

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

In the matter of an Application under Article 126,  
read with Articles 17, 3, 4, Chapters III and VI of  
the Constitution of the Democratic Socialist  
Republic of Sri Lanka

Nihal Sri Ameresekere  
167/4, Vipulasena Mawatha  
Colombo 10.

**PETITIONER**

**Vs**

S.C. (FR) No. 481 / 2009

1. Ceylon Petroleum Corporation  
109, Rotunda Tower  
Galle Road,  
Colombo 3.

2. P.B. Jayasundera  
Secretary to the Treasury  
The Secretariat  
Colombo 1.

3. Standard Chartered Bank  
Sri Lanka Branch  
37 York Street,  
Colombo 1.

Head Office at 1 Basinghall Avenue  
London EC2V 5DD, U.K.

4. Citibank  
Sri Lanka Branch  
65C, Dharmapala Mawatha  
Colombo 7.

Head Office at Citigroup Center  
153, East 53<sup>rd</sup> Street, 16/F, Zone 19  
New York, NY 10022, U.S.A.

5. Deutsche Bank AG  
Sri Lanka Branch  
86 Galle Road,  
Colombo 3

UK Branch at 1 Great Winchester Street  
EC2N 2DB London, U.K.

Head Office at Theodor-Heuss-Allee 70  
60486, Frankfurt, Germany.



6. Commercial Bank of Ceylon PLC  
Commercial House  
21, Bristol Street  
Colombo 1.
7. People's Bank  
75, Sir Chittampalam  
A. Gardiner Mawatha,  
Colombo 2.
8. Ms. T.M.J.Y.P. Fernando  
Director, Bank Supervision  
Central Bank of Sri Lanka  
Towers 1 & 2, Level 6  
30 Janadhipathi Mawatha  
Colombo 1.
9. Hon. Attorney General  
Attorney General's Department  
Colombo 12.

**RESPONDENTS**

**TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS & LADYSHIPS THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

## **COUNTER AFFIDAVIT**

I, NIHAL SRI AMERESEKERE of 167/4, Vipulasena Mawatha, Colombo 10 in the Democratic Socialist Republic of Sri Lanka, being a Buddhist, do hereby solemnly, sincerely and truly affirm and declare as follows:

1. I am the Affirmant and the Petitioner above-named and affirm to the facts herein contained of my own personal knowledge and belief and from the documents herein referred to and as advised.

### **SUBSTITUTION OF 2<sup>ND</sup> & 8<sup>TH</sup> RESPONDENTS**

2. When this Application came up on the last date i.e. 11.2.2010, Your Lordships' Court allowed the Amendment of the Caption for the substitution of the 2<sup>nd</sup> and 8<sup>th</sup> Respondents, as recorded in the Minutes of that day; and likewise also allowed the substitution of the 2<sup>nd</sup> and 8<sup>th</sup> Respondents in my connected Application SC (FR) No. 404/2009, as recorded in the Minutes of that Application.

### **ACCEPTANCE OF AMENDED PETITION DATED 10.11.2009**

3. a) In addition, on the same day 11.2.2010, Your Lordships' Court accepted the Amended Petition filed on 10.11.2009 in this Application, subject only to Objections to the Documents annexed thereto.
- b) Hence, any purported Objections to such Amendments to the Petition, ought and could not be entertained now.



## LIMITED OBJECTIONS TO INTERIM RELIEF

4. Your Lordships' Court also permitted all Counsel to file limited Objections to the interim reliefs sought in this Application, as so recorded in the said Minutes of 11.2.2010.
5. Consequently, I received the following:
  - a) 2 Affidavits both dated 25.2.2010 on behalf of the 3<sup>rd</sup> Respondent, objecting, however, with no corresponding Statements of Objections, received on 26.2.2010
  - b) Undated Statement of Objections of the 4<sup>th</sup> Respondent, together with corresponding Affidavit dated 25.2.2010, received on 4.3.2010.
  - c) 2 Statements of Objections both dated 25.2.2010 of the 5<sup>th</sup> Respondent, together with 2 corresponding Affidavits both previously dated on 23.2.2010, received on 26.2.2010.
  - d) Statement of Objections dated 25.2.2010 of the 6<sup>th</sup> Respondent, together with corresponding Affidavit dated 25.2.2010, received on 26.2.2010
6. **Both Affidavits on behalf of the 5<sup>th</sup> Respondent being dated 23.2.2010 prior to the Statement of Objections both dated 25.2.2010, the said Statement of Objections ought be rejected in-limine.**
7. a) I have not received Statement of Objections from the 1<sup>st</sup>, 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents.  
b) The ~~8<sup>th</sup>~~ <sup>8<sup>m</sup></sup> Respondent to assist to Your Lordships' Court, has tendered further Documents by way of a Motion dated 22.2.2010.

