WRITTEN SUBMISSIONS OF 13th RESPONDENT

INDEX

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

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

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Secretary, The Democratic Left Front
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Petitioner

SC FR Application No. 158/2007

Vs

1. K.N. Choksy M.P.
   President's Counsel
   Former Minister of Finance
   23/3, Sir Ernst De Silva Mawatha
   Colombo 7.

2. Milinda Moragoda M.P.
   Former Minister of Economic Reform
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   Colombo 5.

3. Sripathy Sooriyarachchi M.P.
   Attorney-at-Law
   Former Minister, Public Enterprise Reforms
   22, Niwasa Mawatha
   Rilaulla
   Kadana.

4. Charitha Ratwatte
   Former Secretary to the Treasury
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   Colombo 5.

5. Faiz Mohideen
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   5/2, Liberty Plaza Flats
   250, R.A. De Mel Mawatha
   Colombo 3.

6. N. Pathmanathan
   Former Deputy Secretary to the Treasury
   16, Gregory's Place
   Dehiwela.

7. P.B. Jayasundera
   Secretary to the Treasury / Former Chairman,
   Public Enterprises Reform Commission (PERC)
   The Secretariat
   Colombo 1.

8. Chrisantha Perera
   Former Chairman, PERC / Sri Lanka Insurance Corporation Ltd. (SLIC)
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9. M. Kandasamy
   Member of the Steering Committee / General Manager SLIC
   "Rakshana Mandiraya"
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   Colombo 2.

10. V. Kanagasabapathy
    Chartered Accountant
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    Former Member of PERC
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    Colombo 6.

11. Dayanath Jayasuriya
    Member Steering Committee /
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12. Rani Jayamaha
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13. Nihal Sri Ameresekere
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21. S. Manoharan
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22. Asite Talwatte
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23. Ruwan Fernando
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24. Distilleries Company of Sri Lanka Ltd.
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Colombo 10.

25. Aitken Spence & Company Ltd.
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    Vauxhall Street
    Colombo 2.

26. Aitken Spence Insurance (Pvt) Ltd.
    305, Vauxhall Towers
    Vauxhall Street
    Colombo 2.

27. Sri Lanka Insurance Corporation Ltd.
    "Rakshana Mandiraya"
    21, Vauxhall Street
    Colombo 2.

28. Milford Holdings (Pvt) Ltd.
    110, Norris Canal Road
    Colombo 10.

29. Greenfield Pacific EM Holdings Ltd.
    C/o Asia Box Consultancy Services (Pte) Ltd.,
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    Singapore 069436.

30. Channa De Silva
    Director General
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31. President
    Institute of Chartered Accountants of Sri Lanka
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32. F.H. Puvimanasinghe
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34. Inspector General of Police
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35. Deputy Inspector General of Police
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36. Chairman
Commission to Investigate Allegations of Bribery or Corruption
36, Malalasekera Mawatha
Colombo 7.

37. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

38. D.H.S. Jayawardhene
C/o Milford Holdings (Pvt) Ltd.
110, Norris Canal Road
Colombo 10.

Added- Respondent

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

WRITTEN SUBMISSIONS OF 13TH RESPONDENT

Upon the conclusion of Arguments on 15.7.2008, Your Lordships' Court directed that Written Submissions be tendered on or before 1.8.2008, and to comply therewith, by Motion dated 30.7.2008 explaining the circumstances, I sought the permission of Your Lordships' Court to tender the Written Submission on 4.8.2008, and accordingly, these Written Submissions are respectfully tendered.

1. PREAMBLE

NOTES NOS. 1, 2, 3, 4, 5 AND ADDITIONAL NOTE NO. 6, TENDERED WITH THE ORAL SUBMISSIONS MADE ON 8.7.2008 AND 10.7.2008

It is respectfully submitted that the under-mentioned Notes, tendered to Your Lordships' Court, with the Oral Submissions made on 8.7.2008 and 10.7.2008, **be read and construed, as part and parcel of these Written Submissions**.

Note 1 – Preamble, with a **Chart**
Note 2 – '**Extracts**' from Steering Committee Minutes
Note 3 – Adjustment to Purchase Price Consideration
Note 4 – PWC – **'Indicative Valuation'**
Note 5 – Conduct and actions of
- **Ernst & Young**, *Auditors of SLIC, having rendered other Services to the Government*
- **PricewaterhouseCoopers**, *Consultants to the Government*

together with **'dicta'** from relevant Judgments on **Duties & Responsibilities of Auditors** and **Accountants,** and

Letter dated 5.10.2006 to Ethics Committee, Institute of Chartered Accountants of Sri Lanka, ***vis-à-vis,*** **the conduct and actions of Ernst & Young and PWC (P20(b))**

Letters to **Ernst & Young** and **PWC** by the Hon. Attorney General **(P21(a), P21(b), P22(a)** and **P22(b))**

Cabinet Memorandum of 3rd Respondent Minister (*now deceased*) **on the conduct and actions of Ernst & Young and PWC (P24)**

Additional Note 6 - Observations on Affidavit dated 21.11.2007 of 7th Respondent, Secretary to the Treasury, and former Chairman, PERC

2. MOTION DATED 14.7.2008 AND DOCUMENTS "A", "B", "C", "D"

It is also respectfully submitted that the under-mentioned Documents, marked "**A", "B", "C", "D",** tendered to Your Lordships' Court by Motion dated 14.7.2008, together with **'Supplementary Submissions'**, by way of the said Motion, **also be read and construed, as part and parcel of these Written Submissions.**

Document **"A"** – **SLIC Accounts for the Year 2005** obtained from the Registrar General of Companies

Document **"B"** – **'Excerpts'** of Submissions made to COPE by Suhadha Gamalath, Secretary, Ministry of Justice, as a Member of PERC, giving his **'Opinion'** on '**Conflict of Interest**'.

Document **"C"** – **Schedule**, together with some of the **Letters** compendiously marked **P19,** with relevant and pertinent sections **highlighted**, disclosing that **Ernst & Young**, with the **knowledge** of **PWC**, had obtained several extensions, to compute the 'Net Working Capital' computation, **which they had undertaken to compute for the Government, *the sole Shareholder of SLIC upto 11.4.2003*, on the basis of Audited Annual Accounts of SLIC** .

Document **"D"** – Copy of **PERC Report dated 25.10.2006 to COPE,** which had been knowingly **suppressed** from Your Lordships' Court by 7th Respondent.

3. PERC HAS TO FUNCTION UNDER AND IN TERMS OF PERC ACT NO. 1 OF 1996

1. The functions and powers of PERC are set out in Sections 4 and 5 of the Public Enterprise Reform Commission of Sri Lanka Act No. 1 of 1996 (PERC Act No. 1 of 1996).

2. **Secretary to the Treasury** is an **ex-officio Member of PERC** in terms of Section 3(1)(a) of the PERC Act No.1 of 1996.

3. Section 4(f) stipulates – "Augmenting the revenues of the government, so as to enable it to better address the social agenda".

4. Section 5(i) stipulates – "To assist the Government to create public awareness of Government policies and programmes on the reform of public enterprises with a view to developing a commitment by the public, to such policies and programmes".

5. As per Section 5(t) stipulates – "To act as the agent of the Government, in Sri Lanka or abroad, for purposes of any matter or transaction, **if so authorised**".

6. The 7th Respondent, as Chairman PERC, was bound to act within the confines of the stipulations in the PERC Act, and in terms of decisions collectively made by the Members of the Commission.

7. The Commission in terms of Clause 7(2) of the Scheduled to PERC Act No. 1 of 1996 may delegate to the Chairman any power, duty or function conferred or imposed on or assigned to the Commission by the Act. **If not, the 7th Respondent could not have acted single handed on his own, without deliberation and decision collectively by the Members of the Commission**.

8. Several acts set out hereinbelow disclose that the transaction in issue had been carried out in violation of the provisions of the PERC Act.

4. 'INITIATION' OF PROCESS TO PRIVATISE SLIC

9. Just **prior to 20.7.2001**, PERC **on its own initiative** had submitted an undated and unsigned **'Concept Paper'** for the divestiture of SLIC, purporting to act in terms of Section 5(e) of the PERC Act No. 1 of 1996 i.e '**to make recommendations to the Government** on the sale or disposal to the public of Shares in Government owned Companies' – *vide page 1 of PERC Report **"D"** and Annex 1.1 thereto*.

10. The 7th Respondent was at that time, **both** the Chairman PERC and Secretary to the Treasury, and obviously has to take responsibility for **initiating** and **preparing** such **'Concept Paper'**.

11. As per Section 5(e) of PERC Act No. 1 of 1996, the **'Concept Paper'** recommendation ought to have been **forwarded to the Government.**

12. **Instead**, **on 20.7.2001**, on the basis of such **'Concept Paper'**, the 7th Respondent had issued Letter appointing a **'Core Group'** directing to consider the **'Concept Paper'** and give their recommendations **within a month** - *vide page 1 of PERC Report **"D"** and Annex 1.2 thereto*.

13. Such **undue haste** on the part of the 7th Respondent on the complex divestiture of a valuable national public asset, ***give rise to serious questions, as to why*** ?

14. The question also arises, as to why the 7th Respondent had not caused either 1st Respondent or the 2nd Respondent, to forward such **'Concept Paper'** with the recommendations to the Government i.e. Cabinet of Ministers, in terms of Section 5(e) of PERC Act No. 1 of 1996 ?

15. The **'Core Group'** included the following persons - *vide page 1 of PERC Report **"D"***

    (a) **Lal de Mel (Chairman SLIC) Chairman**
    (b) **Deva Rodrigo (Partner, PricewaterhouseCoopers)**
    (c) Mano Tittawella (Director General, PERC)
    (d) M. Kandasamy (General Manager, SLIC)
    (e) Mrs. M.A.R.C. Cooray (Director General, Dept. of Fiscal Policy & Economic Affairs)

16. **The appointment of the Chairman SLIC, as Chairman of the 'Core Group' is contrary to the spirit of the stipulations of Public Finance Circular No. 352(10) dated 24.8.2000 given under the hand of the 7th Respondent, himself, as then Secretary to the Treasury, which precluded the appointment of Chairman of the Institution to TECs and CATBs.**

17. The **'Core Group'** gave their recommendations on 3.9.2001 – *vide page 2 of PERC Report **"D"** and Annex 1.3 thereto*

18. The 7th Respondent, **in a dual role**, as Secretary to the Treasury and Chairman PERC, could not have issued Letter dated 20.7.2001 on a **'Concept Paper'**, he, himself, had initiated and prepared, as Chairman PERC, **requiring such hasty and questionable action thereon *on the divestiture of a valuable national public asset***.

19. **It is a matter of interest that**

- **the 'Concept Paper' of PERC had required a Valuation of SLIC by the Chief Valuer -** *vide Item 8.1 at page 10 of Annex 1.1 to PERC Report* **"D", and**

- **the 'Core Group' in their Report also had affirmed that the Government Valuation Department be requested to conduct a Valuation of Shares of the SLIC** – *vide Item 8.7 on page 14 of Annex 1.3 to PERC Report **"D".***

20. **Intriguingly,** even at this stage, the matter had not been submitted to the Cabinet of Ministers **for the Government to make a decision in terms of the PERC Act No. 1 of 1996**.

21. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

5. ACTION TAKEN TO SELL 90% SHARES OF SLIC WELL BEFORE AND *CONTRARY* TO CABINET DECISIONS

22. 2nd Respondent Minister, under whom PERC functioned, by Letter dated **21.1.2002 (P1)** addressed to 7th Respondent, then Chairman PERC, appointed a **'Steering Committee',** comprising of the following persons, ***to oversee and facilitate the restructuring and privatization of SLIC***.

- **Chrishantha Perera, Chairman SLIC – *Chairman* (8th Respondent)**
- **P.B. Jayasundera, Chairman PERC – *Member* (7th Respondent)**
- N. Kandasamy, General Manger, SLIC – *Member* (9th Respondent)
- **Devasiri Rodrigo, Partner PWC – *Member* (19th Respondent)**
- V. Kanagasabapathy, Addl. DG, Dpt. of Public Finance – *Member* (10th Respondent)
- Marina Tharmaratnam, Executive Vice President, DFCC – *Member (Resigned in July 2002 due to a conflict of interest)*
- Dayanath Jayasuriya, DG, Insurance Board of Sri Lanka – *Member* (11th Respondent)
- Rani Jayamaha, Assistant to Governor, Central Bank – *Member* (12th Respondent)
- **Aneela de Soysa, Director PERC – *Secretary* (16th Respondent)**

23. It would be noted that 7th Respondent, as Chairman PERC, has been a Member, and the 16th Respondent, Director PERC, has been the Secretary, whilst the 8th Respondent, Chairman SLIC, has been the Chairman of the Steering Committee.

24. Devasiri Rodrigo, Partner PWC, who had been a Member of the **'Core Group'** appointed by the 7th Respondent, has also been a Member of the **'Steering Committee'**.

25. **The appointment of the Chairman SLIC, as Chairman of the 'Steering Committee' is contrary to the stipulations of Public Finance Circular No. 352(10) dated 24.8.2000 given under the hand of the 7th Respondent, himself, as then Secretary to the Treasury, which precluded the appointment of Chairman of the Institution to TECs and CATBs.**

26. The 2nd Respondent, Minister then in charge of PERC, having appointed the aforesaid **'Steering Committee'** on **21.1.2002**, had **subsequently**,

- on **28.2.2002** submitted a Cabinet Memorandum **(P3)** notifying that he had "appointed a Steering Committee **to advise and assist in restructuring SLIC**", and

- that the "**Steering Committee has identified options available and the work that has to be undertaken in preparation for inviting a strategic investor to invest in the company",** *inter-alia*, stating that,

    - "the accounts have to be **re-stated** using **International Accounting Standards**",

    - "public awareness campaign has to be conducted to inform the stake holders"

    - "**in order to attract international investors**, the government requires the service of Financial Advisors, with experience in acquisition and sale of insurance companies to assist in the marketing of the transaction and the negotiation process." (*Emphasis added*)

27. By Cabinet Memorandum **(P3)** dated **28.2.2002** the 2nd Respondent Minister had sought the approval of the Cabinet for the following:

> "5.1 To appoint international advisors to advise and assist in the conduct of the transaction including an independent actuarial valuation of SLIC, a Business Valuation of SLIC, restate the accounts according to International Accounting Standards and to provide legal advice including the preparation of necessary documentation in connection with this transaction."
>
> "5.2 To authorise Sri Lanka Insurance Corporation Ltd to meet payments in connection with the transaction of an amount not exceeding US $ 2 million. To authorise the Government of Sri Lanka to pay a success fee to the Financial Advisors not exceeding US $ 2 million upon the realisation of the sale proceeds."
>
> "5.3 To authorise the Secretary to the Treasury to appoint a Technical Evaluation Committee to evaluate the bids for Financial Advisory Services".
>
> "5.4 To authorise the Steering committee set up by me to invite 5 internationally reputed audit firms to submit proposals to provide Financial Advisory Services through their corporate advisory services divisions and to award the contract based on the advice of the Technical Evaluation Committee."
>
> "5.5 To authorise the Secretary to the Treasury to appoint a Tender Board and Technical Evaluation Committee to evaluate the bids to purchase the shares of SLIC."
>
> "5.6 To gift to the employees of the SLIC 10% of the shares of the company or an amount equivalent in value to 10% of the shares in cash and to divest the balance shares of the SLIC to a strategic investor."
>
> "5.7 To authorise Public Enterprises Reform Commission to facilitate and initiate action on this transaction."

28. Cabinet had approved Items 5.1 to 5.7 above, **subject,** however, to **amendment of 5.5** to read

"**That the Tender Board to be appointed by the Cabinet**", **and**

"**The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of SLIC, whilst retaining a minority share by the Government**".

29. Hence, it is evident that what had been approved by Cabinet was for the Minister to **report to the Cabinet the feasibility of divesting the ownership of SLIC**, **whilst retaining a minority share by the Government**.

30. Clearly, the **Cabinet had not authorised to proceed with the Sale of 90% Shares of SLIC**.

31. The Cabinet, however, had considered and so approved the above Cabinet Memorandum only on **3.4.2002** and had confirmed the same only on **18.4.2002** - *vide* **(P4).**

32. However, **even prior to the Cabinet Approval (P4) communicated on 18.4.2002,** the **'Steering Committee'** had met on the following dates:

25.1.2002 (P16(a)) **- (*1st Meeting*)**
13.2.2002 (P16(b)) **- (*2nd Meeting*)**
18.2.2002 (P16(c)) **- (*3rd Meeting*)**
22.3.2002 (P16(d)) **- (*5th Meeting*)**
11.4.2002 (13R1) **- (*6th Meeting*)**

33. It is evident from the foregoing, that the '**Steering Committee'**, without the Cabinet Approval had proceeded to have had 5 Meetings (*Minutes of 4th Meeting not been marked with the Petition*) and **had made decisions** and **taken actions,** and significantly only at the 6th Meeting **(13R1)** held on **11.4.2002** that **it had been noted that Cabinet Approval had been received**, whereas Cabinet Approval **(P4)** had been communicated only on **18.4.2002**.

34. Notwithstanding and regardless of the Cabinet Decision i.e. "**The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of SLIC, whilst retaining a minority share by the Government**", the '**Steering Committee'**, **even before the Cabinet of Ministers had considered the matter on 3.4.2002** ***had already started proceeding on a another course of action to sell 90% Shares of SLIC*** !

