and objected to many provisions.

A different mode of governance in conformity with the ethos of the main partner in the Colombo Port City, China, cannot now be a rationale for installing a regulatory framework and institutions that function outside the norms and standards of governance and public administration in the Sri Lanka Constitution and legal system.

The objectives, powers, and duties and functions of the CPCEC Commission in the Act clarify that the Commission must “promote sustainable development.”<sup>13</sup> The concept of ‘rapid development of the country’ is referred to in the Preamble to the Act. These objectives must harmonise with the concept of human rights based development reflected in Sri Lanka’s treaty commitments, international law and the global Sustainable Development Goals (SDGs).

Administration and governance in the Colombo Port City to achieve development can and must be monitored for conformity with the Constitution, our written law and these international norms and standards.

The link between constitutionally guaranteed civil and political rights and economic and social rights set out in international treaties ratified by Sri Lanka is fundamental to the Sustainable Development Goals ideology. Often human rights advocacy focuses on civil and political rights, while those who approve of China’s approach to governance give priority to economic and social rights of the People. The SDGs incorporate and prioritise both these sets of rights in the definition of Sustainable Development. Environmental protection is incorporated in many of the SDG’s, while dimensions of civil and political rights, including equality and non-discrimination, labour rights and protection from violence are also incorporated in some SDGs, and in the values framework. Any model of economic growth and development that drives the Colombo Port City must therefore be anchored and not depart from Sri Lanka’s commitments to implement human rights based development and the SDGs.

### **(b) The Sovereignty of the People and Presidential Power**

The CPCEC Act recognises that the President has certain specific powers. The most important power given to him is to vest in the Commission land within the area of the Port City, (Section 65 (1) (3)). The President appoints the Commission and its Chairperson. The majority of the members and the Chairperson must be Sri Lankans. (S 7 (1))

The submission of the final audit report of the Commission to Parliament, giving concurrence to the Master Plan of the Colombo Port City, and the power of giving directions on the Plan are entrusted to the President, unless a Minister is given responsibility for the Colombo Port City (Section 15 (2), 23 (5), 4 (1) 4 (6). The President also has a consultative role in the appointment of the chief executive – the Director-General of the Commission (Section 24 (1). Other powers are given in relation to offshore banking and exemptions and incentives for businesses of strategic importance (Part viii and ix). The President or the Minister in charge of the Colombo Port City, have a broad power to make regulations in respect of matters for which regulations are required under the Act (Section 71).

The enactment of the 20<sup>th</sup> Amendment to the Constitution has created a popular impression that the President now has unlimited powers. Consequently, the above powers under the CPCEC Act can also be exercised without any limitations. However, central to the constitutional concept of governance accountable to the People, is that those who are elected or appointed to public office “hold office” rather than “power.” The People place them “in office” rather than “in power.” This refers back to the concept of the “Sovereignty of the People,” first introduced into the Sri Lankan Constitution of 1972 and incorporated in a specific manner in the Constitution of 1978. Article 3 clarifies that Sovereignty is in the People, and includes the powers of government, fundamental rights and the right to vote. Article 4 states that there are three pillars of government. Parliament, the

President and the Courts exercise legislative, executive and judicial powers respectively, as a reflection of the powers of government of the People. Jurisprudence in the Courts has therefore linked Article 3 and 4 in relevant case law. The 19<sup>th</sup> Amendment introduced a specific provision on the accountability of the President to refrain from violating the fundamental rights of the People, when he acts in the exercise of Presidential power. This provision has been retained in the 20<sup>th</sup> Amendment.<sup>14</sup>

The perception that an “all powerful President” has been empowered by the 20<sup>th</sup> Amendment to avoid scrutiny of his administration by Parliament and the Courts, the other important pillars of government is therefore incorrect. All three pillars have a role in governance under our Constitution. He has responsibilities to Parliament and his actions are subject to judicial scrutiny.

The President, in his Poson day message 2021 said that he is guided by the *Dasa Raja Dharmaya* on a monarch’s duties in Buddhist ethics. These ethics may embody quintessential wisdom on the obligations of a king to his people. However, Sri Lankan citizens must remind themselves that in this country the President is not a monarch. Our Supreme Court in the Dissolution of Parliament Case 2018 recognised that since 1972 when we became a Republic, this country has known no monarch, and the President has not inherited his mantle.<sup>15</sup> Consequently, the exercise of Presidential powers, given by the CPCEC Act will be subject to the scrutiny of Parliament and the Courts.

The Supreme Court in reviewing the Colombo Port City Bill, found that several provisions were in conflict with the Constitution. These were later amended. The Court specifically referred to the fact that the President's power of appointment of members of the Commission could be scrutinised by the Judiciary for conformity with the guidelines for appointment embedded in the Act. They said that arbitrary exercise of that discretionary power can be challenged in the Courts (p.26). It is respectfully submitted that the Court should also have scrutinised the Presidential power of making land grants to the Commission under the colonial State Lands Ordinance (1947), in the light of the provisions on the Sovereignty of the People, embedded in Articles 3 and 4 of the Constitution (1978).