## RESPONSES

8. Without prejudice to the foregoing, in the light of commonality of stances taken in the Objections of the Respondents, I set out hereinbelow my common responses to the averments contained in their respective Statements of Objections.

## TIME BAR

9. a) I cite the following paragraphs 12(h) and 12 (k) of my Petition dated 25.5.2009 in my connected Application SC (FR) No. 404/2009

"12. (h) In the context of the media reports that the Central Bank had intimated to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent Banks, that the Claims made under the transactions put in issue ought not be paid by the 1<sup>st</sup> Respondent (CPC), since the said transactions are 'significantly tainted' (Emphasis added) the Regulations for Banks by the Central Bank, would mandate the 'provisioning for bad and doubtful debts' by the respective Banks; the Petitioner verily believes, that the 6<sup>th</sup> Respondent, Commercial Bank has already made such provisions, in its financial accounts.

12 (k) He verily believes that, ***notwithstanding and regardless of, specific directions in regard to the aforesaid, given in or about December 2008 by the Monetary Board, Central Bank of Sri Lanka, the 3<sup>rd</sup> Respondent Standard Chartered Bank has remitted in valuable foreign exchange a sum exceeding US \$ 100 Mn. between December 2008 and April 2009, and is endeavouring to remit a further sum exceeding US \$ 20 Mn. immediately,*** on such 'Back to Back Agreements' entered into with foreign party / ies.

b) I cite below paragraphs 6, 7 and 8 of the Affidavit dated 23.6.2009 (*Emphasis added*) of the Controller of Exchange filed in my connected SC (FR) Application No. 404/2009.

" 6. I am advised and I accordingly state that the **pursuant to the aforesaid investigation it was found that the derivative contracts** entered into by the Ceylon Petroleum Corporation with Standard Chartered Bank, Citibank N.A., Deutsche Bank AG, Commercial Bank of Ceylon PLC and People's Bank **were materially affected seriously undermining the propriety of the transactions *inter alia* due to**

- a. serious non-compliance with Central Bank directions on financial derivatives;
- b. Ceylon Petroleum Corporation entering into derivative transactions without properly understanding or appreciating the nature of inherent risks;
- c. transactions being heavily weighted/structured for the benefit of the Banks;
- d. the questionable authority of the contracting persons on behalf of Ceylon Petroleum Corporation;
- e. non-compliance with the best market practices and prudential norms by both the Ceylon Petroleum Corporation and the Banks;
- f. non-compliance with the terms of the Cabinet Decision relating to 'oil hedging'

True copies of the Investigation Reports dated 13<sup>th</sup> December 2008 submitted by the Monetary Board to Your Lordships' Court in SC (FR) 535/2008 on 15<sup>th</sup> December 2008 in respect of the Derivative Transactions entered into by the Ceylon Petroleum Corporation with the Standard Chartered Bank, Citibank N.A., Deutsche Bank AG, Commercial Bank of Ceylon PLC and People's Bank are produced before me **marked as 8R1 to 8R5** respectively.

7. I am advised and I accordingly state that in the circumstances the **Central Bank on or about 16<sup>th</sup> December 2008 issued a directive to Standard Chartered Bank, Citibank N.A., Deutsche Bank AG, Commercial Bank of Ceylon PLC and People's Bank not to proceed with the transactions relating to oil hedging as these transactions are materially affected and are substantially tainted.**

True copies of the said directive to Standard Chartered Bank, Citibank N.A., Deutsche Bank AG, Commercial Bank of Ceylon PLC and People's Bank are produced before me **marked as 8R6(a) to 8R6(e)** respectively.