35. At the Meetings of the '**Steering Committee'** had **before the above Cabinet Decision** the following Minutes thereof are noted – (***Emphasis added***):

- "**It was noted that Ernst & Young had sent a proposal** to SLIC for **re-stating** Financial Statements **according to International Accounting Standards**"- (*Item 3.1.2 of **P16(a) – 25.1.2002***)

- "It was noted that the Financial Advisor with expertise in the sale of insurance companies will be required to assist the process of privatisation" ….. **"It was decided that PERC would develop terms of reference for Advisory Services**". "As these skills are not available in country, **the services of international reputed firms will have to be called on**" -. (*Item 3.3 of **P16(a) -** 25.1.2002*)

- "The Committee noted that investment procedures such as Exchange Control requirements, **setting up of Sierra Accounts** etc., should be made known to bidders" - (*Item 4 of **P16(a) -** 25.1.2002*)

- "It was also decided that SLIC needs to identify a suitable person from within SLIC to head the unit and **contract with Ernst & Young, the current Auditors to assist in the process of extracting information**" - (*Item 8 of **P16(a) -** 25.1.2002*)

- **"It was noted that the Auditors would have to be independent of writing up of the books specially if the new investor purchasing the company is regulated under the US SEC Rules. An Audit firm other than the current auditors, Ernst & Young would have to be used to write-up the accounts, if they to be in a position to continue to undertake the audit for the year 2002.** As the work needed to resolve the audit qualifications will take considerable time, it was decided that **Ernst & Young should be requested to assist in this process as a special assignment, as the independence of the auditors would not arise in this case**" - (*Item 3 of **P16(b) –** 13.2.2002*)

- "**It was decided that the SLIC will undertake to fund the IAS audit of SLIC which amounted to around US $ 81,000/-**" - (*Item 11 of **P16(b) –** 13.2.2002*)

- "Since valuation of insurance companies are very complex and need specialised skills, Government Valuation of insurance companies has created many problems for privatisation due to specialist skills not being available. RL suggested that the Government consider this issue early**. RL as rule of thumb the value of an insurance company could be approximated as being; net assets + 25% to 150% of general insurance premiums (depending on nature of market) and one years insurance premium for life insurance."** - (*Item 7 of **P16(c)** – 18.2.2002*) – 'RL' Rodney Lester, IFC, Lead Insurance Specialist.

- "The Financial Statements for the year ended December 31, 2001 are scheduled to be finalised in April 2002. **The IAS audit can start pending finalisation of the audited accounts**. **The Auditors Ernst & Young have submitted a revised proposal for the IAS audit**. This is to be circulated among the members and taken-up at the next Meeting" - (*Item 10 of **P16(c)** – 18.2.2002*)

- "Chairman PERC informed the Steering Committee that the Hon. Minister had informed him that the Cabinet Memorandum has been submitted for approval and suggested that the transaction proceed as planned" (*Item 3 of **P16(d)** – 22.3.2002*).

- **"SLIC is Meeting regularly along with Senior staff and Auditors to monitor the progress of the accounts. PERC staff has also attended the last meeting to observe the arrangements for completion of the accounts. It was decided that Asita Talwatte and Ruwan Fernando, Partners in charge of the Audit be requested to adequately staff the audits so as to achieve the deadlines**. Chairman SLIC stated that the **IAS audit** would commence on April 1, 2002" - (*Item 6 & 7 of **P16(d) -** 22.3.2002*)

- **"The Steering Committee noted that Deva Rodrigo had declared an interest in the assignment for Financial Advisory as the firm in which he was Partner, PricewaterhouseCoopers Sri Lanka has been short-listed and was interested in bidding for the contract**".

- **"It was noted that draft Request for Proposal (RFP) documents were finalised by PERC and issued on March 11, 2002 as decided by the Steering Committee. Bids close on April 8, 2002. The evaluation of the bids will take place on April 9 – 10, 2002. Financial Bids are due to be opened on April 11, 2002 and it is proposed to appoint the Advisors by April 15, 2002"**. (*Item 13 of **P16(d)** – 22.3.2002*)

- "It was decided that Secretary to the Treasury should be requested to appoint a Technical Evaluation Committee as follows to evaluate the bids and make a recommendation to the Tender Board.

Sunil Wijesinghe MD, Merchant Bank of Sri Lanka
Leel Wickramarachchi, CEO / GM, PSIDC
C.C. Jayasuriya, Deputy General Manager, SLIC
Warusavitharana, Director General, State Accounts, Ministry of Finance" –

(*Item 14 of **P16(d)** – 22.3.2002*)

- "Financial Bids will close on April 8, 2002 and not April 5, 2002 in order to allow for 4 weeks for bidders to submit proposals. However, it is still proposed to appoint Advisors by April 15, 2002 to conduct the rest of the schedule and activities as planned". – (*Item 15(d) of **P16(d)** – 22.3.2002*)

- **"It was decided to report on progress of the transaction to Secretary to the Treasury, (4th Respondent) and the Minister**, (2nd Respondent"). – (*Item 15(e) of **P16(d)** – 22.3.2002*)

- "Annex 1 to **P16(d)** is the **first page** of the Minutes of **Pre-Bid Conference for Financial Advisory Services on 22.3.2002,** showing the names of the persons who attended"

36. From the foregoing it is evident that **well before the Cabinet Decision of 3.4.2002 (P4)** notified on **18.4.2002**, that

the 'Steering Committee' had proceeded to -

- **call for Expressions of Interest (EOIs),**

- **call for Financial Bids, and**

- **select the Financial Advisor (later referred to as Consultants to the Government)** i.e. **PWC**.

- at the Meeting on **22.3.2002 (P16(d)** it had been noted that **PWC** has been short listed, thereby disclosing that EOIs had been called for **previously** and **short-listed** on some 'criteria'.

- **Ernst & Young, Auditors of SLIC have been fully involved from the very beginning in structuring of this transaction, and had undertaken to carry out an audit, *in accordance with International Accounting Standards*.**

37. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

6. HIGHLY IRREGULAR AND UNLAWFUL APPOINTMENT OF PWC, AS CONSULTANTS TO THE GOVERNMENT, WITH EXORBITANT FEES, *WITHOUT CABINET SANCTION*

38. It is noted that Cabinet Memorandum **(P3)** dated **28.2.2002** had disclosed the Fees of US $ 2 million to the Financial Advisors, together with Success Fees not exceeding US $ 2 million.

39. Hence, the Financial Advisors, particularly PWC, whose Senior Partner, Deva Rodrigo, had been a Member of the **'Core Group'**, and was a Member of the **'Steering Committee'**, were well and truly aware of the 'budget' for Fees for Financial Advisory Services, when the Bids closed 5 weeks thereafter on **8.4.2002** - *vide* **(P16(d))**.

40. Deva Rodrigo of PWC as a Member of the **'Steering Committee'** was well and truly fully aware and 'privy' to knowledge of the process and scheme to sell 90% Shares of SLIC.

41. Similarly, Ernst & Young as evidence from the Minutes of the **'Steering Committee'** were well and truly aware and 'privy' to knowledge of the process and scheme to sell 90% Shares of SLIC.

42. On **11.3.2002**, the 7th Respondent, as Chairman PERC, had issued Letters to the following persons forwarding Requests for Proposal (RFP) to be submitted by **8.4.2002** - *vide pages 7 & 8 of PERC Report **"D"** and Annex 1.10 thereto*

- P.E.A. Jayawickrama, Someswaran Jayawickrama, Manthri & Co.,
- Representating Office of Arthur Anderson

- M.B. Ismail, Mahoharan & Sangakkara Associates
  Representing Office of Deloitt Touche Tohmatsu

- **G.A.E. Gunatilleke, Ernst & Young**

- R.N. Asirwatham, KPMG Ford, Rhodes Thornton & Co.

- **P.D. Rodrigo, PricewaterhouseCoopers (PWC)**

43. It would appear that the 7th Respondent **had made his own decision** to select the foregoing parties, **devoid of any public advertisements therefor**, on such a large and complex assignment.

- **Ernst & Young** as Auditors of SLIC and having been 'privy' to knowledge of the process and scheme, **stood disqualified** from being invited to act as Advisors or Consultants to the Government on SLIC divestiture.

- **P.D. Rodrigo**, **PWC** having been a Member of '**Steering Committee'**, having also been a Member of the previously appointed **'Core Group'**, and having been 'privy' to knowledge of the process and scheme, **PWC stood disqualified** from being invited to act as Advisors or Consultants to the Government on the SLIC divestiture.

44. The foregoing was unequal treatment and privilege granted, without a 'level playing field'.

45. Consequently, Contract **(P2)** with PWC was signed by the 6th Respondent, as Actg. Secretary to the Treasury, with PWC Indonesia for – **'Investment Banking, Legal Advisory and Actuarial Valuation Services"** set out in **Appendix A** to Contract **(P2),** disclosing in **Appendix C** thereto **(P2(a)),** that **PWC Indonesia and PWC Sri Lanka had acted jointly,** as constituting the '**Key Personnel'**.

46. The **Fees** to PWC for rendering aforesaid Consultancy Services to the Government was **a tax free** total of **US $ 1,065,000** i.e. SL Rs. 103.3 million, and Success Fees of 0.75% of the purchase consideration. (i.e. 0.75% of **Rs. 6050 million** = **Rs. 45.375 million**). Fees were to be computed on the following **'hourly rates'**. At 1 US $ = SL Rs. 97/- the amounts of **Fees** are indicated to demonstrate as being **unrealistic** and **exorbitant.**

International		***SL Rs. per 8-Hour Day***
Partner	*US $ 450 per hour (SL Rs. 43,650 per hour)*	***349,200***
Senior Associate	*US $ 385 per hour (SL Rs. 37,345 per hour)*	***298,760***
Associate	*US $ 275 per hour (SL Rs. 26,675 per hour)*	***213,400***
Paralegal	*US $ 140 per hour (SL Rs. 13,580 per hour)*	***108,640***

Sri Lankan

Partner	*US $ 230 per hour (SL Rs. 22,310 per hour)*	***178,480***
Associate	*US $ 60 per hour(SL Rs. 5,820 per hour)*	***46,560***

47. Document **"X"** to Motion dated 13.12.2007 i.e. PERC Internal Audit Report by SJMS Associates, Chartered Accountants had, *inter-alia*, reported that – "PricewaterhouseCoopers (PWC) was selected as a financial advisor. **Mr. Deva Rodrigo,** Partner of PWC was one of the members of Steering Committee which selected PWC as financial advisor, the conflict of interest was not considered". (*Item 1.3.2 of page 4 of Document **"X")**.*

48. Document **"X"** to Motion dated 13.12.2007 i.e. PERC Internal Audit Report by SJMS Associates, Chartered Accountants had also, *inter-alia*, reported that – 'Appointment letters of the Transaction Evaluation Committee to evaluate the financial advisory services was not given in the Finance Ministry's (Treasury) letter head. (*Item 1.3.4 of page 4 of Document **"X")**.*

49. On **27.3.2002** the 4th Respondent, then Secretary to the Treasury, had issued a Letter on blank paper appointing 4 persons, requested by the 'Steering Committee' (*Item 14 of **(P16(d))** – 22.3.2002*) as a **TEC to evaluate the Bids for Financial Advisory Services** – *vide page 8 of PERC Report **"D"** and Annex 1.11 thereto*.

50. **It is evident that the TEC had been appointed only after the RFP had been prepared and issued by the 7th Respondent, as then Chairman PERC** on **11.3.2002** to 5 parties, the 7th Respondent had selected.

51. In the foregoing context, the following Items in Cabinet Memorandum **(P3)** which had been considered only on **3.4.2002** and Cabinet Decision communicated on **18.4.2002 (P4),** would be relevant

> "5.1 To appoint international advisors to advise and assist in the conduct of the transaction including an independent actuarial valuation of SLIC, a Business Valuation of SLIC, restate the accounts according to International Accounting Standards and to provide legal advice including the preparation of necessary documentation in connection with this transaction."
>
> "5.2 To authorise Sri Lanka Insurance Corporation Ltd to meet payments in connection with the transaction of an amount not exceeding US $ 2 million. To authorise the Government of Sri Lanka to pay a success fee to the Financial Advisors not exceeding US $ 2 million upon the realisation of the sale proceeds."
>
> "5.3 To authorise the Secretary to the Treasury to appoint a Technical Evaluation Committee to evaluate the bids for Financial Advisory Services".
>
> "5.4 To authorise the Steering committee set up by me to invite 5 internationally reputed audit firms to submit proposals to provide Financial Advisory Services through their corporate advisory services divisions and to award the contract based on the advice of the Technical Evaluation Committee."

52. However, the 4th Respondent had appointed a TEC on blank paper on **27.3.2002** i.e. well before the Cabinet had even considered the matter on **3.4.2002** !

53. Also, the 7th Respondent, well before the Cabinet had even considered the matter on **3.4.2002,** had already short listed parties, prepared Request for Proposal (RFP) and had called for Bids from such pre-selected parties, even prior to appointment of a TEC on **27.3.2002** y the 4th Respondent, *before Cabinet approval had been given*, as aforesaid !

54. Hence, the aforesaid acts of both the 4th and the 7th Respondents have been without Cabinet Approval.

55. Accordingly, the entire process of selection and appointment of PWC to render Advisory Services, as Consultants to the Government on this SLIC divestiture **is in violation of specific approval granted by the Cabinet, and thus has been devoid of authority, rendering such selection and appointment to be irregular, unlawful and *ab-initio* null and void**.

56. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

7. HIGHLY IRREGULAR AND UNLAWFUL PROCESS TO *SURREPTITIOUSLY* SELL 90% SHARES OF SLIC, *KNOWINGLY VIOLATING CABINET DECISIONS*

57. The Cabinet Decisions of **3.4.2002** were communicated on **18.4.2002 (P4),** for the 4th Respondent, as Secretary to the Treasury to appoint the TEC, **whilst the Cabinet had reserved the right to appoint a CATB, by itself**.

58. The Cabinet on **3.4.2002** had also decided as follows:

> "**The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of SLIC, whilst retaining a minority share by the Government**".

59. Intriguingly, the 4th and 7th Respondents **had not taken action to give effect to the above Cabinet Decisions**, ***thereby raising the questions as to why ?***

60. However, after nearly 4 months of the Cabinet Decisions, a Letter dated **7.8.2002** from the Department of Public Finance of the General Treasury had been issued by the 6th Respondent, Deputy Secretary to the Treasury, **in response** to Letter dated **29.7.2002** of the 7th Respondent, then Chairman PERC, **appointing**

- a TEC

- a Cabinet Appointed Tender Board (CATB), with himself as Chairman (6th Respondent), **in violation of Cabinet Decision (P4) whereby the Cabinet reserved the right to appoint a Tender Board, by itself**

61. Letter dated **7.8.2002 (P5) specifically drew attention to the requirement for adherence to the Guidelines on Government Tender Procedure and Public Finance Circulars**.

62. It is evident from the above, that the 7th Respondent, then Chairman PERC, had taken action only on **29.7.2002** to request the Secretary to the Treasury, 4th Respondent, to appoint a TEC and CATB ***i.e nearly 4-months after the Cabinet Decision, raising the question as to why ?.***

63. **On the other hand**, intriguingly by, **delaying** by nearly **4-months** the constitution of a TEC and avoiding the appointment of a CATB by a Cabinet, the 7th Respondent, together with the **'Steering Committee' had proceeded to take steps to sell 90% Shares of SLIC in violation of the Cabinet Decision**, which stated -

"**The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of SLIC, whilst retaining a minority share by the Government**".

64. As per pages 11 and 12 of PERC Report **"D"**

- Advertisement **(P6)** calling for Expressions of Interest (EOIs) - "**in respect of the proposed sale of a majority stake of up to 90% Shares of SLIC, with a possible option to purchase 10% allocated to the employees", had been published on 9.7.2002.**

- such Advertisement **(P6)** had been published **essentially only in the local Newspapers** between **9.7.2002** and **9.8.2002,** with a closing date of **23.8.2002**, incurring a cost of only Rs. 657,392/30.

- **Only two Advertisements being placed in the international media**, i.e. Economist of 10.7.2002 and Asian Wall Street Journal of 16.7.2002, **incurring a cost of only US $ 14,240/50** i.e. SL Rs. 1,382,298/-.

65. It is evident that the Advertisements **(P6)** had been carried **well prior to the appointment of the TEC** and the unlawful CATB by **(P5),** which is dated **7.8.2002**.

66. Hence, the TEC and the unlawful CATB had not approved the above Advertisements **(P6)** calling for EOIs, and the contents thereof, as mandated by Guidelines on Government Tender Procedure and Public Finance Circulars, **specifically referred to in (P5).**

67. Advertisements **(P6)** calling for EOIs **had been in the name of PWC Indonesia and PWC Sri Lanka** giving their telephone, fax and personal e-mail contacts **for prospective parties to contact them and to submit the EOIs by mail or fax** on or before 1700 hours Sri Lanka time on **23.8.2002 to PWC Indonesia or PWC Sri Lanka**.

68. **The above is in gross violation of the practice and procedure for placing Government Advertisements, and raises suspicion, as to why such irregular process had been resorted to by the Steering Committee, controlled and/or directed by the 7th Respondent, then Chairman PERC ?**

69. **EOIs before a closing time and date are required to be deposited in a 'sealed box' and opened transparently in public and could not have been sent by mail or fax to PWC, as required by Advertisements (P6)**

70. As per the Advertisements **(P6),** for short listing purposes, the following information **had been mandated to be provided in each EOI**

- Full name of the Company and the contact person, postal address, telephone, fax number and e-mail address

- **Details of ownership structure and company profile**

- Audited Financial Statements for the last three years
- Where relevant, operational capabilities;

    - years of operation in the insurance industry
    - total number of policy holders
    - range of products and services provided
    - details of countries of operation

71. The foregoing **'criteria'** for short listing had not been determined by the TEC and the unlawful CATB, since by **(P5)** dated **7.8.2002,** they had been appointed after the Advertisements **(P6)** had been published.