### (c) The Oversight Role of Parliament

The constitutional framework on governance based on the concept of Sovereignty of the People calls for maintaining a balance between the powers and responsibilities of Parliament and the President. The legislative pillar of governance (Parliament) has an important oversight role in allocation of resources and public financing. A specific chapter and provisions in the Constitution, including Article 148 on Parliament's role, indicate that Parliament exercises "full control of public finance." The Auditor-General's report on the accounts of all government undertakings become important mechanisms for exercising parliamentary oversight.<sup>16</sup> The Supreme Court scrutinised several provisions in the regulatory system of the Colombo Port City Bill in light of provisions on Parliament's financial oversight, in the Constitution. This

resulted in some amendments to the final legislation enacted. The Opposition wanted further amendments to strengthen the oversight role of Parliament, but these were not incorporated in a bipartisan approach to the role and responsibility of Parliament.

The Colombo Port City will have offshore companies. These will have status as "authorised persons" providing services within the zone, on the basis of licenses issued by the Commission. They must be registered under the Companies Act 2007, but the provisions of the Act will not apply fully to these companies. The Public Contracts Act of 1987 will also have no application within the Colombo Port City. It is one of the enactments excluded from the "written laws" of Sri Lanka that apply in the zone.

Serious concerns have been expressed in regard to the non-applicability of important Sri Lankan laws, and the potential for money laundering, including terrorist financing, by bringing any type of foreign currency into the zone as "foreign direct investment." There are also exemptions in regard to the application of the Inland Revenue Act (2017) and the regulatory system of taxation and the Foreign Exchange Act (2017).<sup>17</sup> The exemption from these national laws and their non-application has been justified on the rationale of facilitating "ease of doing business" and "minimising compliance with regulatory frameworks" within the zone. Yet the limitations on Parliamentary oversight and legitimising "non-compliance" with laws and regulatory systems to ensure efficiency and rapid economic growth, pose a serious risk to financial governance in a country that has frequently witnessed massive corruption

and misuse of national resources in public administration. Poor financial governance within the zone can impact on the prospects for achieving rapid and sustainable development.

Parliamentary oversight which is critical for accountable governance can become weak, where there is a strong ruling party majority. It is the quality of membership and representation in Parliament on the government benches and the Opposition that contribute to effective debate and discussion, and developing bipartisan consensus on financial oversight and governance in the national interest. The dominant role of political parties in the nomination process for parliamentary elections in the proportional representation system of Sri Lanka limits the capacity of the People to elect persons of competence and integrity to this important institution. The current practice of appointing candidates defeated at the polls to Parliament on the national list, meant to bring diversity and professional expertise to Parliament, and cross-overs of members to political parties they were not elected to represent, have contributed to public disenchantment with the institution of Parliament. Voters experience a sense of helplessness after national elections. Each day brings more news of raucous rhetoric and empty adversarial exchanges in Parliament, with little hope of useful contributions by both the new and young members and seasoned elderly politicians. In a recent TV panel discussion, a new member was asked how the person's minority party would act to resolve current

issues of public concern. The response was swift – “give us power” the person said twice – no reference to being “elected to office.” A veteran politician of the “Old Left” made a public statement that he was concerned at the prospect of erosion of workers’ rights within the Colombo Port City and that he drafted an amendment. He explained that he was persuaded to withdraw the amendment by “his seniors!”

It is incorrect to suggest that Parliament’s powers and responsibilities, particularly in regard to financial management of State institutions and national resources have been eliminated by the 20<sup>th</sup> Amendment, and the resulting expansion of Presidential powers. It is not the Constitution and laws but members of Parliament who can make themselves “rubber stamps” of the President and the government in office.

Financial oversight of the Colombo Port City that is provided for by the Constitution and our laws may be an unfulfilled expectation, without electoral and Constitutional reforms to strengthen Parliament as an institution. The disadvantage of a majority that has no commitment to fulfil their Constitutional powers and responsibilities, can however be compensated somewhat by a responsible and articulate opposition, media and civil society. That may be one way to ensure that the Colombo Port City administration conforms to norms of financial accountability that are crucial to the effectiveness of an economic zone, intended to contribute to national development.

**(d) Management and Administration of the Colombo Port City as a Public Institution**

Appointments to the Commission are by the President, with some criteria for appointments embedded in the Act. In the Determination on the Colombo Port City Bill, the Supreme Court rejected the concept of unqualified Presidential discretion in making appointments to the Commission. They are subject to judicial review.<sup>18</sup>

In the Shirani Bandaranayake appointment to judicial office case,<sup>19</sup> Justice Mark Fernando also held that even a constitutional provision that does not contain special criteria on appointment to judicial office could be interpreted by the Courts in a manner consistent with other regulatory provisions on qualifications for judicial office. However, appointments to Public Commissions are in general not challenged in the Courts, though they can be subject to critical comment. The jurisprudence in the Supreme Court encourages public scrutiny of Presidential appointments to the CPCE Commission.