8. I am advised and I accordingly state that

- a. **the Standard Chartered Bank (Sri Lanka Branch) has made payments totaling USD 107,778,700 between 12<sup>th</sup> December 2008 and 14<sup>th</sup> April 2009 to Standard Chartered Bank 01, Aldermanbury Square, London EC2V 7SB;**
- b. **the Commercial Bank of Ceylon PLC has made payments totaling USD 7,716,720 between August 2008 and April 2009 to Citibank N.A., New York, NY, USA;**

in respect of the transactions relating to oil hedging. "

I annex compendiously marked "P11" the said Affidavit dated 23.6.2009 of the Controller of Exchange and the Documents / Letters annexed therewith and marked "P12(a)" and P12(b)" respectively Letter dated 19.3.2009 and 3.3.2009 addressed to the Chief Executive of the 3<sup>rd</sup> Respondent by the predecessor in Office of the 8<sup>th</sup> Respondent, pleaded as part and parcel hereof

- c) I cite the excerpts of (i) Letters all dated **16.12.2008** addressed to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents and (ii) Letter dated **13.5.2009** to the 3<sup>rd</sup> Respondent, and (iii) Letter dated 5.6.2009 to the 6<sup>th</sup> Respondent by the Controller of Exchange, all included in "P11".

" (i)

December 16, 2008

**Derivative Transactions with the  
Ceylon Petroleum Corporation (CPC)**

The Central Bank of Sri Lanka (CBSL) commenced an investigation on 13<sup>th</sup> November, 2008 on the above mentioned derivative transactions and pursuant thereto on 28<sup>th</sup> November, 2008, the Supreme Court of Sri Lanka made Order *inter alia* as follows: " .... The Monetary Board under whose authority, the banks have been operating is directed to carry out an investigation as regards the impugned transactions and to take action thereon ...." [ SC / FR Applications No.535 / 2008 and 536 / 2008 ].

Having carried out the aforesaid investigation, the Monetary Board has now submitted a confidential report to the Supreme Court.

Having considered the above matters, and the interim Order made by the Supreme Court of Sri Lanka on 28<sup>th</sup> November, 2008 suspending all payments by the CPC to the respective banks on the aforesaid transactions, we find that the above transactions are materially affected and are substantially tainted.

In the circumstances, please do not proceed with, or give effect to, these transactions.

Please also note that further investigations are being carried out by us in accordance with the Supreme Court Order on 15<sup>th</sup> December, 2008.

**By order of the Monetary Board of the Central Bank of Sri Lanka,**

Secretary  
Monetary Board"

"(ii)

May 13, 2009

Chief Executive Officer  
Standard Chartered Bank  
37, York Street  
Colombo 1.

Dear Sir,

**Hedging Transactions of the Standard Chartered Bank**

As you are aware payments on capital account transactions require prior permission from the Controller of Exchange. However, I observe from the letter addressed to me by the Head of Legal, Compliance & Assurance of Standard Chartered Bank, Ref. No. L&C/EC/MAY/128/09 dated 12<sup>th</sup> May 2009 that you have made payments totaling USD 107, 778,700 between the period 12.12.2008 and 14.04.2009 to Standard Chartered Bank, 01

Aldermanbury Square, London, EC2V 7SB in relation to hedging transactions. Such payments have been made without the prior permission of the Central Bank as required under Section 7(a) of the Exchange Control Act.

Your attention is also drawn to the directive dated 16<sup>th</sup> December 2008 sent to your bank by the Monetary Board informing you not to proceed with the transactions relating to hedging which have been determined as being materially affected and substantially tainted. You have not adhered to such directive as well.

In the circumstances, I hereby direct you not to proceed with any further foreign exchange payments in relation to the transactions specified in the aforesaid letter dated 12.05.2009, with immediate effect.

A further direction would follow in relation to the sums already remitted by you without prior permission.

Yours faithfully

Controller of Exchange"

"(iii)

June 5, 2009

Mr. Amitha Gooneratne  
Managing Director  
Commercial Bank of Ceylon PLC  
Commercial House  
21, Bristol Street  
Colombo 01.

Dear Sir,

**Hedging Transactions of the Commercial Bank PLC**

As you are aware, payments on capital account transactions require prior permission from the Controller of Exchange. However, I observe from the letter addressed to me by the head of Global Treasury of your Bank dated 13<sup>th</sup> May 2009 that you have made payments totaling USD 7,716,720/- between the period August 2008 to April 2009 to CITI Bank N.A. New York, NY, USA in relation to hedging transactions. Such payments have been made without the prior permission of the Central Bank as required under section 7 (a) of the Exchange Control Act.

Your attention is also drawn to the directive dated 16<sup>th</sup> December 2008 sent to your bank by the Monetary Board informing you not to proceed with the transactions relating to hedging which have been determined as being materially affected and substantially tainted. You have not adhered to such directive as well.

In the circumstances, I hereby direct you not to proceed with any further foreign exchange payments in relation to the transactions specified in the aforesaid letter dated 12/05/2009, with immediate effect.

A further direction would follow in relation to the sums already remitted by you without prior permission.