72. The Advertisements **(P6)** is contrary to the Cabinet Decision **(P3) / (P4),** whereby - "**The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of SLIC, whilst retaining a minority share by the Government**"

73. Further, the aforesaid Advertisements **(P6)** being essentially published in the local media as aforesaid, with a very short closing date of 23.8.2002, was contrary to what had been stated to the Cabinet in Cabinet Memorandum **(P3),** that the **'Steering Committee'** was **to attract international investors for which purposes SLIC Accounts had to be re-stated** ***in conformity with International Accounting Standards***.

74. Only two Advertisements had been placed in the **International media**, **incurring a cost of only US $ 14,240/50** i.e. SL Rs. 1,382,298/-, whereas the budgeted Constancy Fees, including Success Fees, to appoint **International Advisors for the purpose of attracting strategic International Investors**, was **US $ 4 million** i.e. SL Rs. 388 million, as per Cabinet Memorandum **(P3)**. The local media Advertisements had cost also only Rs. 657,392/30.

75. **Such Advertisement costs ought be compared with the unrealistic and exorbitant Fees paid to individual Consultants on an hourly basis referred to above.**

76. The foregoing demonstrates that there had been no **serious endeavour**, as warranted, **to attract international strategic investor for SLIC**, and indeed had intriguingly evaded from doing so, and that the whole exercise had been a **pure 'sham'**.

77. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

8. SRI LANKA DISTILLERIES CO. LTD. / 'DISTILLERIES CONSORTIUM' *SURREPTITIOUSLY, IRREGULARLY & UNLAWFULLY* INCLUDED TO BID AND *AWARDED THE SALE*

78. As per PERC Report **"D"** at page 13, the following 17 parties had submitted **'Expressions of Interest' by 5.00 p.m. on 23.8.2002,** as had been required by the Advertisement **(P6)** placed **jointly** by PWC Indonesia and Sri Lanka:

1. **Commercial Bank of Ceylon Ltd**
2. **Eagle Insurance Co. Ltd (a member of the Zurich Financial Services Group)**
3. **Manulife Financial(The Manufactures Life Insurance Company)**
4. **DFCC Bank**
5. **National Insurance Corporation**
6. **AMP Financial Services (Asia) Pvt Ltd.**
7. **Janashakthi Insurance Co. Ltd.**
8. **Aitken Spence Insurance (Pvt) Ltd.**
9. **American International Assurance Co. and American International Underwriters Ltd.**
10. **The Amco Group**

11. **CT Smith Stock Brokers (Pvt) Ltd. and Asiabox Consultancy Services (Pvt) Ltd.**
12. **Ceylinco Insurance Company Ltd.**
13. **Union Assurance Limited**
14. **National Development Bank**
15. **S-Lon Lanka Private Limited**
16. **Santosh Kurup Associates**
17. **Asia Capital Limited**

79. **The above List of 17 parties, who had submitted 'Expressions of Interest' does not disclose the name of Distilleries Company of Sri Lanka Ltd., or a 'Distilleries Consortium'.**

80. The names of the above 17 parties had been **'questionably'** suppressed in the Cabinet Memorandum (**P10)** dated 27.3.2003, for which approval had been granted on 2.4.2003 **(P11). The question arises, *as to why* ?**

81. Among the above names are CT Stock Brokers (Pvt) Ltd. and Asia Box Consultancy Services (Pvt) Ltd., and **separately** Aitken Spence Insurance (Pvt) Ltd.

82. **Had Distilleries Company of Sri Lanka Ltd., or a 'Distilleries Consortium' submitted an 'EOI', *then their name would have been in the list of the 17 names as aforesaid*.**

83. Therefore, **there is no evidence before Your Lordships' Court** that Distilleries Company of Sri Lanka Ltd., or a 'Distilleries Consortium' had submitted an 'EOI', alone or together with another party, and therefore **they could not have entered the process thereafter**. (***The list of 17 names, include 2 names together in some instances)***

84. As per Document **7R4B,** produced by the 7th Respondent, which are Minutes of the TEC Meeting for Technical Bid Opening held on **17.9.2002,** only the following **5 parties** have submitted Technical Proposals for the privatisation of SLIC.

(i) Commercial Bank of Sri Lanka Ltd.
(ii) Eagle Insurance Company Ltd.
(iii) Janashakthi Insurance Company Ltd.
(iv) CTC Stock Brokers
(v) Asia Capital Ltd.'

85. **It is evident from the above Minutes of the TEC, that Distilleries Company of Sri Lanka Ltd., or a 'Distilleries Consortium' had not submitted Technical Proposals, inasmuch as they had not submitted EOIs by 23.8.2002, as had been required by Advertisement (P6)**.

86. As per Document **7R4A,** produced by the 7th Respondent i.e. the Minutes of the Meeting of the unlawful CATB had on **23.9.2002,** it had been noted at Minute 2 that the TEC Minutes of the Bid-Opening was tabled, and as per Item 3 of the Minutes, that only **5 parties**, had submitted Technical Proposals, **as had been required by 5.00 p.m. on 17.9.2002** as had been recorded by the TEC on 17.9.2002. **(7R4B).**

87. At the said Meeting on 23.9.2002, the unlawful CATB decided to allow the following **5 parties to move into the final bidding stage**.

(i) CBC and DFCC
(ii) CTC Stock Brokers and Aitken Spence Insurance
(iii) Eagle Insurance
(iv) Asia Capital and Asian Alliance Insurance
(v) Janashakthi Insurance and National Insurance Company'

88. The unlawful CATB had also noted at Item 3 of the said CATB Minutes of 23.9.2002 **that AMCO Group proposals were received after closing time of 5.00 p.m. on 17.9.2002**. ***Therefore, it is evident that they had been rejected for such late submission.***

89. **Thus it is abundantly evident that Distilleries Company of Sri Lanka Ltd., or 'Distilleries Consortium' had not been approved for final bidding stage**.

90. **7R4A** unlawful CATB Minutes have been unsigned, whilst **7R4B** the TEC Minutes had been signed, and both are attachment to PERC Report **"D,** as Annex 1.22.

91. Document **"X"** PERC Internal Audit Report by SJMS Associates, Chartered Accountants, tendered with Motion dated 13.12.2007 at Item 1.33 on page 4 had stated – **"Most of the Cabinet Appointed Tender Board Minutes were not signed by the CATB Members".**

92. This is highly irregular and unsatisfactory, since TEC Minutes and CATB Minutes are prepared by PERC **and unsigned Minutes leave room for *subsequent manipulations***.

93. It is significant that CT Smith Stock Brokers (Pvt) Ltd., by Letter dated **29.11.2002** *(Annex 1.26 to the PERC Report **"D")*** **had submitted for the first time** the Final Bid (Technical & Financial Proposal) for the privatization of SLIC, **on behalf of the Consortium comprising, Distilleries Company of Sri Lanka Ltd., Aitken Spence & Co. Ltd., and Aitken Spence Insurance (Pvt) Ltd**.

94. Is it indeed a '**strange coincidence'** that in paragraph 28 of the Affidavit of the 7th Respondent he states that the '**Steering Committee'** of which the 7th Respondent was a Member**, ceased to function** (*a few days thereafter*) from about **5th December 2002**, i.e. immediately after the **'Distilleries Consortium'** ***had been so surreptitiously included*** ?

95. **The foregoing is not in conformity with the due process as aforesaid, and is not in conformity with the TEC recommendation and the unlawful CATB decision disclosed by 7R4B and 7R4A** referred to above, **wherein the names of Distilleries Company of Sri Lanka Ltd., / Distilleries Consortium and Aitken Spence & Co. Ltd., were not approved for final bidding stage**.

96. In the given circumstances, the attention of Your Lordships' Court is respectfully drawn to paragraphs 35(a) and 35(b) of the Affidavit of 7th Respondent, which is indeed astonishingly **'revealing'** – *viz*

> **'that it is usual in transactions of this nature for bidders to form consortium and for the composition of consortium to change during the process of a bid - and that the final bidding process could provide for well credentialed financial / insurance parties to join the process, - and leave open the opportunity for new parties, who have not submitted EOIs of possibly joining, with parties who had submitted EOIs'**

97. **Admittedly**, new parties, who had not submitted **EOIs or Technical Proposals *had been wrongfully and unlawfully permitted to join the process***. It refers to well '**credentialed financial'** and/or insurance parties - **obviously the reference is to the Distilleries Company of Sri Lanka Ltd. / 'Distilleries Consortium**', ***which had been the only new party***.

98. The 7th Respondent obviously having perpetrated such gross wrong-doing and illegality, and thus having remembered very well what he had done 5 years ago, ***had vividly remembered such wrongful manipulation, to so state as aforesaid in his Affidavit***.

99. CATB Minutes, had been **unsigned** as reported by the PERC Internal Auditors SJMS Associates, and are normally prepared by PERC, and hence the finger points at the 7th Respondent, that he had manipulated and written the Minutes, which had been **unsigned** by the Members of the CATB. **This is not acceptable in Government Tender Procedure.**

100. **If 'new parties' were to be entertained, then such opportunity, in the interest of the Government and the public, should not have only been known to a few, in this instance the 5 approved Bidders, as per 7R4B and 7R4A or may have been only CT Smith Stock Brokers (Pvt) Ltd., but should have been made known publicly worldwide, since the *intention was to attract international bidders.***

101. **In alternative, the entire process should have been cancelled and re-started to attract intentionally reputed strategic investor/s**.

102. The foregoing perverse explanation by the 7th Respondent alone admits the **manipulative dishonesty** that had been practised in carrying out this transaction.

103. Such shocking statements defeat the very purpose of calling for EOIs, and ranking on a 'point awarding evaluation system on given criteria', **and is unequal treatment before the law**.

104. Such **'back door entrance'**, circumventing the due process, is in blatant violation of Government Tender Guidelines and Procedure and Public Finance Circulars, expressly stipulated as a condition in **(P5)** in appointing the TEC and an unlawful CATB.

105. The foregoing appallingly shocking process is perverse and **renders the entire transaction fraudulent, and *ab-initio* null and void**.

106. Is it a coincidence, that CT Stock Brokers (Pvt) Ltd., forwarded the Final Bids (Technical and Financial Proposal) of **Distilleries Consortium**, as per their Letter dated **29.11.2002** and the PWC **'Indicative Valuation'** also being submitted by Letter dated **29.11.2002,** included in **(P8)** ***providing for 'curious secrecy' ?***

107. Whereas, as per **Attachment 1** to **(P7)** on **21.1.2003 revised** 'financial bids' had been submitted by Commercial Bank of Ceylon / DFCC Consortium and Janashakthi Insurance, whilst Distilleries Consortium **had not revised their 'financial bids' submitted on 29.11.2002**.

108. As per TEC Meeting on 24.1.2003 (part of **(P7)**) Financial Bids had been opened, together with PWC **'Indicative Valuation' (P8),** which had been in a 'sealed envelope' for ***'curious secrecy***'.

109. Whereas contrary to such ***'curious secrecy',*** as per page 2 of **Attachment 1** to **(P7),** parties had been afforded an opportunity to **revise** the bids after **24.2.2003** i.e. after the PWC 'Indicative Valuation' of SLIC was made known making such ***'curious secrecy'*** a mockery.

110. As per the foregoing flawed, highly irregular and unlawful process followed, Cabinet Memorandum **(P10)** had been forwarded on 27.3.2003 **stating falsehoods**, in that, whilst suppressing the names of the 17 parties, who had expressed interest as required by 5.00 p.m. on 23.8.2002 in response to Advertisement **(P6),** the Cabinet Memorandum **(P10)** at page 6 shockingly states as follows (*Emphasis added*):

> **"6 parties submitted Preliminary Technical Proposals. On the basis of the information submitted, following 5 parties were short listed to continue into the next stage;**

1) Commercial Bank and DFCC Bank
2) **Distilleries Company of Sri Lanka Ltd., Aitken Spence & Co. Ltd., Aitken Spence Insurance Ltd., CT Smith Stock Brokers (Pvt) Ltd., and Asia Box Consultancy Pte Ltd**.
3) Eagle Insurance Co. Ltd.
4) Asia Capital Ltd., and Asian Alliance Insurance Company Ltd.
5) Janashakthi Insurance Co. Ltd, and National Insurance Corporation Ltd."

111. The foregoing is false, in that, TEC Minutes **7R4B** and unlawful CATB Minutes **7R4A** **did not disclose the additional names referred to at 2 above, particularly Distilleries Company of Sri Lanka Ltd., and Aitken Spence & Co. Ltd.,** who had been subsequently permitted to come through the **'back door'** as aforesaid.

112. In any case the statement that the aforesaid 5 parties were short listed **is false,** in that, it is contrary the parties, who had been short listed by the TEC and the unlawful CATB – *vide* **7R4B** and **7R4A** produced by the 7th Respondent, himself !

113. It is evident that the 7th Respondent had prepared Cabinet Memorandum **(P10)** dated 27.3.2003 for signature of 2nd Respondent Minister, **deliberately and knowingly misleading the Cabinet of Ministers.**

114. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

9. *MANIPULATIVE* SUBSTITUTION *CONTRARY TO* 'MISLED' CABINET DECISION

115. Cabinet Approval **(P11)** for Cabinet Memorandum **(P10)** had been granted on 2.4.2003 to execute the Share Sale & Purchase Agreement to divest 90% Shares of SLIC to **'Distilleries Consortium'**, in accordance with the approval sought by the 2nd Respondent Minister misleadingly in Cabinet Memorandum **(P10),** specifically seeking authority for the Secretary to the Treasury to execute Share Sale & Purchase Agreement to divest 90% Shares of SLIC to the **'Distilleries Consortium'**.

116. Contrary to such Cabinet Decision, the 5th Respondent, as Actg. Secretary to the Treasury, had signed the Agreement **(P13)** on 11.4.2003 with **two other companies** as the Purchasers of 90% Shares of SLIC, namely, **Milford Holdings (Pvt) Ltd**., and **Greenfield Pacific EM Holdings Ltd., Gibraltar** both of which companies had been incorporated after the Cabinet Memorandum **(P10)** of **27.3.2003**.

117. **Greenfield Pacific EM Holdings Ltd**., had been incorporated on 28.3.2003 in **Gibraltar (P12)** and had given an address **C/o Asia Box Consultancy Services (Pte) Ltd.,** 61, Club Street, Singapore, whilst Milford Holdings (Pvt) Ltd., had been incorporated on 31.3.2003 – *vide Annex 1.44 to PERC Report* ***"D".***

118. Hence, both the above Purchasers, who had signed the above Sale & Purchase Agreement **(P13)** were not in existence, when the 2nd Respondent Minister on **27.3.2003** submitted Cabinet Memorandum **(P10)** seeking approval to sign the Sale & Purchase Agreement with the **'Distilleries Consortium'**, for which alone the Cabinet had specifically given approval **(P11)**, as aforesaid.

119. The aforesaid two companies **Milford Holdings (Pvt) Ltd.,** and **Greenfield Pacific EM Holdings Ltd., Gibraltar** having not been in existence, would and could not have been 'evaluated on a point ranking system', and would and could not have had the following 'criteria' required even to have submitted EOIs, as stipulated in Advertisement **(P6) !**.

- Full name of the Company and the contact person, postal address, telephone, fax number and e-mail address
- **Details of ownership structure and company profile**
- **Audited Financial Statements for the last three years**
- Where relevant, operational capabilities;
    - **years of operation in the insurance industry**
    - **total number of policy holders**
    - **range of products and services provided**
    - **details of countries of operation**

120. Distilleries Company of Sri Lanka Ltd., Aitken Spence & Co. Ltd., and Aitken Spence Insurance (Pvt) Ltd., have been parties to the Sale & Purchase Agreement **(P13)** **only as Guarantors,** that too, to guarantee the payment of the purchase consideration, **and nothing else**.

121. They having been evaluated as **irregularly and unlawfully parachuting parties** for the purchase of 90% Shares of SLIC, has no bearing or significance, whatsoever, on the Sale & Purchase Agreement **(P13)** by being Guarantors thereto to merely guarantee the 'purchase consideration'.

122. Intriguingly, the Added 38th Respondent, D.H.S. Jayawardene had signed **(P13)** on behalf of all the aforesaid 5 parties, i.e. the 2 Purchasers and 3 Guarantors, **including on behalf of Greenfield Pacific EM Holdings Ltd., Gibraltar**.

123. As per page 26 of PERC Report **"D"** and Annex 1.46 thereto, the following persons had been nominated to be Directors of SLIC -

(i) Don Harold Stassen Jayawardene
(ii) Raajpal Kumar Obeyesekere
(iii) Gomin Kavinda Dayasri
(iv) Joseph Michael Suresh Britto
(v) Lintotage Udaya Damien Fernando

124. Even if it is conceded, **without admission,** that the Distilleries Company of Sri Lanka Ltd., / 'Distilleries Consortium' had been a party/ies, who had submitted EOIs, and had been duly, properly and lawfully evaluated and selected, it is against Government Guidelines for Tender Procedure and Public Finance Circulars to have permitted parties, who have succeeded in bidding on Government tenders, to substitute other parties, who had been '**strangers to the entire process',** and had been '**given birth to'** only after the entire process had been completed***; thereby defeating the very Government Tender Process and Procedure*** .