The CPCEC is a powerful Commission with extensive powers. It appears to have complete discretion in ‘giving licenses,’ permission and registration to investors as “authorised persons” who can engage in business in the Colombo Port City. The Commission is described as a “single window investor facilitator.” Since the ethos of the Colombo Port City is to “ease” business operations and activities, compliance with laws and regulatory systems is considered a “burden.” This is the rationale for giving the Commission significant powers and

discretion in the grant of license permissions and registration and exemptions from identified written laws and regulatory frameworks.

When the Colombo Port City Bill was challenged in the Supreme Court, petitioners questioned the Commission’s open-ended discretion in the administration and management of the zone and the absence of ex-officio members from important national financial institutions on the Commission. In response the Court held that Regulatory Authorities defined in the Act must not be deprived of their discretion and decision making powers under their own laws and regulations. The concurrence of the relevant Regulatory Authority must now be obtained, and the implementation of these laws by the Commission must not be impeded by the Commission. Amendments in the Act have been made, to incorporate this perspective. The regulatory powers of the Commission are therefore subject to the requirement that the powers of these Regulatory authorities must be respected.<sup>20</sup>

Recent trends in public administration indicate that political interference has impacted to debilitate the public service and public institutions. People witness passivity in the membership of Governing bodies in public institutions like corporations and universities. The “Bond Scam Scandal,” the “Sil Reddi distribution” episode, and the functioning of the Boards of national airlines, demonstrate how members occupying seats at the top table in these critically important bodies often function like passive and disengaged bystanders in relation to the management and administration of important

public institutions. They have become used to sharing refreshments and pleasantries, and leaving meetings avoiding any issue perceived as “controversial.” Apathy and passivity on the part of the members of a governing body facilitates abuse of power by chairpersons. This is a fertile environment for political interference with what should be objective policy formulation and decision making. If this ethos continues, it is difficult to expect the Colombo Port City Commission to function as a public institution that fulfils its role and responsibility in national development, in a manner that is accountable to the People.

**Land** in the Colombo Port City that is vested in the Commission is described in two ways as “Government Marketable land” and “Project Company marketable land.” The Commission is empowered to lease land, subject to the Act and other written laws.” It can also lease or transfer on freehold basis in a similar manner, “Condominium Parcels” on both these categories of land.

“Government Marketable land” is an area of reclaimed land within the Colombo Port City made available for certain defined and similar development projects of the government. Some of the defined developments refer to using land for residential and commercial purposes and “community based development.” “Project Company Marketable land” refers to areas of reclaimed land made available to the project company on a “Master Lease” issued by the Urban Development Authority to the Project Company for their residential, commercial, entertainment leisure based and similar developments.<sup>21</sup>

Though the Urban Development Authority Act (1978) is excluded as an Act that “shall have no application” within the area of the Colombo Port City, any deed transfer or lease or similar document relating to land vested in the Colombo Port City issued by the Urban Development Authority, is now deemed to be executed by the Commission under the CPCEC Act. This ensures continuity of the source of title acquired from the Urban Development Authority, by the Commission. How this institution will connect with the Commission in relation to this important topic of land within the Colombo Port City is not clear.<sup>22</sup> When The Supreme Court in the Determination of the Colombo Port City Bill reiterated the powers of the President to make land grants under the powers given to him by the Commission and the State Land Ordinance, the Court assumed that the power of lease and transfer of vested land would be exercised by the Commission. The lack of clarity in the concepts of land lease and transfer and the conservation of buildings by the Urban Development Authority was not addressed.

### **Conservation of Heritage Buildings within the Colombo Port City**

The future of old buildings in the well-known “Heritage Square of the Colombo Fort” has been the subject of public discussion. Buildings in Kandy and Galle have been designated “Heritage Sites” by the Department of Archeology. The late Dr Roland Silva initiated this scheme. The Urban Development Authority, Municipal Councils and the Department of Archeology now have a coordinating role and responsibility in

the conservation, repair and maintenance of buildings gazetted as “Heritage Sites.”

The buildings in the Colombo Fort have not however been designated in this manner. A Sri Lankan architect, Pani Wijeratne was on a Jury to consider the social and cultural impact of the Colombo Port City, and a report was submitted during the planning of this Project. Yet the manner of conservation of important old buildings in the “Heritage Square” now apparently included in the Colombo Port City, has not been the subject of regulations in the CPCEC Act.

The Antiquities Ordinance (1940), an old colonial statute provides for the conservation of buildings called “ancient monuments” prior to 1815 – 1850, including on private lands that are in danger of destruction or damage. Such buildings can be declared a “protected monument” in the public interest.<sup>23</sup> Buildings within the “Heritage Square” can be designated as “protected monuments” by a swift amendment to the Antiquities Ordinance. This will facilitate a coordinated conservation response. Authorities and institutions like the Archeology Department and the Urban Development Authority, with the participation of Sri Lanka’s best conservation architects and the private sector, can help ensure that these beautiful buildings remain as well conserved heritage sites, with culturally appropriate and sensitive renovation and modification.