Yours faithfully

Controller of Exchange"

- d) In the foregoing circumstances, as cited at paragraph 9 above at paragraph 12 (k) therein immediately upon coming to know in May 2009 of the noncompliance and/or violation of the directive of the regulator namely Central Bank of Sri Lanka by the Respondent Banks, I promptly instituted my SC (FR) Application No. 404/2009 on 25.5.2009, without any lapse of time, whatsoever.
- e) I cite paragraph 3 (b) of my Petition dated 25.6.2009 (which also is paragraph 3(b) in my Amended Petition dated 10.11.2009) in this Application No. 481/2009

“3 (b) In like manner in the given circumstances of **wagering**, the Petitioner on 25.5.2009 filed SC (FR) Application No. 404/2009 putting in issue transactions, described as ‘**Petroleum Oil Hedging Agreements**’, which said Application came-up before Your Lordships’ Court on 1.6.2009 and 2.6.2009, (*Emphasis added*) and the Respondents seeking time to file documents, together with limited objections relevant to the interim relief that had been sought, the said Application has been fixed for Support on 14.7.2009.”

- f) I cite paragraphs 10 (a), 10(b) and 10(c) of my Petition dated 25.6.2009 (which also are paragraphs 10(a), 10(b) and 10(c) in my Amended Petition dated 10.11.2009) in this Application No. 481/2009

“10. (a) The Petitioner on 2.6.2009 in Your Lordships’ Court came to be aware that the 5<sup>th</sup> Respondent (*Emphasis added*), Deutsche Bank has filed for Arbitration at the International Center for Settlement of Investment Disputes in the US (ICSID), coming under the purview of the World Bank. **The said Claim would be against the Government of Sri Lanka and not against the 1<sup>st</sup> Respondent (CPC).**

(b) Similarly, the Petitioner came to be aware that the 4<sup>th</sup> Respondent, Citibank has instituted Arbitration Proceedings in the U.K, in the London Court of International Arbitration, under the ISDA Master Agreement, and is being defended by the 9<sup>th</sup> Respondent, Attorney General, with the assistance of Foreign Lawyers, costing the 1<sup>st</sup> Respondent (CPC) and/or the Government of Sri Lanka, considerable costs by way of Foreign Lawyers and Experts Fees, etc., *which to date the Petitioner understands on this Arbitration alone has amounted to around Rs. 25.0 Mn., which is public money.*

(c) The Petitioner also understands that the 3<sup>rd</sup> Respondent, Standard Chartered Bank, the lead Bank that initiated the dubious transactions put in issue has instituted Legal Action in the UK High Court, making a Claim against the 1<sup>st</sup> Respondent (CPC).”

- g) Accordingly, having come to know in Your Lordships’ Court only on 2.6.2009 as aforesaid, that proceedings had been instituted by the Respondents in foreign jurisdictions, I promptly filed this Application No. 481/2009 on 25.6.2009, which is well within time; and subsequently filed Amended Petition dated 10.11.2009 which was accepted by Your Lordships’ Court on 11.2.2010 as aforesaid (*vide paragraph 3 above*)
- h) In any case, the ‘transactions put in issue’ have been carried out secretively in a shady manner, away from the public glare, devoid of disclosure and transparency, which is even absent before Your Lordships’ Court, as proven by the limited Objections filed in this Application No. 481/2009, and in my connected Application No. 404/2009.
- i) Inasmuch as the totality of the Claims made by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents have not been disclosed even before Your Lordships’ Court, and nor has the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> Respondents disclosed the costs incurred by the State, utilizing public monies, in defending the arbitrations / litigations instituted in foreign jurisdictions.

- j) (i) The 4<sup>th</sup> Respondent at paragraph 4 of its Statement of Objections, *inter-alia*, has stated - "..... claiming for an award in a sum of US Dollars 194,505,771/64 being early termination amount (or such other amount as the Arbitration Tribunal determines to be the early termination amount) and interest up to the due date of 26<sup>th</sup> March 2009 of US Dollars 952,321/03 amounting to a total sum of US Dollars 195,458,092/67"

- (ii) I cite below paragraph 7 (d) (iii) of my Amended Petition dated 10.11.2009

"7 (d) (iii) As per the Petitioner's computation, the purported amounts claimable on these 2 impugned transactions as at end-November 2008 is around **US \$ 62 Mn.**, and as at end-December 2008 is around **US \$ 84 Mn.**, and as at end June / July 2009 totaling **US \$ 204 Mn.** "

- k) In any case, all the 'transactions put in issue' **were live and continuing on date of filing of my first Application on 25.5.2009 No. 404/2009** and this Application on **25.6.2009 (Amended on 10.11.2009 as aforesaid)** inasmuch as the earliest completion date was **May 2009** and the last completion date was **October 2009**.