125. The foregoing procedure followed is blatantly in gross violation of the Government Tender Guidelines and Procedures laid down in Public Finance Circular No. FIN 358(4) dated 29.11.1999, together with the Annexures thereto, **given under the very hand of the 7th Respondent, himself**, **as then Secretary to the Treasury and Secretary, Ministry of Finance & Planning,** stipulating, *inter-alia*, the duties, functions and responsibilities of the Line Ministry Secretary, CATB and its Chairman, TEC and its Chairman and Head of the Executive Agency, ***particularly for Procurements / Tenders of a value of over Rs. 100 million.***

10. '<u>BENEFICIAL OWNER/S'</u> OF GREENFIELD PACIFIC EM HOLDINGS LTD. <u>GIBRALTAR</u> & MONEY LAUNDERING

126. Without prejudice to the foregoing, it is respectfully submitted, that the Government cannot enter into any transaction with parties, in this instance, Greenfield Pacific EM Holdings Ltd., Gibraltar, without knowing, who the actual / beneficial owners of such company are, as had been mandated to be disclosed in the EOI, as required by Advertisement **(P6).**

127. Since, Greenfield Pacific EM Holdings Ltd., incorporated in Gibraltar, had given the address of Asia Box Consultancy (Pte) Ltd, Singapore, an associate company of CT Smith Stock Brokers (Pvt) Ltd., parties in the Consortium, the question arises, as to whether Asia Box Consultancy (Pte) Ltd., was instrumental in having Greenfield Pacific EM Holdings Ltd., incorporated in Gibraltar ?

128. In this context, the following paragraphs of the Counter Affidavit dated 9.1.2008 of the Petitioner are cited: (*Emphasis added)*

> "182. Given the disclosures in my Petition of this scandalous transaction in issue, concerning a sovereign Government, the 29th Respondent having a banking background as stated, ought to have taken investigative and remedial action, that ordinarily a reputed bank would have taken, concerning a transaction such as the transaction in issue. Intriguingly, the 29th Respondent has not done so, and therefore has to face the consequences therefor."
>
> "184. The 38th Respondent in his Affidavit at paragraph 5 has stated that he has no management or financial interest in the 29th Respondent, and that he was authorized to sign the Agreement P13 in view of the short notice."
>
> "185 Nevertheless, even having been given adequate notice and time, it is the 38th Respondent, who has signed the Affidavit on behalf of the 29th Respondent in this Case."
>
> "186 a) Fax Letters 29R5, 29R6 and 29R7 annexed to the Affidavit of the 29th Respondent, signed by the same person, 'Private Banking Officer' of 'SG Private Banking' / 'SG Hambros' confirm that the 29th Respondent is solely owned by Hambros (Gibraltar Nominees) Ltd., Gibraltar, and that Hambros (Gibraltar Nominees) Ltd., is owned by SG Hambros Bank (Gibraltar) Ltd., and that SG Hambros Bank (Gibraltar) Ltd., is owned by SG Hambros Bank Ltd., United Kingdom.
>
> b) 29R8 the Annual Report of SG Hambros Bank Ltd. United Kingdom annexed to the Affidavit of the 29th Respondent discloses in the Directors' Report that **a <u>principal 'business activity'</u> is the provision of** '<u>**trust structures'**</u>.

c) I respectfully urge that Your Lordships' Court be pleased to direct the 37th Respondent to obtain all relevant information of evidence of the real 'beneficial owners' of the 29th Respondent, through the Financial Intelligence Unit of the Central Bank, as per the current internationally prevalent financial transactions tracking systems, from the Financial Investigation Units in Gibraltar, United Kingdom and Singapore, and to afford the same to Your Lordships' Court, for the due and proper adjudication of this matter, particularly moreso, in the context of paragraph 32 of the Affidavit of the 29th Respondent, making a plea of protection as a foreign investor in a transaction with a sovereign state."

129. The Government has a duty, responsibility and obligation to ascertain the actual source of the US $ 10 million, which had been paid by the said Gibraltar Company, through the Hatton National Bank, raising the question, as to whether the such funds have come through a **Seirra Account,** and also whether such funds are tainted and/or laundered money, coming under the ambit of the following Statutes,

- Convention on Suppression of Terrorist Financing Act No. 25 of 2005
- Prevention of Money Laundering Act No. 5 of 2006
- Financial Transaction Reporting Act No. 6 of 2006 (*actually '**suspicious transactions***)

enacted after the UN Securities Council Resolution of September 2001 and the UN Convention Against Corruption of December 2005, to which Sri Lanka is a signatory.

130. Reference, *inter-alia*, is respectfully drawn to Article 52 of the UN Convention Against Corruption, under Chapter V - 'Asset Recovery'

> "Each State Party (***which includes Sri Lanka***) shall take such measures as may be necessary, in accordance with domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, **to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts** and **to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates" (**referred to as 'Politically Exposed Persons - **'PEPS')**. (*Emphasis added*)

131. In terms of Article 58 of the UN Convention Against Corruption for Financial Intelligence Units to be set-up for the foregoing purpose, Sri Lanka has already set-up a Financial Intelligence Unit (FIU) at the Central Bank of Sri Lanka.

132. It is respectfully submitted for Your Lordships' Court to consider, as to whether the 38th Added-Respondent, D.H.S. Jayawardene and the Managing Director of the 25th Respondent, Aitken Spence & Co. Ltd., Rajan Britto, could be deemed to be **'close associates of those entrusted with prominent public functions' - 'PEPS'** ?

11. SLIC NOW OWNED BY PARTIES, WHO HAD NOT SUBMITTED EOIs, AND *HAD NOT BEEN EVALUATED AND SHORT LISTED FOR BIDDING*

133. Pointedly, at paragraph 70 (ix) on page 32 of the Affidavit of the 28th Respondent, Milford Holdings (Pvt) Ltd, **the present owners** of Milford Holdings (Pvt) Ltd. are -

(i) **Distilleries Company of Sri Lanka Ltd. 98.08%,** and

(ii) **Stassen Exports Ltd. 1.91%,**

134. **Therefore** even Aitken Spence & Co. Ltd., whose insurance company, Aitken Spence Insurance Co. (Pvt) Ltd., had submitted an EOI, and which insurance company is listed among the **5 parties** for final bidding in **7R4B** and **7R4A, are no more shareholders of Milford Holdings (Pvt) Ltd**.

135. Accordingly,

(i) **Distilleries Company of Sri Lanka Ltd**., and **Stassen Exports Ltd**., through Milford Holdings (Pvt) Ltd. are at present the **indirect owners** of SLIC, and

(ii) The other direct owner is **Greenfield Pacific EM Holdings Ltd., Gibraltar**.

all of whom were not parties, who had submitted EOIs, and had not been evaluated and short listed for final bidding, as per 7th Respondent's own documents 7R4B and 7R4A.

136. **Hence, in the foregoing circumstances of the 'Distilleries Consortium' having been improperly, irregularly, unfairly and unequally included, through a surreptitious 'back door process' in the final stages, and thereby they being granted 'unfair' and undue privilege and 'unequal treatment' before the law, and the 'transaction in issue', which having been carried out by an 'unlawful' CATB, is *ab-initio* null and avoid and ought be cancelled and annulled; *and the wrong-doers dealt with in terms of the law***.

137. It ought to be further pointed out, that the Shareholders of SLIC are **Milford Holdings (Pvt) Ltd.** and **Greenfield Pacific EM Holdings Ltd**.

138. Such Shareholders ought be considered in the context of the provisions of the Companies Act No. 7 of 2007, particularly Section 56, which provides for '**distribution of reserves'**, including dividends, by Directors, **subject to their opinion of solvency,** and Section 61, which provides for '**recovery of distributions' from Shareholders**, where there has been '**over distribution'** of reserves.

139. In this case, Milford Holdings (Pvt) Ltd., and Greenfield Pacific EM Holdings Ltd., being the **Shareholders** of SLIC, **would pose a grave threat to SLIC**, which was a valuable public asset, belonging to the people, providing insurance for general risk, as well as life, to the public.

12. 'PURCHASE PRICE ADJUSTMENT' NOT CONCLUDED *FOR OVER 5-YEARS*, THEREBY RENDERING THE TRANSACTION *FRUSTRATED*

140. Share Sale & Purchase Agreement **(P13)** had been signed and 90% Shares of SLIC sold on 11.4.2003 on the basis of an agreed 'Adjustment to Purchase Consideration', based on the SLIC Accounts as at **31.3.2002,** to be adjusted as per the SLIC Accounts updated to **11.4.2003**.

141. Such **'adjustment to the purchase price consideration'** was to be effected within ***60 days*** i.e. by **11.6.2003** in terms of Clause 4A of Sale and Purchase Agreement **(P13)** cited below:

"4A. ADJUSTMENT OF CONSIDERATION

(A) The Consideration shall be adjusted following First Completion as follows:

(i) if the Net Working Capital is higher than the amount shown in Management Accounts, by adding the amount by which Net Working Capital exceeds that amount; and

(ii) if Net Working Capital is less than the amount shown in the Management Accounts, by deducting the amount by which Net Working Capital is less than that amount.

(B) If as a result of such adjustment:

(i) the amount of the Consideration is increased, the Purchasers shall pay to the Seller in cash a sum equal to that increase; or

(ii) the amount of the Consideration is reduced, the Seller shall pay to the Purchasers in cash a sum equal to that reduction.

(C) Any such payment shall be made within five (5) Business Days following the day on which the Net Working Capital is determined in accordance with sub-clause (D) below.

(D) As soon as reasonably practicable and by no later than sixty (60) days following First Completion, or such other date agreed by the parties, the Purchasers shall procure that the Company prepares and delivers to the Seller a balance sheet of the Company as at First Completion (the "Completion Balance Sheet"). The Completion Balance Sheet shall be prepared in accordance with (i) the accounting policies, principles, practices, evaluation rules and procedures, methods and bases adopted by the Company in the preparation of the Management Accounts and (ii) to the extent not covered by (i), IAS in force at the Management Accounts Date."

142. 'Net Working Capital' referred to in Clause 4A has been defined in Clause 1 - **'Interpretation'** at page 3 of Sale & Purchase Agreement **(P13)** thus:

> "'Net Working Capital' means the current assets less current liabilities of the Company as at First Completion Date as shown in the completion Balance Sheet."

'First Completion' means completion of the sale and purchase of the sale shares i.e. 90% of the issued capital of SLIC in accordance with Agreement **(P13)** as defined in Interpretation Clause 1.

143. The **'adjustment of purchase price consideration'** had to be computed in terms of Clause 4A with the defined interpretation of 'Net Working Capital' **before 11.6.2003**.

144. In essence, the intention had been to increase or decrease the purchase consideration by the increase or decrease of the 'Net Working Capital' i.e. 'Net Current Assets'.

145. As evidenced by the Minutes of the Steering Committee, there is no doubt, whatsoever, that the **intention and commitment had been to compute the 'purchase price adjustment' on the basis of the Audited Accounts of SLIC as at 31.3.2002 (P15) and 11.4.2003 (13R8)**

146. International Accounting Standards, on which basis the Accounts of SLIC had been **re-stated** by Ernst & Young as at **31.3.2002 (P15)** and **11.4.2003 (13R8)** mandated that 'Current Assts' and 'Current Liabilities' be disclosed on the face of the Balance Sheet or by way of a Note thereto – *vide* **13R9(a)** and **13R9(b)**, ***which Ernst & Young had knowingly and deliberately failed to do***.

147. In any case, the very stipulation in Clause 4A for computing the purchase price adjustment necessitated and/or mandated that 'Current Assets' and 'Current Liabilities' should be disclosed separately on the SLIC Balance Sheets as at **31.3.2002 (P15)** and **11.4.2003 (13R8),** to compute the **'purchase price adjustment**, on the basis of the increase or decrease of 'Net Working Capital' i.e. 'Net Current Assets', which is Current Assets less Current Liabilities.

148. The SLIC statutory audited Accounts as at **31.12.2001 (P14)** and **31.12.2002 (P17),** which had been audited by Ernst & Young, had in fact disclosed the 'Current Assets' and 'Current Liabilities' **separately** on the face of the Balance Sheet, itself.

149. Hence, there was no difficulty, whatsoever, in similarly disclosing the 'Current Assets' and 'Current Liabilities' **separately** on the SLIC Balance Sheets as at 31.3.2002 **(P15)** and 11.4.2003 **(13R8)** for the computation of the increase or decrease of the 'Net Working Capital'.

150. The cogent question arises, as to why intentionally and deliberately the 'Current Assets' and 'Current Liabilities' had not been shown separately on the SLIC Accounts as at 31.3.2002 **(P15)** and 11.4.2003 **(13R8)**

- in violation of International Accounting Standards, ***whilst Ernst & Young and PWC knowingly had held out otherwise to mislead the Government***

- **departing from the policy of SLIC** of showing 'Current Assets' and 'Current Liabilities' **separately** on the face of the Balance Sheet – *vide* as at 31.12.2001 **(P14)** and 31.12.2002 **(P17),** ***well and truly known to both Ernst & Young and PWC***.

- **in deliberate violation of the requirement to compute the** '**purchase price adjustment'** in terms of Clause 4A of Sale and Purchase Agreement **(P13),** ***which was well and truly known to both PWC and Ernst & Young***.

151. The **'dubious mistake'** made had been to handover absolute possession, management and control of SLIC to the Purchasers on **11.4.2003**, after which Accounts of SLIC had to be finalised and audited for the computation of the '**purchase price adjustment'** in terms of Clause 4A of Sale & Purchase Agreement **(P13).**

152. Such questionable decision, without any safeguard to protect the interests of the Government, **had led to the non-conclusion and frustration of this transaction**, and an intentional and calculated deliberate attempt made **to defraud the Government to the tune of Rs. 2.1 billion**.

153. The following **Financial Accounts of SLIC** are relevant and pertinent to be taken into reckoning in examining this **'transaction in issue'**

P14 - **Audited** Balance Sheet of SLIC as at **31.12.2001**, ***certified*** by Ernst & Young on **11.6.2002**, *in accordance with Sri Lanka Accounting Standards*.

P17 - **Audited** Balance Sheet of SLIC as at **31.12.2002**, ***certified*** by Ernst & Young on **28.11.2003**, *in accordance with Sri Lanka Accounting Standards*.

P15 - **Un-audited** Balance Sheet of SLIC as at **31.3.2002**, ***signed*** by Ernst & Young on **9.8.2002**, *stated to be as per* ***International Accounting Standards***.

13R8 - **Un-audited** Balance Sheet of SLIC as at **11.4.2003**, ***signed*** by Ernst & Young on **26.3.2004**, *stated to be as per* ***International Accounting Standards***.

154. It would be noted that

- Audited Balance Sheet of SLIC as at 31.12.2002 **(P17)** had been certified by Ernst & Young on **28.11.2003,** and

- **un-audited Balance Sheet** of SLIC as at **11.4.2003 (13R8)** had been signed by Ernst & Young on **26.3.2004**,

which had been **after the Purchasers had taken over the absolute possession, management and control of SLIC**.

155. **Whilst audited and certified Balance Sheets of SLIC as at 31.12.2001 (P14) and 31.12.2002 (P17) were available**, *'intriguingly'* this transaction had been endeavoured to be 'concluded' on the basis of **un-audited** Balance Sheets of SLIC as at **31.3.2002 (P15)** and **11.4.2003 (13R8)**, ***whereas Steering Committee Minutes clearly disclose that the said Accounts were to be audited***.

156. **A government transaction of this magnitude, surely cannot be concluded on the basis of un-audited Balance Sheets !**

157. The SLIC Balance Sheets as at **31.3.2002 (P15)** and as at **11.4.2003 (13R8)** ***ought to have been audited and certified in the first instance***, to make the **'purchase price adjustment'** to conclude this transaction. **Such would have been the legitimate expectation of any ordinary person with commonsense**.

158. The cogent question also arises, as to why it had been agreed only to adjust the purchase price consideration by the increase in the 'Net Current Assets', and not the '**Total Net Assets'** ?

159. In this connection, paragraph 151 of the Counter Affidavit dated 9.1.2008 of the Petitioner is quoted:

> "151. Attention is drawn to paragraphs 49, 28 (e) and (f) of the Affidavit of the 27th Respondent, wherein it is admitted that PricewaterhouseCoopers had structured the price adjustment on the basis of 'net working capital' and not 'net assets' in Agreement P13, only after discussions had with the Bidders, i.e. 24th, 25th and 26th Respondents, giving a purported rationale therefor. Such ought to have been in agreement with the State."

13. SLIC ACCOUNTS SURREPTITIOUSLY FALSELY *RETROSPECTIVELY RECLASSIFIED* WITH DELIBERATE INTENT TO DEFRAUD THE GOVERNMENT TO THE TUNE OF RS. 2.1 BILLION

160. '**Investments**', which form a main asset of an **Insurance Company**, is *classified* as 'Fixed Assets', if intended to be held for a long period of time, and is *classified* as 'Current Assets' if intended to be held for a period less than 12 Months, as per Accounting Standards. *vide* – (**13R3(e)** *citing IAS I Para 57)*.

161. In comparing the SLIC **audited** Balance Sheets as at **31.12.2001 (P14)** and **31.12.2002 (P17**), **'Investments'** of Rs. 3958 million, which had been stated as 'Fixed Assets' in the **audited** Balance Sheet as at **31.12.2001 (P14),** had been surreptitiously ***retrospectively re-classified*** as 'Current Assets' as at **31.12.2001 itself**, as revealed by the **audited** Balance Sheet as at **31.12.2002 (P17),** which gives the ***comparative figures*** **as at 31.12.2001**.