The report of the Jury for the Colombo Port City referred to earlier can perhaps provide a basis for conservation work. Failure to respond to the issue of conservation of these important buildings within the “Heritage

Square” of the Fort may ultimately result in an “authorised agent” company destroying the buildings or renovating them according to norms and standards that conflict with the concept of Sri Lanka Heritage Sites. We may witness a repetition of the Tissa Wewa episode relating to the dredging of the Tissa Wewa by a Chinese company.

### **Respecting Norms on Equality and Non-Discrimination in the Constitution**

The Colombo Port City Bill Determination by the Supreme Court considered some other issues regarding the powers of the Commission and the grant of licenses, permission and registration of “authorised persons” conducting business in the Colombo Port City. The Supreme Court emphasised the importance of the Act not permitting arbitrary decision making by the Commission, violating provisions of relevant written statutes. Discrimination in grant of exemptions and benefit to authorized persons has to be avoided by setting specific guidelines on the basis of a “reasonable classification” of exemptions provided.

Their lordships focused on the need to enforce and conform to Art 12 of the Constitution on the fundamental right to equality and equal protection of the law. However, the Court did not consider the exemption of the offshore companies from the provisions of the Companies Act a violation of this norm, since this Act had provisions on exempting offshore companies. The Court also pointed out that the Registrar General of Companies is considered a Regulatory Authority in the Act, and the Commission’s decisions must not violate implementation of the relevant

provisions of the Companies Act within the zone. The Court dismissed arguments on the risks of money-laundering and terrorist financing, since legislation on the topic apply within the zone.<sup>24</sup>

The Commission is empowered to permit Sri Lankans to engage in business within the Colombo Port City with authorised persons on the basis of a counterpart contribution of lease of their premises. The value of the land is part of the investment. They cannot invest in these businesses in any other manner unless the funds are in foreign exchange from outside the country. Authorised persons within the zone can also be allowed to partner with Sri Lankans in business enterprises **outside** the Colombo Port City. The Commission is required to ensure that such ventures are in the public interest and advancement of the Sri Lankan national economy. The Commission must also ensure that exemptions given to authorised person operating within the zone are not granted when they operate outside the zone. The latter requirement was introduced in to the Act as an amendment, because the Supreme Court held that granting such exemption would discriminate against other business ventures outside the zone.<sup>25</sup>

Authorised persons, including offshore companies can obtain services from institutions and persons outside the zone. The Colombo Port City will have a “residential community” within the area of authority of the Commission. The Commission is required to “promote urban amenity operations” for this purpose. Yet the Municipalities Ordinance is one of the statutes considered inapplicable within the zone. The Supreme Court Determination does not consider

the important issue of authorised persons accessing and obtaining services such as water and light from outside the zone.<sup>26</sup>

The judgment therefore provided some guidance to the Commission on how to ensure that their administration conforms to law and the Constitution. It is hard to predict whether the Commission will be influenced by the judgment of the Supreme Court. Perhaps the judgment should be attached to copies of the Act, and circulated to all members and “authorised persons” as part of the information on the Colombo Port City and the Commission.

#### **(e) The Role and Responsibility of the Courts and the Colombo Port City**

One of the key pillars in the governance structure of our country as set out in the Constitution is the Judiciary. The Judiciary’s role and responsibility is located in the Sovereignty of the People. The independence of the Judiciary from interference by the other pillars of governance, Parliament and the President as chief executive, is central to the concept of Sovereignty of the People. Checks and balances in the exercise of power and responsibilities by each of the institutions are linked with ensuring the People’s well-being and protection from abuse of power in governance. The Sovereignty of the People is also connected to the enforcement of constitutionally protected fundamental rights through the courts, and the capacity to challenge arbitrary exercise of power by State institutions. The Determination of the Supreme Court in the Colombo Port City litigation recognises the important role of the

Courts in facilitating accountable governance by the other pillars in governance.

The judgment of the Supreme Court in the Colombo Port City Economic Commission Bill Determination clarifies and reiterates that the administration of the Colombo Port City as a public institution must conform to the chapter on fundamental rights.<sup>27</sup> Several provisions in the Bill were struck down as unconstitutional and had to be amended in the final Act on the basis of possible violation of Articles 12 and 14 (i) (g) and (h) of the Constitution. The Court emphasised the importance of the Commission conforming to decision making powers of statutory, including Regulatory Authorities specified by the Act. The Supreme Court addressed the need for the Commission to exercise discretionary powers in conformity with Articles 12 (1) and 148 of the Constitution, especially in granting exemptions including fiscal exemptions.