- l) Hence, there was **continuing infringement** and a right for me to institute actions.

- m) The '**shrouded secrecy**' maintained of the 'transactions put in issue' is clearly borne out by the fact that, the said transactions and the **material contingent commitments of the State and costs**, have been **suppressed** in the "Pre-Election Budgetary Position Report" issued on 1.3.2010 by the Ministry of Finance & Planning, as mandated under Section 16 of the Fiscal Management (Responsibility) Act No. 3 of 2003 **for the information of the People.**

#### ATTEMPTED INTERVENTION IN SC (FR) NOS. 535/2008 & 536/2008

10. a) I cite below paragraphs 15 (c), 15(d) and 15(e) of my connected Application No. 404/2009

"15. (c) The Petitioner respectfully states that the Petitioner filed Intervening Petitions in SC (FR) Applications Nos. 535/2008 and 536/2008, and **the Petitioner misdirecting himself having not been present in Your Lordships' Court on 13.1.2009, the Petitioner's Intervening Applications were not considered and the Petitioner was not added as a Interveniend-Respondent, unlike another Intervening Petitioner, Vasudeva Nanayakkara, whose Application had been allowed by Your Lordships' Court, upon having heard his Counsel, and he had been added as the 9<sup>th</sup> Respondent in SC (FR) Application No. 535/2008.** (*Emphasis added*)

*A true copies of certified copy of the proceedings of 13.1.2009 and Motion dated 15.1.2009 are annexed respectively marked ("P12(a)") and ("P12(b)"), pleaded as part and parcel hereof*

- (d) Therefore, the Petitioner very respectfully states that the **Petitioner had not been an Added-Party in the above Applications,** which had been terminated on the Applications made by the respective Petitioners. (*Emphasis added*)

- (e) Except the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 9<sup>th</sup> Respondent, Hon. Attorney General, who has been made a party in terms of Article 134 of the Constitution, all other Respondents above-named were not Respondents in the aforesaid SC(FR) Applications Nos. 535/2008 and 536/2008, **whereas, the Petitioner's Intervening Application in SC(FR) No. 535/2008 was to have added the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent Banks, being direct parties to the transactions put in issue, as necessary parties.**" (*Emphasis added*)

- b) I cite below similar paragraphs 17 (d) and 17 (e) of my Petition / Amended Petition in this Application No. 481/2009

"17 (d) The Petitioner respectfully states that the Petitioner filed Intervening Petitions in SC (FR) Applications Nos. 535/2008 and 536/2008, and **the Petitioner misdirecting himself having not been present in Your Lordships' Court on 13.1.2009, the Petitioner's Intervening Applications were not considered and the Petitioner was not added as a Interventient-Respondent, unlike another Intervening Petitioner, Vasudeva Nanayakkara, whose Application had been allowed by Your Lordships' Court, upon having heard his Counsel, and he had been added as the 9<sup>th</sup> Respondent in SC (FR) Application No. 535/2008.** (Emphasis added)

(e) Therefore, the Petitioner very respectfully states that the **Petitioner had not been an Added-Party in the above Applications**, which had been terminated on the Applications made by the respective Petitioners." (Emphasis added)

- c) Though in the Supreme Court Minutes of 13.1.2009 my name appears 'as present', which is an **error**, in that, I was present on the previous day on **17.12.2008** and not on 13.1.2009 as stated above. The Stenographer has merely copied the previous day's appearances, and **to rely on such erroneous triviality discloses the desperation** on the part of the Respondents !
- d) In fact as referred to at paragraph 10 above I had marked the proceedings of 13.1.2009 as "**P12(a)**", and my Motion dated 15.1.2009 as "**P12(b)**" the contents of my said Motion are cited below:

"**WHEREAS** when this matter, in which I had tendered an Intervening Petition, came up on 17.12.2008, Your Lordships' Court made an interim order and fixed the matter for Hearing on 16.2.2009.