162. Such surreptitious ***retrospective re-classification*** **effected without any specific disclosure thereof, and any explanation therefor,** would have the effect of **reducing** the 'Net Working Capital' between the said 2 dates i.e. **31.12.2001** and **31.12.2002** by **Rs. 3958 million**, as given below.

	A As per Audited Balance Sheet **31.12.2001**	**C** The **comparative** figures as at **31.12.2001**, given in Audited Balance Sheet **as at 31.12.2002**	**A-C** **Difference**
	Rs. Mn.	Rs. Mn.	Rs. Mn.
Non-Current Assets			
Investments	**11,833**	**7,875**	**3,958**
Others	1,805	2,760	(955)
	13,638	10,635	3,003
Current Assets			
Investments	**9,567**	**13,525**	**(3,958)**
Others	4,691	3,736	955
	14,258	17,261	(3,003)
Current Liabilities	6,506	6,506	-
Net Current Assets / '*Net Working Capital*'	**7,752**	**10,755**	**(3,003)**
Net Assets	21,390	21,390	-
Equity & Non-Current Liabilities			
Share Capital & Reserves	3,109	3,109	-
Non-Current Liabilities	18,281	18,281	-
	21,390	21,390	-

Note: ***Rs. 955 Mn**. - comprising Loans to Policy Holders Rs. 403 Mn., and Other Loans Rs. 552 Mn., has been retrospectively re-classified from Current Assets to Non-Current Assets, **thereby reducing the incidence of Rs. 3958 million to Rs. 3,003 million**.*

163. The incidence of the '**increase**' of the 'Net Working Capital' / 'Net Current Assets', in comparing

- the **original** Balance Sheet as at 31.12.2001 **(P14)** and the Balance Sheet as at 31.12.2002 **(P17)**, **and**

- the surreptitiously ***retrospectively re-classified*** Balance Sheet as at 31.12.2001(given in **(P17))** and the Balance Sheet as at 31.12.2002 **(P17),**

are set out below:

	A As per Audited Balance Sheet **31.12.2001**	B As per Audited Balance Sheet **31.12.2002**	B-A **Difference**	C The **comparative** figures as at **31.12.2001**, given in Audited Balance Sheet **as at 31.12.2002**	B-C **Difference**
	Rs. Mn.	Rs. Mn.	Rs. Mn.	Rs. Mn.	Rs. Mn.
Non-Current Assets					
Investments	**11,833**	**9,223**	**(2,610)**	**7,875**	**1,348**
Others	1,805	5,191	**3,386**	2,760	2,431
	13,638	14,414	776	10,635	3,779
Current Assets					
Investments	**9,567**	**13,394**	**3,827**	**13,525**	**(131)**
Others	**4,691**	3,490	(1,201)	**3,736**	(246)
	14,258	16,884	2,626	17,261	(377)
Current Liabilities	6,506	5,665	(841)	6,506	(841)
Net Current Assets / '*Net Working Capital*'	**7,752**	**11,219**	**3,467**	**10,755**	**464**
Assets before deducting Non-Current Liabilities	21,390	25,633	4,243	21,390	4,243
Equity & Non-Current Liabilities					
Share Capital & Reserves	3,109	4,224	1,115	3,109	1,115
Non-Current Liabilities	18,281	21,409	3,128	18,281	3,128
	21,390	25,633	4,243	21,390	4,243

164. It is disclosed that there had been an **'increase'** of **Rs. 3,467 million** in 'Net Working Capital / 'Net Current Assets' between 31.12.2001 and 31.12.2002, **before** such ***surreptitious retrospective re-classification***, and such increase had drastically reduced to **Rs. 464 million after such *surreptitious retrospective re-classification***.

165. **(P18)** dated **9.10.2002** is a **standard Letter**, commonly referred to as the '**freeze letter'** sent by PERC to Government owned Companies being privatized, **so that there are no material changes effected until the sale process is concluded**, during a divestiture process, **to prevent changes which would have a 'material incidence' on the evaluation and price** – *vide* Minutes of Steering Committee 3.10.2002 **(P16(e)**.

166. Therefore, the above material surreptitious retrospective ***re-classification*** effected as at **31.12.2001** in the Balance Sheet of 31.12.2002 **(P17) having a material impact on the purchase price consideration**, **could not have been permitted in the context of (P18)**. And in any case, it could not have been so done, without proper disclosure thereof, *and without any explanation therefor*.

167. As disclosed by correspondence compendiously marked **(P19),** Ernst & Young, **who had undertaken to compute the 'Net Working Capital' computation** for the **'purchase price adjustment',** and **having held out that such assignment was underway**, had requested for 17 extensions to compute the same **intimating that they had almost complete the same and required only few more days**, when they fully well knew that the said computation had to be completed within 60 days from 11.4.2003 i.e by **11.6.2003** in terms of Clause 4A of the Sale and Purchase Agreement **(P13)** ***when they undertook such assignment***.

168. The correspondence for the aforesaid 17 extensions having been copied to PWC Indonesia and Sri Lanka, PWC were also well and truly aware of this '**delaying process'**, in colluding to confuse and camouflage the SLIC Accounts for the Purchasers to obtain fraudulently a refund of Rs. 2.1 billion from the Government, on the premise that the 'Net Working Capital' had decreased by such **surreptitious retrospective reclassification** of Investments from Fixed Assets to Current Assets as at 31.12.2001.

169. Since, the **surreptitious retrospective reclassification** of Investment had been effected in the SLIC Balance Sheet as at 31.12.2001, in the SLIC Balance Sheet as at 31.12.2002 **(P17)** certified by Ernst & Young on **28.11.2003**, **such retrospective reclassification would have to be contained in the SLIC Balance Sheet as at 31.3.2002 (P15) which is a date shortly after 31.12.2001**.

170. Thereby, if such ***surreptitious retrospective reclassification*** was not discovered and raised, by PERC, and Ernst & Young and PWC put on notice thereof, then the SLIC Balance Sheet as at 31.3.2002 would have contained such retrospectively increase in value of Current Assets by way of Investments being **reclassified**, and thereby resulting in a decrease in the 'Net Working Capital' computation between **31.3.2002** and **11.4.2003** in terms of Clause 4A of Share Sale & Purchase Agreement **(P13)**.

171. **Such deliberate intention to defraud the Government to the tune of Rs. 2.1 billion** is clearly **proven** by;

- Letter dated 7.12.2004 of SLIC under the hand of the Added 38th Respondent **demanding Rs. 2.1 billion from the Government**, together with a 'Net Working Capital' computation, with a Schedule under the hand of the 38th Added-Respondent and another, showing fraudulently the 'Current Assets' and 'Current Liabilities' as at 31.3.2002 and 11.4.2003, **disclosing the computation of Rs. 2.1 billion** – *vide* Annex 2.3 of PERC Report **"D". The said computation had not been audited and certified by Ernst & Young, Auditors of SLIC.**

- Letter by the Hon Attorney General dated 9.2.2005 to Sudath Perera Associates, Attorneys-at-Law – *vide* Annex 2.6 of PERC Report **"D",** in response to Letter of Demand from Sudath Perera Associates, Attorneys-at-Law dated 11.1.2005 on behalf of the Purchasers, Milford Holdings (Pvt) Ltd., (28th Respondent) and Greenfield Pacific EM Holdings Ltd., (29th Respondent) **demanding Rs. 2.1 billion from the Government** – *vide* Annex 2.4 of PERC Report **"D".**

- Letter dated 11.4.2005 from the Hon. Attorney General to the 38th Added-Respondent, Managing Director of Distilleries Company of Sri Lanka Ltd., **(P23)** refuting as wrongful and unlawful **the demand of Rs. 2.1 billion made from the Government** by Letter of Distilleries Company of Sri Lanka Ltd., dated 18.3.2005 under the hand of the 38th Added-Respondent – *vide* Annex 2.14 of PERC Report **"D"**

172. The foregoing **fraudulent demands to obtain a refund of Rs. 2.1 billion from the Government** had been persistently made even after,

- Ernst & Young and PWC had been put on notice by PERC's Letters dated 17.11.2004 (2) and 25.11.2004 **(13R4A** / **13R4B** and **13R2J)**
- Letter dated 17.11.2004 by PERC to the 38th Added-Respondent, Chairman SLIC, with copy to the 7th Respondent, as Secretary to the Treasury – Annex 2.2 of PERC Report **"D"**

- Letter dated 12.1.2005 by PERC to the 38th Added-Respondent, Chairman SLIC, with copy to to the 7th Respondent, as Secretary to the Treasury – Annex 2.5 of PERC Report **"D"**

Disclosing the ***surreptitious retrospective reclassification*** of **Investments**, with the deliberate intent to change the 'Net Working Capital' increase between **31.3.2002** and **11.4.2003,** into a decrease, ***to thereby fraudulently make a claim for refund from the Government***.

173. It is indeed quite a diametrical **'turn-around'** by Milford Holdings (Pvt) Ltd., 28th Respondent / Consortium, who were **fraudulently demanding Rs. 2.1 billion back from the Government**, ***even sending Letters of Demand,*** now in the face of disclosures made before Your Lordships' Court', are desperately pleading **not to cancel and annul the transaction**, and that **they would pay more money to the Government** !

174. **This alone 'discloses' that they, including the 38th Added-Respondent were not '*bona-fide'* Purchasers, and had been well and truly aware of the '*mala-fides'* involved, and now in the face of exposures before Your Lordships' Court are desperately 'pleading' to cover-up by paying more money to Government**.

175. Surely, a 'party', 'who has misappropriated' or robbed public property, i.e valuable Shares of Government, **and had further attempted to defraud the Government to the tune of Rs. 2.1 billion,** cannot any manner or howsoever, 'cure' such 'illegality' and serious 'offence', by proposing to pay the correct value of the property 'misappropriated', **in a dubious and illegal bidding process.**

176. **A party who has misappropriated public property cannot be heard to say that they would be poorer, if such misappropriated public property is restored to the rightful and legitimate owner, in this instance, the Government i.e. the public**.

177. It was well and truly established, that the Purchasers / Consortium having taken absolute possession, management and control of SLIC on 11.4.2003, had knowingly, intentionally and deliberately '***retrospectively re-classified'*** in the 31.12.2002 Balance Sheet dated **28.11.2003 (P17)** Investments as at 31.12.2001 from 'Fixed Assets' to 'Current Assets' **with the sole intention of defrauding the Government to the tune of Rs. 2.1 billion,** with such **knowingly falsified** Accounts.

178. The foregoing are punishable offences under and in terms of the **Offences Against Public Property Act No. 12 of 1982**, attracting fines of 3 times the amount attempted to be defrauded from the Government **in this instance 3 times Rs 2.1 billion i.e. Rs. 6.3 billion, and imprisonment upto 20 years**.

179. **All persons are equal before the law, regardless of the socio-political status and standing, and no person can be socio-politically powerful, to be above the rule of law**.

180. **On the contrary, the law ought be enforced most stringently against the social politically influential and powerful, than against the helpless poor**.

181. There is no question of the Government refunding any money, but on the contrary, these parties, **who had wrongfully and unlawfully misappropriated unto themselves public property i.e. Shareholdings of the Government**, and ***had attempted to intentionally and deliberately defraud the Government to the tune of Rs. 2.1 billion*** stand **liable to be fined upto 300% i.e. Rs. 6.3 billion** in terms of the Offences Against Public Property Act No. 12 of 1982, together with sentences of imprisonment upto 20 years.

182. The same applies to all those, **who had aided and abetted and/or colluded** in the perpetration of the foregoing.

14. ERNST & YOUNG AND PWC *BY BEING PARTIES TO SURREPTITIOUSLY FALSIFYING THE SLIC ACCOUNTS RETROSPECTIVELY AND SUPPRESSING SUCH FALSIFICATION* HAD ACTED IN COLLUSION WITH THE PURCHASERS / CONSORTIUM IN THEIR *ATTEMPT TO DEFRAUD THE GOVERNMENT TO THE TUNE OF RS. 2.1 BILLION*

183. Ernst & Young, who had requested for '**17 extensions'** from June 2003 upto October 2004 to compute the 'Net Working Capital' computation for the '**purchase price adjustment'**, after the aforesaid Letters dated 17.11.2004 **(13R4A)** and 25.11.2004 **(13R4B) went completely silent** and **were unable to explain such surreptitious retrospective reclassification,** which materially impacted on the 'Net Working Capital' computation.

184. Ernst & Young evaded responding to the above AND **could not explain** the same, notwithstanding reminder Letters dated 9.12.2004 **(13R4C)** and 13.1.2005 **(13R4D).**

185. **It is in the foregoing circumstances, that Ernst & Young, knowingly and deliberately failed, neglected and evaded to**

- **certify, as audited, the SLIC Accounts as at 31.3.2002 (P15) and 11.4.2003 (13R8),**
- **confirm that the said SLIC Accounts had been prepared in conformity with International Accounting Standards, since *they had not been so prepared*;**

forward the Net Working Capital computation for the 'purchase price adjustment' *which they had undertaken to do*.

186. PWC, who were well and truly aware of the foregoing position, and who had been responsible for **'structuring this deal'** charging unrealistic and exorbitant fees, had similarly evaded to clarify and confirm the foregoing issues raised by PERC, whereas as Consultants to the Government, it was their primary duty and responsibility, to have diligently acted to protect the interests of the Government, **whereas even when the aforesaid fraudulent issues were raised by PERC**, **PWC failed and neglected to act to protect the interest of the Government**.

187. **Hence, both Ernst & Young and PWC had acted in collusion with the Purchasers / Consortium in this despicable attempt to defraud the Government to the tune of Rs. 2.1 billion**.

188. A further confusion to confound and frustrate the conclusion of this transaction had been a subtle attempt to draw a 'red herring', that the 'general insurance' and 'life assurance' funds, ought be treated differently, and that only the 'general insurance' fund belonged to the Company, and that the Net Working Capital 'increase' or 'decrease' to the **'adjustment of the purchase price consideration',** ought be computed, only in relation to 'general insurance' funds.

189. Clearly, the foregoing is not the position, in that,

- both the **un-audited** Balance Sheets re-stated by Ernst & Young as at **31.3.2002 (P15)** and **11.4.2003 (13R8) show the total funds** of the Company, SLIC, and

- in addition, *Agreement* ***(P13) does not draw any such purported distinction*** *between 'general insurance' and 'life insurance' funds for such computation*.

190. The PWC 'Indicative Valuation' **(P8)** of **SLIC had taken into reckoning both the 'general' and 'life' insurance business lines of SLIC**.

191. This is further endorsed by PWC Letter dated 1.10.2004 addressed to PERC **(13R3(e))**, whereby it had been attempted to compute the Net Working Capital i.e. 'Current Assets' less 'Current Liabilities' **in relation to the total of both such funds,** as per the **un-audited** Balance Sheet as at **31.3.2002 (P15)** *vide* Schedules to **(13R3(e))** giving Total Assets as **Rs. 28,582.5 million** and the **un-audited** Balance Sheet as at **31.3.2002 (P15)** giving Total Assets as **Rs. 28,582.5 million**.

192. Intriguingly, PWC **required an indemnity to afford such clarifications** – *vide* **(13R3(d) / (13R2(g)**.

193. As per Letter dated 28.10.2004 **(13R3(g)**, PWC when posed the question, **did not confirm that SLIC un-audited Balance Sheet as at 31.3.2002 was prepared in accordance with International Accounting Standards**, but stated – ***"According to M/s Ernst & Young, the Balance Sheet as at 31.3.2002 was prepared in accordance with International Accounting Standards"*.**

194. **Ernst & Young, Auditors of SLIC and PWC Consultants to the Government *by being parties to surreptitiously falsifying the SLIC Accounts retrospectively and suppressing such falsification* had aided and abetted and/or colluded with the aforesaid attempt to defraud the Government to the tune of Rs. 2.1 billion**, **totally dishonouring their professional duty, loyalty and obligation to the Government as the sole Shareholder of SLIC**, as at the said Balance Sheet dates **31.12.2001, 31.3.2002 31.12.2002 and 11.4.2003**.

195. The foregoing are punishable offences under and in terms of the **Offences Against Public Property Act No. 12 of 1982**, attracting fines of 3 times the amount attempted to be defrauded from the Government **in this instance 3 times Rs 2.1 billion i.e. Rs. 6.3 billion, and imprisonment upto 20 years**.

196. **All persons are equal before the law, regardless of the socio-political status and standing, and no person can be socio-politically powerful, to be above the rule of law**.

197. **On the contrary, the law ought be enforced most stringently against the social politically influential and powerful, than against the helpless poor**.

15. PWC 'INDICATIVE VALUATION' IS GROSSLY ERRONEOUS AND CANNOT BE RELIED UPON

198. **It is a matter of interest that**

- **the 'Concept Paper' of PERC had required a Valuation of SLIC by the Chief Valuer -** *vide Item 8.1 at page 10 of Annex 1.1 to PERC Report* **"D", and**

- **the 'Core Group' in their Report also had affirmed that the Government Valuation Department be requested to conduct a Valuation of Shares of the SLIC** – *vide Item 8.7 on page 14 of Annex 1.3 to PERC Report* ***"D".***

199. However, the **'Steering Committee'** had questionably **decided not to obtain a Valuation from the Chief Valuer,** but to obtain a Valuation from **PWC**. Chief Valuer, if he had deemed necessary, would have consulted international authorities he has access to as the Chief Valuer of the country.