As stated earlier, State inaction can be challenged when it results in violation of fundamental rights by Non-State action.<sup>28</sup> There is an argument that fundamental rights can be a basis for making them liable in a civil court. It is also of interest that important fundamental rights on freedom of speech and expression and the right to freedom of movement can only be claimed by citizens. This has implications for non-citizens who are “authorized persons” and members of the Port City community.<sup>29</sup> Issues regarding Non-State actors and violation of fundamental rights did not surface in the litigation, but the jurisprudence on the subject will apply in the Colombo Port City.

The Supreme Court recognised in the judgment that there could be judicial review of a presidential appointment to the Commission that “was not according to law.” They said that arbitrary exercise of a power of appointment could be challenged in “appropriate legal proceedings.”<sup>30</sup> In a leading case, senior counsel for petitioner is said to have asked the Court whether the constitutional provision on Presidential appointment to the Supreme Court without guidelines gave unlimited discretion that was so open-ended, that the President could appoint a member of the staff of the law library! Justice Mark Fernando’s judgment clarifies that “the power is discretionary and not absolute. It is neither untrammelled nor unrestrained.” His Lordship proceeded to state that a Judge of the Supreme Court had to be an attorney-at-law of the Supreme Court, and also satisfy certain other conditions.<sup>31</sup> A statement by a senior counsel in the Colombo Port City case said that even a foreigner can be appointed as a judge of this court is not supported by the jurisprudence on judicial appointments. The President’s and Commission’s power of appointment under the Colombo Port City Act cannot be described as an open-ended discretion, and can be challenged for violation of constitutional norms and standards.

The Courts have jurisdiction to try offences committed within the Colombo Port City.<sup>32</sup> However, a provision in the Act states that when an authorised person or persons commits an offence under this Act, they will not to be deemed to have committed that offence, if it is proven that was “committed without his knowledge or that he exercised due diligence to prevent the Commission of

the offence.”<sup>33</sup> This conforms with the ethos of “facilitating ease of doing business” and “relieving from the burden of compliance” (to law and regulation) stated as objectives of the Commission.<sup>34</sup> Similarly, a provision that notwithstanding anything to the contrary in any written law in general, registration licenses, deeds and transfers or leases in compliance with the Colombo Port City Commission Act, cannot be terminated or be amended to the detriment of the new investor. Some exceptions are mentioned.<sup>35</sup> The scope and application of these special provisions in the Act in the context of the administration of justice in the country are not clear. For instance, what is the scope of the defence of “lack of knowledge” of an offence, and “due diligence” or taking care, in relation to statutory offences under the Act?

In light of the objective of ease of doing business, the Act prioritises arbitration as a method of dispute resolution. This, as pointed out by the Supreme Court does not “oust” the courts, as arbitration is not mandatory but on the basis of consensual agreement.<sup>36</sup> The Supreme Court also considered the special part of the Act that required courts to give priority to hearing civil or commercial cases in the Colombo Port City, and hearing them expeditiously on a “day to day basis.” Their Lordships rejected the petitioner’s argument that there was a violation of Articles 3, 4, and 12 of the Constitution on the judicial power of the people, and the concept of the right of citizens to equality and non-discrimination. This provision was considered by the Court to be a “reasonable classification” for the purpose of achieving the objective of ease of doing business and attracting new investments.<sup>37</sup>

It is submitted with respect that the “reasonability” of granting this privilege is questionable, in a context where delays in many areas, including cases on child sexual abuse have led to denial of justice to the vast majority of the populace in this country. Surely, the laws delays are a general problem in the administration of justice that must be addressed with targeted interventions to improve legal proceedings in courts of law. Giving priority to one category of commercial litigation within the Colombo Port City for fast-tracking is discriminatory, unless several other areas are also selected for this purpose, on the basis of national priority.

## Conclusions

There is an evidence base indicating that Special Economic Zones function effectively only when there is accountable governance through effective regulation and management within zones.

Negative impacts such as environmental degradation, and politicisation in decision-making, undermine the capacity of the zones to deliver the promised economic growth.<sup>38</sup>

Besides, such zones should not deviate from the regulatory system of the country based on a written Constitution, and core legal norms and standards in the system of governance. The UN Guiding Principles on Business and proposals to formulate and adopt a multi-lateral Convention linking business and human rights based economic growth and development, reflect new thinking on the role of Non-State corporate actors in national development. Corporate social responsibility

and balancing economic growth with international norms on human rights and sustainable development are given priority. Sri Lanka has a written Constitution and a model of democratic governance based on commitments of the government to harmonise domestic laws, policies and governance with international treaties that the country has ratified.<sup>39</sup> The judgment of the Supreme Court seems to conform with these trends on sustainable development, even though international norms were not considered in the litigation.

The objectives of encouraging foreign investment providing fiscal and non-fiscal incentives, preferential business policies and hire and fire of workers, and promoting ease of business, clearly guided the drafters of the Colombo Port City Bill, ignoring Sri Lanka's Constitution and written law. When the Colombo Port City Bill was challenged in the Supreme Court, the basis of many petitions was non-conformity with our national regulatory system. The Judgment of Supreme Court concluded that the Port City Economic Zone cannot function as a separate enclave for legal regulation that is outside the framework of our Constitution and legal system.