**AND WHEREAS** having come to know that this Case is to be mentioned on 13.1.2009, I requested a Lawyer to examine the record, and I was informed that certain parties affected by the interim order had filed papers, and that a Minute had been made by Your Lordships' Court to – 'List this matter before the previous Bench on 13.1.2009, notifying Attorneys-at-Law for all persons, who have filed papers after the interim order was made by Court' (Emphasis added)

**AND WHEREAS** in such circumstances, I misdirected myself that only the above parties, who had filed papers after the interim order of 17.12.2008 had to be present, and the Registry having also not notified me, I respectfully apologise for not being present in Court on 13.1.2009 (Emphasis added)

**WHEREFORE** in the given circumstances, I respectfully Move that Your Lordships' Court be pleased to permit me to intervene this Case, should Your Lordships' Court decide on 27.1.2009 to proceed with this Case; a copy of my Intervention-Petition, Affidavit and Documents filed in this Case, having already been forwarded to the Petitioner and Respondents – vide my Motion dated 18.12.2008"

- (e) On 27.1.2009 the aforesaid Applications 535/2008 and 536/2008 were **terminated** by Your Lordships' Court on the Applications made by the respective Petitioners, prior to me having been permitted to be an Interventient Party. **Hence, not having been an Interventient Party, I had no right to move for continuance of the said Applications.**

*I annex marked "**P13**" the. Supreme Court Minutes of 27.1.2009.pleaded as part and parcel hereof*

- (f) Accordingly, when my connected Application No. 404/2009 dated 25.5.2009 came up on 1.6.2009 Your Lordships' Court fixed my Application for Support on the very next day 2.6.2009.

## NECESSARY PARTIES

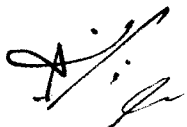
11. a) I cite paragraph 18 (b) and 18 (c) of my Petition dated 25.6.2009 (**which also are paragraphs 18(b) and 18(c) in my Amended Petition dated 10.11.2009**) in this Application, which are identical to paragraphs 16(b) and 16(c) of my Petition dated 25.5.2009 made in my connected Application No. 404/2009

“18 (b) The Petitioner respectfully reserves the right to seek to adduce, with the permission of Your Lordships’ Court, further documents and facts pertaining to this matter of national and public importance, **should the necessity arises and/or to seek to add any other necessary party, with the permission of Your Lordships’ Court.**  
(Emphasis added)

18 (c) Significantly, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent Banks, being principal parties to the transactions put in issue, had not been made parties in either of the aforesaid SC (FR) Applications Nos. 535/2008 and 536/2008, whereas the Petitioner in his Intervening Petition in SC (FR) Application No. 535/2008 had prayed that the said Respondent Banks be added as necessary parties.”

- b) It has been stated by the 3<sup>rd</sup> Respondent at paragraph 35 of its Affidavit, that in my Petition seeking to intervene in Cases Nos. 535/2008 and 536/2008, I had stated that the Secretary to the Treasury (P.B. Jayasundera) and Governor Central Bank were necessary parties, and had chosen to omit them from my present Applications viz Nos. 481/2009 and 404/2009.
- c) (i) The said Secretary to the Treasury is now substituted as 2<sup>nd</sup> Respondent in both Applications Nos. 404/2009 and 481/2009.
- (ii) The relevant direct functionaries of Central Bank, namely the Controller of Exchange is the 8<sup>th</sup> Respondent in Application No. 404/2009, and the Director, Bank Supervision is the 8<sup>th</sup> Respondent in Application No. 481/2009.
- (iii) I have no objection to the Governor of Central Bank being added as a party, if Your Lordships’ Court so directs.
- d) Inasmuch as aforesaid, I had reserve by right to add any other necessary party, with the permission of Your Lordships’ Court , should the necessity arises.
- e) I also cite in paragraphs 18(d) of my Petition dated 25.6.2009 (**which also is paragraph 18(d) in my Amended Petition dated 10.11.2009**) in this Application, which is the identical paragraph 16(d) in my Petition in my connected Application No. 404/2009.

“18(d) The Petitioner very respectfully states, that he reserves the right to sue those, who had been directly involved in directing the transactions in issue to be carried out, and those who had carried out the transactions in issue, for the recovery by the State of losses and damages, if any, caused to the People of the country.”



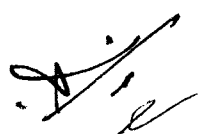
## SUPPRESSION OF FACTS AND DOCUMENTS

12. a) I have lucidly stated the necessary facts and adduced the necessary documents to Your Lordships' Court to establish the stance taken by me in my Petitions in Application Nos. 481/2009 and 404/2009
- b) **I have not deliberately and knowingly suppressed material facts or documents**, but have averred facts and adduced documents, which are relevant and material to the crux of my Petitions, and the stance I have taken, without making my Petitions prolix.
- c) The Respondents desperately, akin to a 'drowning person clutching to a straw' are deliberately attempting to mislead Your Lordships' Court in trying to explain how the 'transactions put in issue' had come to be perpetrated. Such does not cure the illegality of the 'transactions put in issue'.