200. As per Appendix C **(P2(a))** to Contract **(P2),** the Government had with PWC for Investment Banking, Legal and Actuarial Valuation Services the names of the persons, who were to carry out the actuarial valuations of the businesses of SLIC were the following: (*Paul Nuttall has been an experienced Valuer from the* ***United States****).*

Paul Nuttall- Head of Actuarial Valuation
Michael Playford - Support on Actuarial Life & General Valuation
Tony Leung - Support on Actuarial Life Valuation

201. Intriguingly however, without any explanation, whatsoever, and **giving rise to 'question'**, the PWC '**Indicative Valuation'** had been submitted by Paul Reddel, with Actuarial Valuation Reports done, **not by the aforesaid persons in terms of the Contract (P2) / (P2(a)**, but by the following persons, all from **Australia.**

Noeline Woof - Non-Life Insurance Business Valuation
Tim Jenkins - Non-Life Insurance Business Valuation
Life Appraisal Valuation
Chris Latham - Non-Life Business Valuation
Bruce Cameron - Life Appraisal Valuation

202. PWC **'Indicative Valuation'** has stated that such Valuation of SLIC is as at **31.12.2001 (P8)**, and that such Valuation is qualified by PWC, to the extent that *(It ought be noted that SLIC was sold on* ***11.4.2003*** *and that such '****Indicative Valuation'*** *is at a date 1 year and 3 months previously*) –

- '*they had not verified the financial data they had relied on'*;
- '*they do not accept any responsibility for any errors in the information';*
- *'they have stated that they express no opinion as to how closely the actual results will correspond to the projected forecasts'.*
- ***'they have reserved their right, without any obligation, to review and amend the calculations in the Valuation Report and revise the same';***

203. Following 'extracts' are cited from the PWC 'Indicative Valuation' Report given in the Appendixes thereto, ***which are pertinent to have been taken into reckoning in examining such Valuation, which had not been done***.

Page 3- Appendix I

"It is important to note that not all of the information requested was capable of being provided by SLIC. This has led to more uncertainty in the outstanding claims estimates calculated than would otherwise be the case. In the absence of the data requested, it was not possible to narrow significantly the range of likely outstanding claims estimates."

"Our analysis has necessitated a large number of assumptions to be drawn, most of which are based on very limited information. The extent to which these assumptions prove to be incorrect will have a significant impact on the reasonableness of the analysis conducted"

Page 5 – Appendix I

"Due to the fact that no computer database exists for non life claim records or payment information, we have not been able to obtain the data we required to complete an analysis of outstanding claims".

"Nonetheless, an opinion on the adequacy of these provisions was requested. This has necessitated a large number of assumptions to be drawn, most of which are based on very limited information. This has resulted in a high level of uncertainty surrounding the calculated outstanding claims estimates"

Page 6 – Appendix I

"The provision for unissued policies amounts to 626 million Rs., or 10% of SLIC's total non life insurance liabilities. This is intended to provide funds for possible refund of premiums from customers who paid their premium but did not follow through to completion of underwriting and policy issuance. This fund has accumulated over a number of years".

"Based on discussions with SLIC management, it seems in our opinion that a large amount of the provision for unissued policies held as at 31 December 2001 could be released as profit".

Page 20 – Appendix I

"The extent to which the provision for unissued policies can be reduced is not an actuarial question, but rather a legal or accounting question. We recommend this be considered by SLIC after discussions with its auditors and legal advisors"

Page 36 – Appendix I

***"*In our opinion satisfactory explanation for each of these items is required before firm recommendations can be given in respect of outstanding claims as at 31 December 2001 for the General Accident portfolio".**

Page 40 – Appendix I

"In our opinion satisfactory explanation for each of these items is required before firm recommendations can be given in respect of outstanding claims as at 31 December 2001 for the Non Life business of SLIC"

Page 6 - Appendix II

***"*This approach does not consider other possible ownership claims on the assets. The shareholders may well claim that they have a right to all of the net worth (or a significant portion of it). This may or may not include a claim on any capital injections made in the past."**

Page 15 - Appendix II

***"*SLIC has not conducted a detailed expenses analysis of its life business. Therefore we have assumed that expenses (and commissions) conform to those used in pricing the product concerned and have used these in developing the projection models. We have then been able to determine the total level for SLIC of expense and commission product allowances produced from the in force business and new business".**

"Common international practice is to select 10 or 15 years of new business. We have calculated multipliers taking into account 15 years new business".

204. PWC had submitted the **'Indicative Valuation' (P8)** in a **'sealed envelope'** for **'secrecy'**, with a covering Letter dated **29.11.2002**, addressed to the **7th Respondent**, **then Chairman, PERC,** to be held and opened by the CATB.

205. As instructed by the CATB, the TEC on **24.1.2003 (part of P7)** had opened the PWC **'Indicative Valuation'** and the **'financial bids'** at the same time.

206. **As per Attachment 1** of PWC to TEC Minutes of **25.3.2003 (P7),** it is disclosed that the original **'financial bids'** had been opened on **24.1.2003,** and that subsequently, **'financial bids'** have been **increased** after **24.2.2003**, *rendering such 'secrecy' an intriguingly **'nullity'***!

207. TEC at its Meeting held at **9.30 a.m**. on **25.3.2003 (P7)** at the PERC Office at **World Trade Center** made a final recommendation, and the unlawful CATB at its Meeting at **10.00 a.m.** on the same day, i.e. **25.3.2003**, had at the **Treasury Auditorium, Ministry of Finance,** had agreed with the TEC recommendation **(P9)**; disclosing that TEC had **considered** and **decided** on making a final recommendation, had **recorded** the Minutes of its Meeting, and **had attended the CATB Meeting at another location** ***all within the space of only ½ hour***.

208. It is evident from the **'procedure'** followed, that the PWC **'Indicative Valuation'** ***had not been subject to any review, examination or question***, and had been opened on **24.1.2003** by the TEC, and merely compared with the financial 'Bids' received – *vide **(part of P7)** and Letter attached to **(P8)***.

209. PWC **'Indicative Valuation'** - **had included the valuations of both the 'general' and 'life' insurance business lines of SLIC**.

210. The valuation of the **'general insurance'** business is stated to have been based on a 'Discounted Cash-Flow' method, at 17% p.a. and 18% p.a., giving a Valuation of Rs. 4,017 million to Rs. 4,292 million, which together with the **'life insurance'** business Valuation of Rs. 1,086 million, gave a total **'Indicative Valuation'** of Rs. 5,012 million to Rs. 5377 million - *vide Pages 7, 8, 9, 38 and 39 of **(P8)***.

211. The above 'Valuation' of **'general insurance'** business had been computed on the basis of SLIC 'audited profits before tax' for the **Year 2001** of Rs. 1567.2 million, **being reduced to Rs. 647.1 million** by the deduction of **'Other Income'** as given below: - *vide pages 38 and 39 of **(P8)**.*

	Rs.Mn.	**Rs.Mn.**
Net Profit before Tax		1,567.2
This is shown to have included the following 'Other Income'		
- Investment Income	875.5	
- Other Income / (Expenses)	694.2	
	1,569.7	
Adjustment – Deduct certain Items of Other Income		
'Reversal of Provision for fall in Value of Investments'	698.8	
'Exchange Gain / Loss'	221.3	(920.1)
Adjusted Net Profit before Tax		647.1
Income Tax (estimated @ 35%)		(226.5)
Adjusted Net Profit after Tax		420.6

212. The above **'adjustment'** i.e. **deduction of Rs. 920 million** had been made against 'Other Income / (Expenses) of **Rs. 694.2 million**, thereby making it a **'negative'** figure of (**Rs. 225.8 million)** for Year 2001, to reduce the Net Profit after Tax from **Rs. 1161.9 million** to **Rs. 420.6 million**

213. The question arises on the **validity** of such material deduction of the 'Reversal of Provision for fall in value of Investments', when the audited Balance Sheets as at 31.12.2001 **(P14)** and 31.12.2002 **(P17)** disclose that the **'market value'** of Equity Investments have, ***in fact, been materially higher than the Book Values***, as given below.

214. **Investments in Equity Securities,** with fluctuating 'market values', as per the SLIC audited Balance Sheets, as at 31.12.2000, 31.12.2001 and 31.12.2002, are set out below:

As at 31.12.2000

As per Note 10.2 at page 27 of **(P14)** and 10.2.1 on page 31 of **(P14),** the Equity Investments under Current Assets, are shown at a value of **Rs. 1870.7 million** (Rs. 1374.2 million + Rs. 496.5 million), whilst the **'market value'** of such investments had been disclosed to be **Rs. 1870.7 million** (Rs. 1374.2. million + Rs. 496.5 million) i.e. **a Book Value has been stated to be the 'market value' as at 31.12.2000.**

As at 31.12.2001

As per Note 10.2 at page 27 of **(P14)** and 10.2.1 on page 31 of **(P14),** the Equity Investments under Current Assets, are shown at a value of **Rs. 2808.0 million** (Rs. 1863.2 million + Rs. 944.8 million), whilst the **'market value'** of such investments had been disclosed to be **Rs. 3157.8 million** (Rs. 1945.3 million + Rs. 1212.5 million) i.e. **the Book Value has been less than the 'market value' by Rs. 349.8 million as at 31.12.2001.**

As at 31.12.2002

As per Note 10.2 at page 28 of **(P17)** and 10.2.1 on page 32 of **(P17)** the Equity Investments under Current Assets, are shown at a value of **Rs. 2783.7 million** (Rs. 1852.5 million + Rs. 931.2 million), whilst the 'market value' of such investments had been disclosed to be **Rs. 4856.7 million** (Rs. 3193.6 million + Rs. 1663.1 million) i.e. **the Book Value has been less than the 'market value' by Rs. 2073 million as at 31.12.2002.**

215. Hence, the ***market value*** of these **Equity Investments** had been greater than the Book Values as at 31.12.2001 and 31.12.2002 and had **increased** by Rs. 1723.2 million (Rs. 2073.0 million – 349.8 million) between **31.12.2001** and **31.12.2002**.; whilst the PWC **'Indicative Valuation'** dated **29.11.2002 (P8),** had **questionably deducted** a 'Reversal of Provisions for falling value of Investments of Rs. 698.8 million, whereas the **Investments** had been even greater than the 'Book Value' as at 31.12.2001, ***whereby such deduction is not warranted***.

216. Based on the above erroneous adjustment, **'net profits after tax'** had been re-stated for the **Year 2001**, and PWC on such **'erroneous premise'** had projected **'net profits after tax'** for **5-Years** as follows, ***on the basis of continuation every year of such 'erroneous deduction', effected for 1-Year, that too, errorneously !***

	2001 Rs.Mn.	2002 Rs.Mn.	2003 Rs.Mn.	2004 Rs.Mn.	2005 Rs.Mn.	2006 Rs.Mn.
Net Profit after Tax	420.6	**221.0**	**264.7**	**406.1**	**386.4**	**411.7**

217. As per the erroneous **'adjustments'** made for the **Year 2001** as above, the adjusted and **re-stated** 'net profits **before** tax' for the Year 2001 and projections for the **5-Years,** based on such erroneously adjusted Net Profits for the Year 2001, had been **after deducting continuous amounts shown below as 'Other Income' / ('Expenses')** - *vide Page 38 of **(P8)***

218. **Adding back** such erroneously and continuously **deducted amounts** the following corrected projections of 'net profit after tax' are computed on the basis of the PWC projections;

	2001 Rs.Mn.	2002 Rs.Mn.	2003 Rs.Mn.	2004 Rs.Mn.	2005 Rs.Mn.	2006 Rs.Mn.
Adjusted Profits before Tax	647.1	339.9	407.2	624.7	594.5	633.4
Other Income / (Expenses) ***deducted***	**(225.8)**	**(485.4)**	**(400.5)**	**(424.8)**	**(456.9)**	**(487)**
Adjusted Projected Profits before Tax and **before** above erroneous **Deduction**	872.9	825.3	807.7	1049.5	1051.4	1120.4
Tax @ 35%	(305.5)	(288.9)	(282.7)	(367.3)	(368.0)	(392.1)
Corrected Adjusted Net Profit after Tax	**567.4**	**536.4**	**525.0**	**682.2**	**683.4**	**728.3**

219. The foregoing erroneous projections by PWC of Net Profits **after** Tax of SLIC is **proven** by the following:

- PWC 'Indicative Valuation' (***P8*** Page 38) Profit **after** Tax for 2002 is **Rs. 221 Mn**., whereas Profit **after** Tax for 002, as per draft Accounts (***P10*** Page 1 dated 27.3.2003) is given as **Rs. 753 Mn**. (***i.e. 3.4 times the projected***); (*Audited Accounts for 2002 certified on 28.11.2003, i.e. after the Purchaser 'took over' SLIC on 11.4.2003, **'questionably'** discloses a 'net loss' of Rs. 418 Mn !)*

- PWC 'Indicative Valuation' (***P8*** Page 38) Profit **after** Tax for 2005 is **Rs. 386.4 Mn**., whereas the Audited Accounts for 2005 (Document **'A'**) reveals a Profit **after** Tax of **Rs. 1020.3 Mn**. (***i.e. 2.6 times the projected***) (*Even the corrected Net Profit **after** Tax figure for 2005 based on PWC projections is Rs. 683.4 million.)*

220. The international practice would have been **to project Net Profits for 10 – 15 years and not just for 5-years**, since SLIC had been well established for over 40 years, with the reasonable expectation for continuation and growth for a further 15-years or more – *vide* PWC **'Inticative Valuation'** Report itself !

Page 22 – Appendix II

"Common international practice is to select 10 or 15 years of new business. We have calculated multipliers taking into account 15 years new business".

221. The above erroneous and low 'Discounted Cash-Flow' Valuation of the 'general insurance' business, based on projections / forecasts for **5-Years,** and the valuation of 'life insurance' business, in total had been reckoned to be more than 10 times the questionably reduced '**adjusted profits'** after tax for the **Year 2001**, as referred to above – *vide Pages 7 and 39 of **(P8)***.

222. The above erroneous and low **'Indicative Valuation'** is said to have also been '***crossed checked'***, with the Net **Tangible** Assets, as per the SLIC Balance Sheet as at 31.12.2001, noting that the **'Indicative Valuation'** is 1.5 to 1.7 times the Book Value of Assets - *vide Pages 7, 39 and 40 of **(P8)***

223. The Book Value of the Net **Tangible** Assets, as per the SLIC audited Balance Sheet as at 31.12.2001 had been **Rs. 3109 million**, whilst at page 40 of **(P8)** it had been reckoned to be Rs. 3015 million, adjusted with surplus cash, the adjusted Net **Tangible** Assets has been stated at **Rs. 2028 million** !

224. Admittedly, the '**Market Values'** of the Fixed Assets, including valuable Land and Buildings had not been taken into reckoning, as referred to at paragraph 8(d) of the Petition - *viz*

"The 'market values' of the following valuable freehold properties, with valuable Buildings of SLIC, have not been taken into reckoning in placing a valuation on the 90% Shares of SLIC.

- Lands & Buildings in Colombo 1 and 2	3A 2R 33.35P
- Land at Katubedda	2A 0R 13P
- Lands & Buildings at Anuradhapura, Kandy, Matara, Trincomalee, Avissawella, Gampaha, Marawila, Kalutara, Thalgaswela, Negombo, Ambalangoda, Chilaw	2A 3R 38.96P
- Bungalows at Anuradhapura, Nuwara-Eliya, Kandy	1A 0R 25.83P
- Staff Quarters at Hingurakgoda, Mahiyangana	0A 1R 30P
- 2 properties in Jaffna	0A 1R 30P
- Condominium property at Kurunegala "	

225. As per the SLIC audited Balance Sheet as at 31.12.2001, at page 9 of **(P14),** the **Fixed Assets had been given at a Book Value of only Rs. 329.3 million** (Rs. 274.9 million + Rs. 54.4 million).

226. Cabinet Memorandum dated 27.3.2003 **(P10)** however had stated thus indicating a **Net Assets of around Rs. 5.7 billion**;

"SLIC recorded a turnover (Gross Written Premium) over Rs. 7.8 bn**. with a profit after tax of Rs. 753 mn**. and has **net assets of around Rs. 5.7 bn**. after revaluation of fixed assets, for the financial year ending **31st December 2002** as per the unaudited draft accounts." (*Emphasis added*)

Therefore, admittedly the Net Assets Value reckoned by PWC is grossly erroneous.

227. The total value of Investments, as per the audited Balance Sheets of SLIC as at **31.12.2001 (P14)** and **31.12.2002 (P17)**, has been given as **Rs. 21,308.1** million and **Rs. 22,616.7 million**, respectively.

228. In regard to the above, the 7th Respondent at paragraph 54 of his Affidavit **misleadingly** states that 'total liabilities as at 31.12.2002 exceeded Rs. 22,616.7 million', whereas these are not liabilities but include large provisions for future '**insurance claims'**, **which would not fall due in the short-term, inasmuch as all life policy holders would not die suddenly** !

229. In addition, the '**brand value'** of SLIC, a well established (for over 40 years) profitable insurance giant in Sri Lanka, apparently had not been taken into reckoning; particularly in that the name **'Sri Lanka'** had been **prohibited** from being used by a Company under and in terms of Section 19 of Companies Act No. 17 of 1982, and so also now in terms of Section 7 of Companies Act No. 7 of 2007.

230. On the basis of the available information, attempt is made below to impute the following **'adjustments'** to be reckoned to the PWC '**Indicative Valuation'** of SLIC, to demonstrate that the PWC '**Indicative Valuation'** is **grossly erroneous and cannot be relied upon** -.