The Court accepted that many provisions in the Bill could be subject to judicial review and quashed them for violation of the Constitution. It is the petition and the opinion of the Supreme Court that contributed to a clear pronouncement that public institutions including the Colombo Port City Economic Commission cannot function outside the framework of the country's law and Constitution. The opinion

of the Supreme Court therefore provides a basis for challenging the public impression that the Colombo Port City can be a "business enclave" "an international hub" where investors are completely relieved of what the original Bill perceived as the "burden of compliance" with the Constitution and the law of the land. Here is an important affirmation that the Colombo Port City activities can and must be monitored by the People, Civil Society and regulatory institutions according to the norms and standards of our law and Constitution.

The litigation on the Colombo Port City Bill, also raises serious questions in regard to formulation of laws and policies that are placed for enactment in Parliament, the legislative pillar of governance in the Constitution. Given these realities how could the Colombo Port City Bill have been publicly described by the Attorney-General as a Bill in conformity with the Constitution that was being placed before Parliament?<sup>40</sup>

Additional Solicitor General, Mrs Farzana Jameel appearing on behalf of the Attorney-General made very good arguments on some of the provisions in the Bill which were reviewed and considered valid by the Supreme Court. Mrs Jameel also submitted amendments to provisions which she said would be moved at the Committee Stage of the Bill's passage in Parliament. This helped to cure some provisions of their unconstitutionality.

It is respectfully submitted that approval of the procedure of submitting amendments to a Bill when it is challenged in litigation, relieves the Attorney-General of his/her

clear responsibility to scrutinize proposed legislation for constitutionality and advise the government of the need for changes to a Bill. It is prior scrutiny by the Attorney-General before a Bill is challenged that reinforces Government's accountability to engage in law and policy making that conforms to Constitutional norms. The practice of submitting changes to a Bill during judicial review in the Supreme Court on the basis of future Parliamentary Committee Stage amendments, was challenged by Counsel for petitioners in the 20<sup>th</sup> Amendment litigation, but not accepted by the Supreme Court. It is unfortunate that this has encouraged the Attorney-General's Department to follow this questionable practice, instead of fulfilling the responsibility to scrutinise a Bill for constitutional conformity **before** a Bill is tabled for debate and enactment by Parliament. This practice is surely one that merits serious consideration by the Supreme Court in a review of its approach to scrutiny of Bills.

The implications of the Colombo Port City Commission Act excluding important statutes such as the Urban Development Act, the Municipal Councils Ordinance will be clear only on commencement of the work of the Colombo Port City Economic Commission. Similarly, the impact of the Commission granting exemptions or incentives from important statutes such as the Inland Revenue Act and Termination of Employment of Workers Act.<sup>41</sup> The exclusion of the latter in its application to Colombo Port City businesses introduces a hire and fire concept that is not applicable in labour relations outside this area. When this type of exemption from labour laws was introduced

in the Free Trade Zone in the 1977 – 1980 period, it was the activism of civil society organisations, including women's groups, that helped prevent exploitation of women workers in factories within and outside the FTZ. The same engagement may be necessary to ensure that the objectives of minimising compliance in law and regulation to promote investor confidence and "facilitating ease of business" does not further legitimize and reinforce an ethos of ignoring law and regulation and worker rights in management and the administration of public institutions. It is important not to encourage further erosion of public confidence in administration of justice by undermining fundamental rights of the People, legitimizing political interference in law enforcement, and impunity for violation of law and the Constitution.

It will be a classic irony if despite the changes made to the Colombo Port City Act because of challenge by petitioners and judicial review in litigation, the Colombo Port City is permitted to become an enclave that is a "State within a State." This in a context where the concept of devolution and power sharing with Provinces has been the subject of controversy during different political regimes.

The jurisprudence of the Supreme Court over the years has recognised the important concept of the "Sovereignty of the People." The Colombo Port City Case in the Supreme Court and the Dissolution of Parliament Case (2018) recognised that there cannot be another "Sovereign" or an executive power of public authorities that erodes and undermines the Sovereignty of the People. Court cases have recognised the validity

of the analysis of State power by Justice Mark Fernando in *de Silva v. Athukorale* (1993) that “unfettered discretion is solely inappropriate to a public authority which possesses power solely in order that it may be used for the public good.”<sup>42</sup> These words must also guide the exercise of presidential powers. The controversial exercise of Presidential powers of pardon, on Poson Day, as an act of compassion, enabled a controversial politician to walk free, ignoring a conviction of murder by the highest court of the land, the Supreme Court. The Bar Association of Sri Lanka has in a public statement emphasised that the power of pardon is not open-ended discretion but must conform to the constitutional provisions on pardons.<sup>43</sup> There is litigation in the courts challenging some Presidential pardons, since Presidential pardons cannot be granted outside the parameters of the Constitution, when there are court convictions for criminal offences under our Penal Code. This must be understood clearly in the administration of the Colombo Port City.