## MATERIAL FACTS OF RELEVANCE

13. a) The Respondents state that the Secretary to the Treasury (the 2<sup>nd</sup> Substituted Respondent) had played a pivotal role in causing the 'transactions put in issue' to be entered into, by appointing and obtaining a Report from a Study Group, on the subject of **Oil Hedging**.
- b) As Secretary to the Treasury, the 2<sup>nd</sup> Substituted Respondent, would have caused the Cabinet Paper seeking approval to be prepared, and submitted to the Cabinet of Ministers.
- c) The 8<sup>th</sup> Respondent, Director, Bank Supervision has submitted by way of Motion dated 22.2.2010, copies of Hedging Contracts entered into by the 3<sup>rd</sup> and/or 4<sup>th</sup> and/or 5<sup>th</sup> Respondents, with other parties, namely, Sri Lankan Airlines, Lanka IOC and ACL Cables, which apparently have been under scrutiny or examination by the Central Bank.
- d) What is of relevance is that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have entered into 2 Hedging Contracts for 12 Month periods, with Sri Lankan Airlines Ltd., in May 2008, whilst the 2<sup>nd</sup> Substituted Respondent was both Chairman of Sri Lankan Airlines Ltd., and the Secretary to the Treasury.
- e) (i) In SC (FR) Application No. 209/2007 as the 22<sup>nd</sup> Respondent therein, by paragraph 7 of my Statement of Objections dated 27.7.2009, adducing Documents compendiously marked "22RX3", I disclosed to Your Lordships' Court the matters referred to at paragraphs (a) and (b) above, and the 'nexus/collusion' between the 2<sup>nd</sup> Substituted Respondent, and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
- (ii) The said facts and Documents adduced by me as aforesaid, were not denied and/or controverted by the 2<sup>nd</sup> Substituted Respondent, who was the 8<sup>th</sup> Respondent in SC (FR) Application No. 209/2007, in relation to which there was a Hearing before Your Lordships' Court, on his own Application, to which my said Statement of Objections were filed.

*Annexed compendiously marked "P14" are true copies of the Caption of my said Statement of Objections dated 27.7.2009, together with the relevant pages containing paragraph 7 thereof and the Documents marked "22RX3". pleaded as part and parcel hereof ( I shall obtain and adduce a certified copy of same from Your Lordships' Court should Your Lordships' Court so direct)*



**LOCUS STANDI, FUNDAMENTAL RIGHTS JURISDICTION, DOCTRINE OF PUBLIC TRUST & RIGHT TO INSTITUTE ACTION**

14. a) I cite below paragraph 4 (c) in my Petition dated 25.6.2009 (which also is paragraph 4(c) in my Amended Petition dated 10.11.2009) in this Application setting out the 'dicta' of Your Lordships' Court in the Judgment delivered on 4.6.2009 in SC (FR) Application No. 158/2007 (*Emphasis added*).

"4 (c) Your Lordships' Court in the recent Judgment delivered on 4.6.2009 in SC (FR) Application No. 158/2007, *inter-alia*, stated as follows:

"In this case the petitioner in SCFR 158/2007 who has locus standi as a matter of right, to come before this Court for the alleged violation of his and the citizens' right to equality before the law, has emphatically asserted that he invoked the jurisdiction of this Court also in pursuance of a duty cast on every citizen of Sri Lanka. He has relied on Article 28(d) of the Constitution which appears in Chapter VI which set out Derivative Principles of State Policy and Fundamental Duties. According to Article 28(d) relied on by the petitioner, it is the duty of every citizen in Sri Lanka "to preserve and protect public property and to combat misuse and waste of public property." The petitioner's position is that he came before Court in obedience to a constitutional duty to protect public property - that is the SLIC, [which ultimately belongs to the people who possess the powers of the Government (Article 3 of the Constitution)] sold in contravention of the law.

Article 29 of the Constitution which appears in the same Chapter referred to above provides that :

"The provisions of this Chapter do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal."