(i) Discounted Cash-flow Projection adjusted to 15-Years
(ii) Low profits projected adjusted – *vide* paragraph 219 above
(iii) Fixed Assets adjusted to Market Values, as per Cabinet Memorandum **(P10) –** *vide* paragraph 226 above
(iv) Equity Investments adjusted to Market Values - *vide* paragraph 214 above
(v) Excess Reserves / Provisions, as per PWC **'Indicative Valuation'** written-back

(Note: Imputation of Valuation, as per Schedule to Motion dated 14.7.2008 is erroneous, in that, Item (iii) above has inadvertently got duplicated)

Imputed 'adjustments' to be reckoned to PWC 'Indicative Valuation' as at 31.12.2001

	Rs. Mn.	Rs. Mn.
Value of General Insurance Business		
- Discounted 5-Year Cash Flow @ 17.5 p.a.	4,155	
- Value of Life Insurances Business	1,086	5,241
Add - (i) Adjustment for General Insurance Business for 15-Years, since reckoned only for 5-Years	2,686	
10% increase, since above adjustment for 15-Years, on basis of projected fixed level of operations	269	2,955
Add -(ii) Adjustment by an average of 'plus 2 times', the Discounted Cash Flow Value since profit projected by PWC is under-estimated.		14,220
Add -(iii) Market Value of Fixed Assets disclosed in Cabinet Memorandum (***P10*** Page 1) as at 31.12.2002 - Rs. 5,700 Mn.- less Book Value of Fixed Assets 31.12.2002 Rs. 329 Mn. = Rs. 5,371 Mn. - adjusted to 11.4.2003 by +5%		5,640
Add – (iv) Market Value of Investments, not recorded in the Accounts as at 31.12.2002 - Rs. 4,856.7 Mn. less Rs. 2,808 Mn. = Rs. 2,048.7 Mn. - adjusted to 11.4.2003 by +5% (*May need reckoning in part as deemed attributed to Life Policy Holders*)		2,151
Add – (v) Adjustment for Life Insurance Business Outstanding Claims Rs. 1,921 Mn., Technical Reserves Rs. 1,628 Mn., Premium Awaiting Adjustments Rs. 626 Mn. - Total Rs. 4,175 Mn. - Excess Valuation written back reckoned at an estimated 10 % - (*vide **P8**,* Appendix I, Page 2, 3, etc...)		418
		30,625
Deduct - Dividends distributed to Government - (Rs. 500 Mn. + 750 Mn.) ?		1,250
		29,375

231. As per such imputed 'possible adjustments', the adjusted Valuation of SLIC is around **Rs. 30,000 million**. Given the above scenario, would not the realistic valuation of SLIC at least have been in the range of **Rs. 20,000 million to Rs. 30,000 million** ?

232. As per Steering Committee Minutes (*Item 7 of **P16(c)** – 18.2.2002*) **Rodney Lester, IFC, Lead Insurance Specialist,** has stated thus –

> **"As rule of thumb the value of an insurance company could be approximated as being; net assets + 25% to 150% of general insurance premiums (depending on nature of market) and one years insurance premium for life insurance."**

233. On the basis of the above **'rule of thumb',** the SLIC Valuation as at 31.12.2002 based on the SLIC Balance Sheet as at 31.12.2002 **(P17)** is reckoned as follows:

	Rs.Mn.
Net Assets as at 31.12.2002 as per Accounts	4,224
Adjustment for Market Value of Fixed Assets not recorded	5,371
Adjustment for Market Value of Investments not recorded	2,049
	11,644
Add 150% of General Insurance Premium of 2002	7,595
Add 1-Years Life Insurance Premium for 2002	2,788
	22,027

234. **Thus it is revealed that the Indicative Valuation of PWC given in (P8) of Rs. 5012 million to Rs. 5377 million is a gross erroneous under valuation** and the same had not been examined and checked, even given the above **'rule of thumb'** intimated by an IFC Lead Insurance Specialist ! **As computed above, the Valuation of SLIC is revealed to be over Rs. 20,000 million** !

235. PWC Indonesia, 17th Respondent, and its Attorney, 18th Respondent, who was the Project Co-ordinator heading the PWC Team **(P2) / (P2(a))** on the SLIC privatisation, having submitted **'Indicative Valuation'** of SLIC **(P8),** prepared by persons, who were not the persons nominated in the Contract **(P2) / (P2(a)),** though noticed by Your Lordships' Court, in the face of the averments in the Petition, have absconded from appearing in these proceedings, to defend their actions.

236. This only establishes that **PWC Indonesia** have admittedly acted collusively to deliberately and knowingly grossly under-value SLIC, as aforesaid, and submitted the **'Indicative Valuation' (P8)** significantly as a **'secret document'** in a **'sealed envelope',** as per Letter dated 29.11.2002, forming part of **(P8).**

237. Having disposed of SLIC to the Purchasers for **Rs. 6,050 million** on the basis of the above grossly erroneous '**Indicative Valuation'** of **PWC,** the **Purchaser / Consortium has subsequently endeavoured to wrongfully, unlawfully and fraudulently, surreptitiously reclassify retrospectively the Accounts of SLIC, with the deliberate intent to fraudulently obtain a refund of Rs. 2,100 million from the Government,** ***thereby making the purchase consideration even well below the grossly erroneous under-valued PWC 'Indicative Valuation' of Rs. 5012 million to Rs. 5377 million*** !

16. 'CONFLICTS OF INTEREST'

238. **Intriguingly**, the transaction in issue is fully tainted with several grave and serious instances of **'Conflict of Interest',** as have been set out in paragraph 20 of the Petition cited below:

> "20.a) 19th Respondent, Senior Partner of PWC, had been a Member, Steering Committee, which had selected PWC, as Consultants to the Government, and had continued thereafter as a Member, Steering Committee, supervising the work of PWC, and approving payments to them. It is understood that Auditors of PERC had queried this. *(Marina Tharmaratnam, a Member of the Steering Committee had **resigned** in July 2002, for conflict of interest).*

b) 16th Respondent had been a Director, PERC and Secretary, Steering Committee, handling this transaction, as the 'Transaction Manager', and had joined PWC as a Partner in March 2003, just prior to the execution on 11.4.2003 of the Agreement to sell 90% Shares of SLIC.

c) Ernst & Young, had been Auditors of SLIC, when the Government was 100% owner, and had continued to be Auditors of SLIC after the Sale of 90% Shares of SLIC to the Purchasers, and thereby had failed and neglected to discharge their duty and responsibility to the Government.

d) 7th Respondent, who had handled this transaction as Chairman / Senior Advisor, PERC, and thereafter as Secretary to the Treasury and *ex-officio* Member of PERC had been a Senior Policy Advisor to Ernst & Young, and **had failed and neglected to take action to protect the interests of the Government**".

239. **'Conflict of Interest'** referred to above pertaining to **PWC**, is indeed grave and serious, in that, its **Senior Partner, Devasiri Rodrigo, Chartered Accountant, 19th Respondent**, had been a Member of the **'Core Group'** appointed by the 7th Respondent, and also had been a Member of the **'Steering Committee**'.

240. It is the **'Steering Committee',** which had irregularly and unlawfully, **without Cabinet Approval,** selected **PWC Indonesia and Sri Lanka** to be Consultants to the Government on this transaction in issue.

241. 7th Respondent by Letter dated 11.3.2002 *(vide – page 7 of PERC Report **"D"** and Annex 1.10 thereto),* had forwarded the Request for Proposals (RFP) to **Devasiri Rodrigo of PWC** for the Consultancy on the SLIC divestiture, for **'Investment Banking', 'Legal Advisory' and 'Actuarial Valuation Services'**; notwithstanding that he, having been a Member of the **'Core Group'** and the **'Steering Committee',** was 'privy' to the process and scheme that was 'mapped out', and the Budget for Fees for such Consultancy.

242. Though **Devasiri Rodrigo of PWC** had excused himself from the **'Steering Committee'** Meeting at the time the decision was made to appoint **PWC**, **admittedly by him due to 'Conflict of Interest',** this appears to have been only a 'cosmetic camouflage' !

243. **Devasiri Rodrigo of PWC, in fact, had continued, as a Member of the 'Steering Committee', responsible for supervising the work of PWC, and approving payments to PWC** ! – *vide Steering Committee Minutes **(P25(a)), (P25(b)), (P25(c),***

244. The transaction in issue, including **'structuring the deal'** and **'Valuation of SLIC'**, had been dubiously handled by **PWC**, as aforesaid, causing enormous loss and damage to the Government, ***with a fraudulent claim of Rs. 2,100 million against the Government***, for which **Devasiri Rodrigo**, too stands liable and responsible to the Government, as then **Senior Partner of PWC**.

245. The **16th Respondent**, **Aneela de Soysa, Chartered Accountant**, who had been the Director of PERC and **'Transaction Manager'**, intimately involved in this transaction in issue, and the **Secretary** of the **'Steering Committee',** notwithstanding the grave and serious **'Conflict of Interest',** had shockingly **joined PWC, as a Partner in March 2003**, **<u>just one month</u> before the signing of the Sale and Purchase Agreement on 11.4.2003 (P13).**

246. **Aneela de Soysa** of **PERC** had done so, whilst **PWC** had continued to have a duty, obligation and responsibility to the Government, to ensure proper conclusion of the transaction in issue, as per the 'Net Working Capital' computation for the 'purchase price adjustment', which had to be completed by **<u>11.6.2003</u>**, and which stands non-concluded and frustrated; ***with a fraudulent claim of Rs. 2,100 million made against the Government***.

247. The above had led to a **grave and serious dispute between the Government and PWC** on this transaction in issue, on which the Hon. Attorney General had addressed Letters to PWC dated 9.2.2005 **(P21(b))** and 11.4.2005 **(P22(b))** and as disclosed in Cabinet Memorandum **(P24).**

248. **Aneela de Soysa, as a Partner of PWC**, notwithstanding such **'Conflict of Interest'**, had unashamedly thereafter continued to represent **PWC**, in dealing with PERC on this transaction in issue, as disclosed by several Letters included among the Letters, compendiously marked **(P19),** and also by Letters marked **(13R3c), (13R3e), (13R3f), (13R3g).**

249. The **7th Respondent, P.B. Jayasundera, Secretary, Ministry of Finance and Secretary to the Treasury** at paragraph 61 of his Affidavit, **has admitted** that he had served, **as a Senior Policy Advisor to Ernst & Young**, on a part-time basis, but has not disclosed during which period/s he had provided such services, **as a Senior Policy Advisor to Ernst & Young,** notwithstanding the grave and serious **'Conflict of Interest'.**

250. **7th Respondent** by Letter dated 11.3.2002 *(vide – page 7 of PERC Report **"D"** and Annex 1.10 thereto),* had forwarded the Request for Proposals (RFP) to **Ernst & Young** for the Consultancy on the SLIC divestiture, for **'Investment Banking', 'Legal Advisory' and 'Actuarial Valuation Services'**; notwithstanding **Ernst & Young** having been the statutory Auditors of SLIC, and they having worked closely with the **'Steering Committee'** on the divestiture process of SLIC and thereby being 'privy' to the process and scheme that was 'mapped out', and the Budget for Fees for such Consultancy.

251. **Ernst & Young** had been given several lucrative 'consultancy assignments' on privatizations by PERC, whilst the **7th Respondent** was Chairman, PERC / Secretary to the Treasury, and in respect of some of which, there had been grave and serious 'lapses' on the part of Ernst & Young, in addition to this transaction in issue, ***with a fraudulent claim of Rs. 2,100 million made against the Government;*** **also** on LIOC, one issue in which had been rectified saving the Government billions of rupees, and some other issues involving billions of rupees are yet to be dealt with !

252. In regard to the foregoing, the following paragraph from Letter dated 5.10.2006 to the Institute of Chartered Accountants of Sri Lanka **(P20(b)** at page 4 is cited:.

> **"There were other large privatisation transactions, such as in the petroleum retail sector, i.e. 2nd Player 'LIOC' [*with a questionable 'policy formula', unacceptable 'subsidy claims' from the Government, the 'breach of a basic condition', and the 'conferment of a valuable right without any consideration']* and 3rd Player, which Ernst & Young had handled for PERC with lucrative fees,** *whilst Dr. P.B. Jayasundera had been actively involved in the said re-structuring / privatisation processes on behalf of the Government !* **"**

253. There is a **grave and serious dispute between the Government and Ernst & Young** on this transaction in issue, and also a grave and serious **'Conflict of Interest'** on the part of **Ernst & Young** *vis-à-vis* the Government, which had warranted action being taken by the Government against **Ernst & Young,** on which the Hon. Attorney General had addressed Letters to **Ernst & Young** dated 9.2.2005 **(P21(a))** and 11.4.2002 **(P22(a))** and as disclosed in Cabinet Memorandum **(P24).**

254. Action by the Government against **Ernst & Young** had to be taken by the **7th Respondent**, as the Secretary to the Treasury. **Clearly he had been unable to so act**, since he had been compromised by ***having been engaged by Ernst & Young, as a Senior Policy Advisor***.

255. **Ernst & Young** also had compromised the **7th Respondent, a Senior Public Servant**, by ***engaging him as Senior Policy Advisor***, whilst they had received lucrative 'consultancy assignments' from PERC of which the 7th Respondent was the Chairman / the Secretary to the Treasury, notwithstanding such grave and serious **'Conflict of Interest'.**

256. The **7th Respondent** also had to deal with **Ernst & Young** in his official capacity, as a Senior Public Servant i.e. Chairman PERC / Secretary to the Treasury, on issues pertaining to such assignments, and issues arising therefrom, **such as this transaction in issue**, ***whilst he had also been a Senior Policy Advisor to Ernst & Young.***

257. **'Excerpts'** of an Opinion on '**Conflict of Interest**' expressed to COPE by Suhada Gamalath, Secretary, Ministry of Justice, as a Member of PERC, is annexed hereto marked **"B"**.

17. CONDUCT AND ACTIONS OF ERNST & YOUNG, *AUDITORS OF SLIC, HAVING ALSO RENDERED OTHER SERVICES TO THE GOVERNMENT,* WARRANTS ACTION IN TERMS OF THE LAW AND ALSO FOR GROSS PROFESSIONAL MISCONDUCT

258. Ernst & Young have carried out the **statutory audits** of SLIC for the years ended 31.12.2001 **(P14)** and 31.12.2002 **(P17).**

259. Ernst & Young have re-stated the SLIC Accounts as at 31.3.2002 **(P15)** and 11.4.2003 **(13R8),** ***holding out*** that the same are in compliance with the International Accounting Standards, **when they were not**.

260. Ernst & Young, as Auditors, owed a duty of care, loyalty and responsibility to the Government, as the sole Shareholder of SLIC upto **11.4.2003**, ***which they had breached***.

261. As evidenced by the **'Steering Committee'** Minutes, Ernst & Young, had

- been well and truly fully involved in working closely with the **'Steering Committee'** in relation to the divestiture of SLIC, including updating its Accounts.

- **undertaken to audit** the SLIC Accounts, as re-stated in compliance with International Accounting Standards, ***but thereafter Ernst & Young had failed and neglected to fulfil and honour such duty***, ***obligation and undertaking***; **resulting in the frustration of this transaction**, *causing loss, damage and detriment to the Government, the sole Shareholder of SLIC*.

262. The following **'extracts'** from the Steering Committee Minutes are cited to establish the foregoing:

P16(a) - 1st Meeting - 25.1.2002

It was noted that the SLIC has requested the Auditors, Ernst & Young to assist with getting the books into order to overcome these deficiencies.

It was noted that Ernst & Young had sent a proposal to SLIC for restating the Financial Statements according to International Accounting Standards

It was also decided that SLIC needs to identify a suitable person from within SLIC to head the unit and contract with Ernst & Young, the current auditors to assist in the process of extracting information.

Ernst & Young in house team appointed 20 February

P16(b) - 2nd Meeting - 13.2.2002

It was noted that the auditors would have to be independent of writing up of the books especially if the new investor purchasing the company is regulated under US SEC rules. An audit firm other than the current auditors, Ernst & Young would have to be used to write up the accounts if they are to be in a position to continue to undertake the audit for the year 2002.

As the work needed to resolve the audit qualifications will take considerable time, it was decided that Ernst & Young should be requested to assist in this process as a special assignment as the independence of the auditors would not arise in this case.

it was decided that SLIC will undertake to fund the IAS audit of SLIC which amounted to around US $ 81,000.

P16(c) - 3rd Meeting - 18.2.2002

The IAS audit can start pending finalisation of the audited accounts.

The Auditors, Ernst & Young have submitted a revised proposal for the IAS audit.

P16(d) - 5th Meeting - 22.3.2002

It was decided that M/s Asita Talwatte and Ruwan Fernando, the partners in charge of the Audit be requested to adequately staff the audits so as to achieve the deadlines.

b) The IAS Audit which was due to commence on March 15 2002.

263. The SLIC Accounts to 31.3.2002 **(P15)** and 11.4.2003 **(13R8) had been signed** by Ernst & Young, stipulating that '**they have not performed an audit, and accordingly do not express an opinion',**

264. **However, contrary thereto**, at the end of their Reports, Ernst & Young had stated thus -

> ***'Nothing has come to our attention that causes us to believe that the accompanying financial statements do not give a true and fair view in accordance with International Accounting Standards'*** –

265. The foregoing are not **'audit certifications'** in compliance with **Auditing Standards**.

266. **Ernst & Young ought to have known, that a Government transaction of this magnitude cannot be concluded on the basis of unaudited Accounts**.

267. On the other hand, SLIC Balance Sheets as at 31.12.2001 **(P14)** and 31.12.2002 **(P17) had been audited and certified** by Ernst & Young, showing the classification of 'Current Assets' and 'Current Liabilities' separately, **certifying that –**

> **'the said Accounts give a true and fair view of the state of affairs of SLIC as at the said dates'.**

268. The foregoing is in conformity with **'audit certifications'** in compliance with **Auditing Standards** mandated under Sri Lanka Accounting and Auditing Standards Act No. 15 of 1995.