When the President speaks of his adherence to “*Dasa Raja Dharmaya*” in governance as he did on Poson day 2021, the People and the other organs of governance, Parliament and the Courts must remember that he is no monarch, but governed in the exercise of his powers, by the law and written Constitution that places Sovereignty in the People. It is this concept of the People’s Sovereignty as distinct from the concept of Presidential power – expanded as it has been by the 20<sup>th</sup> Amendment, that must guide the administration and governance of the Colombo Port City by the Commission.

There is confusion in the minds of the public today in regard to the term “Sovereignty”. Buddhist monks and politicians often refer to the President as clothed with the mantle of a monarch in governance. Similarly, the Sovereignty of the State of Sri Lanka is confused with the Sovereignty of the People. The latter concept is challenged in a critique of the human rights of the People, as Western ideology that permits interference with the Sovereignty of the nation State of Sri Lanka.

However, international human rights treaties, whose ideas are also incorporated in the Chapter on fundamental rights in our Constitution, are norms built from a historical experience with abuse of State power. This is why nation States like Sri Lanka have absorbed these norms and standards in their national Constitutions, reinforcing this approach by ratifying multilateral human rights treaties over many decades. Parliament, the Courts and the Executive, including State legal advisors like the Attorney-General must know that ratification of international human rights treaties and acceptance of global policies like the SDG’s are a reflection of the Sri Lankan State’s **voluntary** roll back of State Sovereignty. This is an expression of willingness to harmonise these norms in domestic Constitutions, laws, policies and governance.

Today we sometimes think of Sri Lanka as a “fragile” or “dysfunctional democracy.” Yet we have sustained this form of governance for decades. Public controversy on the Colombo Port City has centred sometimes on the idea that the project will encourage foreign domination by a key partner, China, a growing global superpower. It is suggested

that a new and different type of governance will be installed by the Commission and the President in the Colombo Port City, because of the “capture” by a foreign power. Yet, if such a capture and transformation in governance due to foreign influences takes place, this will be due to the complicity or passivity of the People and institutions and individuals who hold office in governance, as has happened in our country’s colonial history.

Individuals within public institutions, in Parliament, the public sector, or the Judiciary, have a responsibility to make a positive difference and contribution to accountable governance, for the well-being of the Sovereign People. They have a responsibility to strengthen and not undermine the democratic governance that we have accepted for decades, based on constitutionalism and limitation of State power. They and the People and civil society must not legitimise the political currency of authoritarianism and unlimited State power in governance. Politicians, including the President and a majority party in Parliament do not “come into power.” They hold public office and are accountable to a Sovereign People. It is with this lens that we must monitor and challenge the administration and functioning of the Colombo Port City, through activism and engagement.

Our Courts and the Attorney-General and the law officers of the State must in light of our jurisprudence on fundamental rights and writs consistently uphold the written Constitution and the concept of the Sovereignty of the People and accountable

exercise of administrative power within the Colombo Port City Economic Zone. Justice Nalin Perera expressed this sentiment in the Dissolution of Parliament Case (2018) when his lordship said that sustained public confidence in the court system “must be nourished by the Court’s complete detachment in fact and in appearance from political forces and political settlements.”<sup>44</sup> The People of this country will only enjoy the expected dividends and benefits of economic growth from the Colombo Port City if there is continued commitment to the ideal of constitutional democratic governance. As Arahath Mahinda is said to have advised King Devanampiyatissa on another Poson Day in antiquity, the land belongs to the People and those holding public office are temporary guardians of their resources.

Justice A.R.B. Amerasinghe eloquently rephrased this same idea in the well-known case, *Bulankulama v. Secy Ministry of Industrial Development* (2000). His Lordship said that “the Constitution declares that Sovereignty is in the People and is inalienable (Article 3). Being a representative democracy, the power of the people is exercised through persons who are for the time being entrusted with certain functions.” Having referred to Parliament, the President and the Courts, His Lordship went on to say that “the organs of the State are guardians to whom the People have committed the care and preservation of the resources of the People. This not only accords with the scheme of government set out in the Constitution, but also with the enlightened concept of the duties of our rulers.”<sup>45</sup>

The oversight of the People, especially the media and civil society, and pillars of governance like Parliament, and the process of judicial review can help ensure that a very powerful Colombo Port City Economic Commission and an Executive President act in the public interest and with respect for the law and the Constitution. Erosion of the right of freedom of expression and right to information and media freedom by Presidential fiats such as gazette notifications

will contribute to ineffective and poor management, corruption, and a culture of non-accountability in the administration of the Colombo Port City.

We must all prevent the Port City becoming an enclave of industrial or any other kind of economic growth where governance of a public institution is de-linked from these abiding democratic values.