The above provision shows that the duty set out in Article 28(d) is not enforceable against the petitioner in any court or tribunal. But if a person, on his own volition, decides to invoke the jurisdiction of this Court in terms of Articles 12(1), 17, 126(1) and 28(d) can this Court prevent that ? My considered answer is in the negative. On the other hand, when the Court has to deal with any objection to such application the Court has consider Articles 12(1), 17, 126 and 28(d) in combination. These articles do not merely confer power on this Court to issue directions or orders for enforcement of fundamental rights but lays down a constitutional duty to protect the fundamental rights of the people and for that purpose confer on this Court all incidental and ancillary powers necessary to progressively move forward to fashion and adopt, within the framework of the law, new strategies for the purpose of securing the enforcement of peoples fundamental rights. It must be remembered that these two applications have been filed in the public interest to make the fundamental right enshrined in article meaningful - that is to make it "tangible" and "palpable", and also to ensure that all officers of the State and its agencies entrusted with the duty to discharge their functions and obligations, do so in accordance with the law, bearing in mind the concept of equality enshrined in the Constitution and the basic tenet of the Rule of Law."

" ..... The ruler's trusteeship of the resources of the State which belong to the people is a part of the legal heritage of Sri Lanka dating back at least to the third century BC as pointed out by Justice Weeramantry in his separate opinion in the International Court of Justice in the Danube Case, by quoting the sermon of Arahath Mahinda to King Devanampiya Tissa as recorded in the Great Chronicle - Mahawansa. (See Bulankulama case - 2000 (3) SLR 243 at 254-255.)

This concept of the public trust which curtailed the absolute power of the monarch is in perfect harmony with the doctrine of public trust developed by the Supreme Court on the basis of the sovereignty of the people set out in Articles 3 and 4 of the Constitution, Article 12(1) and the principle of the Rule of Law, which is the basis of our Constitution. The Rule of Law is the principle which keeps all organs of the State within the limits of the law and the public trust doctrine operates as a check to ensure that the powers delegated to the organs of the government are held in trust and properly exercised to the benefit of the people and not to their detriment. When the Executive which is the custodian of the People's Executive Power "act ultra vires and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court." Per S.N. Silva CJ, in Vasudeva Nanayakkara vs. Choksy, SCFR 209/2007 SCM 21.7.2008. As pointed out by the Chief Justice (in Senarath vs. Kumaratunga SCFR 503/2005 SC Minutes of 3.5.2007 - 2007 BLR 23 at 30), the public interest to keep the executive within the power given to it by law is the "positive component" in the right to equality."

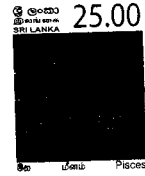
- b) I also state that Your Lordships' Court has over the years entertained and dealt with on a just and equitable basis several actions in a similar manner Eg: Bulankulama and Others V. Secretary, Ministry of Industrial Development and Others (Eppawela Case) - SC (FR) Application No. 884/99 vide - Judgment dated 7.4.200.
- c) I also cite the following 'dicta' of Your Lordship the Chief Justice from the Judgment of Your Lordships' Court delivered on 3.8.2009 in SC (FR) Application No. 352/2007 (*Water's Edge Case*) (*Emphasis added*)

" In any event the Constitution unequivocally empowers the Supreme Court to be the ultimate guardian of rights of the people of Sri Lanka, going so far as to confer the Court sole and exclusive jurisdiction over matters relating to Fundamental Rights.

As is made amply clear by subsection (4) of Article 126, inherent to the effective supervision of matters pertaining to Fundamental Rights is the ability and power of the Supreme Court to administer relief and make directions so long as such relief and directions are "just and equitable" - a simple and unqualified two-word threshold clearly meant to give the board discretion and power required of the Supreme Court to effectively address the infinitely myriad ways in which fundamental rights can be violated. It is important to recognize, then, that the Supreme Court's board powers over matters of Fundamental Rights stem, not from an overzealous interpretation of judicial power, but from an understanding of the very nature of these matters for which the Court has been empowered to protect. Fundamental Rights applications are qualitatively different from other types of appeals heard before this Court and warrant greater latitude in their consideration and to grant redress in order to encompass the equitable jurisdiction exercised in these applications."

15. In the given facts and circumstances, I very respectfully state that I am entitled to be granted Leave to Proceed and the Interim Reliefs prayed for.

The foregoing Affidavit having been read and understood by the Affirmant within-named, affirmed to and signed at Colombo on this 10<sup>th</sup> day of March 2010



BEFORE ME

**S. NAVARATANAM**  
Justice of the Peace (All Island)  
No 2510 Wipitaseena Mawatha,  
Colombo 10.  
Reg. No. 08/8/WP/AI/168

08/03/10