## Endnotes

- <sup>1</sup> Dr Dayanatha Jayasuriya PC. “Erosion of National Sovereignty and Free Trade Zones: A Storm in a Tea Cup”? *Daily FT* 11/5/21; Global Experience with Special Economic Zones with a Focus on China and Africa, World Bank, Feb 2015.
- <sup>2</sup> Colombo Port City Economic Commission Bill, Special Determination of the Supreme Court SCSD 04/2021, 05/2021, 07/2021 to 23/2021; Statement of the Attorney-General published in Daily News of Colombo 27/4/21.
- <sup>3</sup> *Ibid* p.20.
- <sup>4</sup> Cited in R.K.W. Goonesekere, *Select Laws on State Lands*, Law and Society Trust (2006) p. 33.
- <sup>5</sup> *Ibid* ;p. 33-34, 117; Willes Principles of South African Law 7<sup>th</sup> ed. Juta and Co Ltd, Cape Town (1977) p.163.
- <sup>6</sup> *Bulankulame v. Secretary Ministry of Industrial Development*, 2000 3 SLR, 343 p. 253 – 257.
- <sup>7</sup> S 75 on Interpretations; Schedule III.
- <sup>8</sup> SCSD Nos 1 to 03/2012.
- <sup>9</sup> See R.K.W. Goonesekere, note 4 *supra* pp. 118 – 121, 372.
- <sup>10</sup> Art 35 and proviso 20<sup>th</sup> Amendment.
- <sup>11</sup> *Mohamed Faiz v. Attorney-General* 1995 1 SLR 372; *Upaliratna v. Tikiri Banda* 1995 1 SLR 165.
- <sup>12</sup> World Bank Report note 1 *supra*.
- <sup>13</sup> S 5 (i).
- <sup>14</sup> Art 3, 4, 35 (1) and proviso.
- <sup>15</sup> *R Sampanthan and Others v. AG and Others* SC FR Appl 351-361 (2018) H.N.J Perera CJ pp.31, 38, 69.
- <sup>16</sup> Arts 148, 154. Chapter VII.
- <sup>17</sup> Schedule III and II.
- <sup>18</sup> S 7(1) (2), note 2 *supra* p. 25 – 26.
- <sup>19</sup> *Edward Silva and Others v. Shirani Bandaranayake* 1997 1 SLR 92.
- <sup>20</sup> Note 2, *supra* p. 27 – 31.
- <sup>21</sup> S 65 (1) (3), 75, and Schedule III, S 6 (1) (c) to (f) and S 38.
- <sup>22</sup> S 65 (2), Part III.
- <sup>23</sup> Antiquities Ordinance (1940) Part III S. 16 (1) (2), 18; S 48.
- <sup>24</sup> Note 2 *supra* p 37 – 40, 46 – 50.
- <sup>25</sup> S 26 (1) 27 (3) (4) (Foreign direct investment) S 38,39, 27 (5) (Partnership with Lease of Land), S 37 (1), (2) (3) authorized persons engaging in business with a Sri Lankan citizen, or resident outside Colombo Port City.
- <sup>26</sup> S 5 (j), Schedule III, S 6 (1) (a).
- <sup>27</sup> S 75; judgment pp 27 - 33, 37 -39, 43-44,45-46,48; Constitution Arts. 14(1) (g), 14 (1) (h).
- <sup>28</sup> Note 11 *supra*.
- <sup>29</sup> Constitution Article 14 (1), especially (a) and (h); S. Goonesekere, “Fundamental Rights and the Law of Delict” in Human Rights, Human Values and the Rule of Law, Essays in Honour of H.L. Silva PC ed. A.R.B. Amerasinghe and S.S. Wijeratne, Legal Aid Foundation and the Bar Association pp. 51 – 70.

<sup>30</sup> P. 26.

<sup>31</sup> Note 19 supra p. 95; anecdote. Krishantha Weliamune PC, a Junior to a Senior Counsel R.K.W. Goonesekere in the Case.

<sup>32</sup> S 68 (1) (e).

<sup>33</sup> S 69 proviso.

<sup>34</sup> S 5 (c) (d).

<sup>35</sup> S 67.

<sup>36</sup> Note 2, p. 51.

<sup>37</sup> Ibid, p.52; Part IV, Priority in Hearing Legal Proceedings.

<sup>38</sup> World Bank Report note 1 supra.

<sup>39</sup> Constitution Art 33 (1) (g) UN Guiding Principles on Business and Human Rights OHCHR (2011) HR/PUS/11/04.

<sup>40</sup> *Daily News*, 27/4/2021, Colombo.

<sup>41</sup> Schedule II and III of the Act.

<sup>42</sup> *De Silva v. Athukorale*, 1993 1SLR 283 at p. 297; *R. Sampanthan and Others v. AG and Others*, note 15 supra, p. 38, 69.

<sup>43</sup> Constitution Art. 34 (1) and proviso; Bar Association Public Statement in Presidential Pardons 24 June 2021.

<sup>44</sup> Note 15 supra p. 69.

<sup>45</sup> Note 6 supra at p. 253 – 254.

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