269. Intriguingly, Ernst & Young, **acting collusively in being parties to surreptitious retrospective falsification of SLIC Accounts and suppression thereof**, ***violating Auditing Standards for disclosure***, had surreptitiously ***retrospectively re-classified*** Investments in the SLIC Balance Sheet as at 31.12.2001, as discovered in the SLIC Balance Sheet as at 31.12.2002 **(P17)** in the 'comparative figures' given as at 31.12.2001, ***without specific disclosure thereof and without any explanation therefor.***

270. **The foregoing resulted in a fraudulent claim on this SLIC divestiture being made by the Purchasers against the Government to the tune of Rs. 2,100 million**.

271. **Notwithstanding that the International Accounting Standards had required disclosure of 'Current Assets' and 'Current Liabilities' separately on the face of the Balance Sheet or in Notes thereto (13R9(a) / (13R9(b),** Ernst & Young had intriguingly failed to disclose 'Current Assets' and 'Current Liabilities' separately in the SLIC Balance Sheets as at 31.3.2002 **(P15)** and 11.4.2003 **(13R8).**

272. Ernst & Young having been intimately involved with the **'Steering Committee'** in assisting in the divestiture process of SLIC, having undertaken to re-state the SLIC Accounts as at 31.3.2002 in compliance with International Accounting Standards, intriguingly failed to disclose the 'Current Assets' and 'Current Liabilities' separately on the face of the Balance Sheet or in Notes thereto, **even though Ernst & Young were well and truly aware that the Sale & Purchase Agreement (P13) required such disclosure, to compute the 'Net Working Capital' computation for the 'purchase price adjustment'**.

273. As disclosed by the correspondence compendiously marked **(P19),** Ernst & Young had,

- been well and truly aware that Sale & Purchase Agreement **(P13),** for which purpose Ernst & Young had to **audit** the SLIC Accounts as at 31.3.2002 and 11.4.2003 for the 'Net Working Capital' computation, as per Clause 4A of the Sale & Purchase Agreement **(P13)** for the 'purchase price adjustment'.

- been well and truly aware that the above had to be completed within 60 days, i.e. by **11.6.2003,** and for which purpose, Ernst & Young **had undertaken to audit the SLIC Accounts as at 31.3.2002 and 11.4.2003** and prepare the ''Net Working Capital' computation for the 'purchase price adjustment'.

- directly and indirectly, obtained **'17 Extensions'** between June 2003 and October 2004 from PERC, representing the Government, for the preparation of the 'Net Working Capital' computation for the 'purchase price adjustment', on the basis of SLIC audited Accounts as at 31.3.2002 and 11.4.2003, ***holding out that they had completed the work and wanted only a few more days***, **but had failed to forward the same to PERC, representing the Government.**

274. The following **'extracts'** are cited from the Letters compendiously marked **(P19)** to established the foregoing;

9.6.2003 - from DCSL to PERC

> "We are in the process of finalizing financial statements for the year ended 31st December 2002 with the **Auditors Ernst & Young. It is likely that this will be finalized by end June 2003."**

7.8.2003 - from DCSL to PERC

> "We hereby request you to extend the period of submitting the **audited accounts up to 11th April 2003** by further two months. (i.e. until 11th October 2003)"

11.11.2003 - from SLIC to DCSL

"We have provided draft accounts to **M/s Ernst & Young and they are in the process of finalizing the audit** and review."

11.11.2003 - from **Ernst & Young to PERC,** (with copy to SLIC)

"**SLIC Working Capital Adjustment**

We wish to inform you that the **above assignment has commenced and it would take approximately 5-6 weeks to complete.** Accordingly, we wish to submit a draft report by 15th December 2003."

12.11.2003 - **from PERC to SLIC, (with copies to Partners, PWC and Chairman, PERC)**

"..... **supported by the letter of same date addressed to me by M/s Ernst & Young**, and agree to a further extension of 5 weeks up to Friday, 12th December 2003,"

15.12.2003 - from **Ernst & Young to PERC,** (with copy to SLIC)

"**Audit of Financial Statements for the period ended 11th April 2003, and Review and Report on these Financial Statements in accordance with International Accounting Standards**

We would require a further period of 5-6 weeks to complete the assignment dependent on the timely availability of the required information."

30.1.2004 - from SLIC to PERC

"Audit of Financial Statement for the period ended 11th April 2003, and Review and Report on these Financial Statements in accordance with International Accounting Standards

…... **we need couple of days to finish few more work with our auditors, M/s Ernst & Young**, Chartered Accountants."

28.5.2004 - from SLIC to PERC, (with copy to Ernst & Young)

" ..... working capital could not be completed as planned due **to non availability of the Partners, M/s Ernst & Young.**

Therefore, I kindly request you to extend time till 15th June, 2004"

30.6.2004 - from SLIC to PERC

"Net Working Capital Adjustment

….. we have already provided the **Net Working Capital Computation** certified by the directors to **M/s. Ernst & Young** for their review."

19.7.2004 - from SLIC to PERC (with copy to **Ernst & Young**)

"As **M/s Ernst & Young** informed that they require time to complete their work, we request you to extend time till 16th August 2004 to finalise this matter."

16.8.2004 - from SLIC to PERC**, (with copy to Ernst & Young)**

" Sri Lanka Insurance Corporation Ltd - **Net Working Capital Adjustment**

Accordingly to M/s Ernst & Young, they have completed their review and need few more days to finalize their report."

30.8.2004 - from **Ernst & Young** to SLIC

"Sri Lanka Insurance Corporation Ltd - **Net Working Capital Computation**

.....we wish to bring to your notice that **we have now completed most of the necessary field work** with regard to the above assignment.

We will submit the report to you upon completion of the technical review by our Technical Committee, **within a few days**."

21.9.2004 - from PERC to SLIC

"Net Working Capital Adjustment - Divestiture of SLIC

The Financial Statements of SLIC as at 11th April, 2003 prepared according to IAS standards had been forwarded by Ernst & Young, Chartered Accountants on 26th March, 2004.

Subsequently, as per our records, **Officials of PricewaterhouseCoopers and Ernst & Young have had a Meeting on 21st April, 2004 at PERC to finalize this matter."**

15.10.2004 - from SLIC to PERC

"Working Capital Adjustment

The Chairman has asked for some clarifications to be obtained on the above, and unfortunately he is away from the island last few weeks. He is expected to be back this weekend and we are certain that the final report can be sent **within 10 days after the final discussion with Ernst & Young next week."**

275. When put on query by PERC, acting on behalf of the Government, by Letters dated 17.11.2004 **(13R4(a))** and 25.11.2004 **(13R4(b)),** particularly on the **surreptitious *retrospective reclassification*** of Investments as at 31.12.2001 in the 'comparative figures' column for 2001 in the SLIC Audited Balance Sheet as at 31.12.2002 **(P17),** Ernst & Young **even notwithstanding reminders** dated 9.12.2004 **(13R4(c))** and 13.1.2005 **(13R4(d)), failed and neglected to afford explanations on the query raised.**

276. In the face of such query raised by PERC in November 2004 on such **surreptitious *retrospective reclassification*** of Investments, Ernst & Young having previously requested and obtained '**17 Extensions'** between June 2003 and October 2004 from PERC, **thereafter did not even ask for any further extensions of time after November 2004** to prepare the 'Net Working Capital' computation for the adjustment of 'purchase price consideration'.

277. Ernst & Young, notwithstanding the grave and serious **'Conflict of Interest'** continued to be the Auditors of SLIC, after the Purchasers took absolute possession, management and control of SLIC on 11.4.2003, knowing fully well that they were **committed to audit the SLIC Accounts at that time** as at 31.12.2002 **(P17),** 31.2.2002 **(P15)** and 11.4.2003 **(13R8),** and accordingly **prepare for the Government**, **the Seller** the 'Net Working Capital' computation for the adjustment of 'purchase price adjustment'.

278. In the context of the conduct and actions of Ernst & Young, Hon. Attorney General, by Letters dated 9.2.2005 **(P21(a))** had put Ernst & Young on notice of negligence, and had forwarded further Letter dated 11.4.2005 **(P22(a))** to Ernst & Young putting them on notice of legal action for negligent acts or wilful misconduct and wrongful conduct.

279. **Ernst & Young** also had compromised the **7th Respondent, a Senior Public Servant**, by ***engaging him as Senior Policy Advisor***, whilst they had received lucrative 'consultancy assignments' from PERC of which the 7th Respondent was the Chairman / the Secretary to the Treasury, notwithstanding such grave and serious **'Conflict of Interest'.**

18. CONDUCT AND ACTIONS OF PRICEWATERHOUSECOOPERS, INDONESIA AND SRI LANKA *CONSULTANTS TO THE GOVERNMENT* IN TERMS OF CONTRACT (P2), WARRANTS ACTION IN TERMS OF THE LAW AND ALSO FOR GROSS PROFESSIONAL MISCONDUCT

280. As evidenced by **Appendix "C" (P2(a))** to **Contract (P2),** the PWC **'Key Personnel Team'** was headed by PWC Indonesian Partner, Roger de Montfort, as **Project Co-ordinator**, and by PWC **Sri Lankan Team Leader,** Channa Manoharan, and had comprised of personnel from PWC Indonesia and PWC Sri Lanka, and other Specialists.

281. Advertisements **(P6)** calling for '**Expressions of Interest'** for the Sale of 90% Shares of SLIC had been placed **jointly** in the names of PWC Indonesia and PWC Sri Lanka.

282. 7th Respondent, then Chairman PERC by Letter dated 11.3.2002 *(vide – page 7 of PERC Report **"D"** and Annex 1.10 thereto),* had forwarded the Request for Proposals (RFP) to **Devasiri Rodrigo of PWC** for the Consultancy on the SLIC divestiture.

283. At the 5th **'Steering Committee'** Meeting on 22.3.2002 at Item 13 of the Minutes **(P16(d)),** it had been recorded thus – "The Steering Committee noted that Mr. Deva Rodrigo had declared an interest in the assignment for Financial Advisory as the firm in which he was Partner, PricewaterhouseCoopers Sri Lanka has been short-listed and was interested in bidding for the contract".

284. The foregoing, well and truly establishes that PWC Sri Lanka, acted together jointly with PWC Indonesia, as further borne out by the correspondence compendiously marked **(P19),** and Letters marked **(13R3(c)), (13R3(e)), 13R3(f)), (13R3(g)).**

285. Notwithstanding the **'Conflict of Interest'**, Devasiri Rodrigo of PWC, in fact, had continued, as a Member of the 'Steering Committee', responsible for supervising the work of PWC, and approving payments to PWC ! – *vide Steering Committee Minutes **(P25(a)), (P25(b)), (P25(c),***

286. Thus, PWC having been represented on the **'Steering Committee',** and having acted as Consultants to the Government in terms of Contract **(P2)** on the transaction in issue, attending **'Steering Committee'** Meetings to 'structure the deal', were well and truly aware of all the conduct and actions of Ernst & Young, as morefully set out in the preceding Section.

287. PWC, as Consultants to the Government, having been well and truly aware of all the foregoing conduct and actions of Ernst & Young, had deliberately failed and neglected to discharge their duty, due care and responsibility, as Consultants to the Government, to protect the interests of the Government, the Client of PWC, in terms of Contract **(P2)**.

288. On the other hand, 'mysteriously' they chose to 'turn a blind eye' to the conduct and actions of Ernst & Young, which had caused loss, damage and detriment to the Government, the Client of PWC, in terms of Contract **(P2)**.

289. ***Even when put on query*** by PERC, acting on behalf of the Government, by Letter dated 17.11.2004 **(13R2(j)),** particularly on the **surreptitious *retrospective reclassification*** of Investments as at 31.12.2001 in the 'comparative figures' column for 2001 in the SLIC Audited Balance Sheet as at 31.12.2002 **(P17),** PWC, **having acted collusively in being parties to the surreptitious retrospective falsification of SLIC Accounts and suppression thereof**, **even notwithstanding reminders** dated 9.12.2004 **(13R2(k))** and 13.1.2005 **(13R2(l)), failed and neglected to afford explanations on the query raised.**

290. **The foregoing resulted in a fraudulent claim on this SLIC divestiture being made by the Purchasers against the Government to the tune of Rs. 2,100 million**.

291. PWC had been responsible for **'structuring the deal'**, including framing Clause 4A of Sale & Purchase Agreement **(P13)** to compute the 'Net Working Capital' increase or decrease for the 'purchase price adjustment', and had deliberately failed and neglected to ensure that SLIC Accounts were so prepared, to have enabled such computation and adjustment.

292. **On the other hand, PWC had worked 'hand in glove' with Ernst & Young, to collude with the Purchasers**, which had led to the transaction becoming **frustrated**, and resulting in the ***Purchasers making a fraudulent claim against the Government to the tune of Rs. 2,100 million***.

293. Notwithstanding being Consultants to the Government, in terms of Contract **(P2)**, PWC had failed and neglected to ensure that the SLIC Accounts were prepared in accordance with International Accounting Standards, as PWC, themselves had required, to attract International Investors, and had failed to get the SLIC Accounts **audited** by Ernst & Young, or in the least alert the Government of such misdemeanour on the part of Ernst & Young.

294. **Notwithstanding that the International Accounting Standards had required disclosure of 'Current Assets' and 'Current Liabilities' separately on the face of the Balance Sheet or in Notes thereto (13R9(a) / (13R9(b),** PWC had failed to alert the Government and question, as to why, Ernst & Young had intriguingly failed to disclose 'Current Assets' and 'Current Liabilities' separately in the SLIC Balance Sheets as at 31.3.2002 **(P15)** and 11.4.2003 **(13R8).**

295. **PWC were well and truly aware that the Sale & Purchase Agreement (P13) structured by PWC, themselves, required such disclosure of 'Current Assets' and 'Current Liabilities' separately, to compute the 'Net Working Capital' computation for the 'purchase price adjustment'**.

296. **PWC ought to have known, that a Government transaction of this magnitude cannot be concluded on the basis of unaudited Accounts.**

297. Notwithstanding the grave and serious **'Conflict of Interest',** PWC had shockingly engaged the 16th Respondent, Aneela de Soysa**,** who had been the Director of PERC and **'Transaction Manager'**, intimately involved in this transaction in issue, and the **Secretary** of the **'Steering Committee', as a Partner of PWC in March 2003**, **just one month before the signing of the Sale and Purchase Agreement on 11.4.2003 (P13).**

298. Notwithstanding such **'Conflict of Interest',** PWC had caused Aneela de Soysa, as a Partner of PWC, to unashamedly thereafter continue to represent PWC, in dealing with PERC on this transaction in issue, as disclosed by several Letters included among the Letters, compendiously marked **(P19),** and also by Letters marked **(13R3c), (13R3e), (13R3f), (13R3g).**

299. PWC had continued to have a duty, obligation and responsibility to the Government, to have ensured proper conclusion of the transaction in issue, as per the 'Net Working Capital' computation for the 'purchase price adjustment', which had to be completed by **11.6.2003**, and which stands non-concluded and frustrated; ***with a fraudulent claim of Rs. 2,100 million made against the Government***.

300. PWC had engaged personnel, **other than those named** in **Appendix "C" (P2(a)),** to **Contract (P2),** to carry out a **dubious and gross under-valuation of SLIC**, causing colossal loss and damage to the Government.

301. PWC Indonesia had absconded and PWC Sri Lanka had been unable to explain such dubious and gross under-valuation of SLIC, thereby establishing that PWC had in fact, acted 'hand in glove' with the Purchasers in making such dubious and gross under-valuation of SLIC as corroborated by the subsequent conduct and actions of PWC, referred to above.

302. The above had led to a **grave and serious dispute between the Government and PWC** on this transaction in issue, on which the Hon. Attorney General had addressed Letters to PWC dated 9.2.2005 **(P21(b))** and 11.4.2005 **(P22(b))** and as disclosed in Cabinet Memorandum **(P24).**

19. INACION BY THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SRI LANKA (ICASL) ON THE PROFESSIONAL MISCONDUCT BY ERNST & YOUNG AND PWC, WARRANTS ACTION IN TERMS OF THE LAW

303. A Member of the public had made a Complaint to the ICASL, **as far back as August 2005**, on the professional misconduct by Ernst & Young and PWC in the scandalous privatisation of SLIC.

304. As requested by the ICASL, having obtained permission from the 3rd Respondent, Minister, (*now deceased*), I, together with a Director of PERC, who had been directed by him, gave evidence, as far back as April 2006 before a 4-Member Panel of the 10-Member Ethics Committee of the ICASL.

305. The foregoing is borne out by paragraph 7 of my Affidavit dated 2.8.2007, supported by Letters marked **(13R6(a)), (13R6(b)), (13R6(c)), (13R6(d)), (13R6(e)), (13R6(f)), (13R6(g)), (13R6(h)),** and **(P20(b)),** together with **(13R7).**

306. The above correspondence with the ICASL reveals that documentation forwarded had been **'tampered'** with and/or **'cannibalised'**, evidently due to endeavours to 'scuttle' the Inquiry **(13R6(e))** / **(13R6(f))**.

307. The 4-Members of the Panel of the Ethics Committee were,

- F.H. Puvimanasinghe, Chairman, (32nd Respondent)
- M.N. Gunasekera
- L.C. Piyasena, and
- J.G.D.R. Muttupulle

- *vide **(13R6(h))** – 6.7.2007*

> "4) The Investigation 'Panel of the Ethics Committee' consisted of Messrs. F.H. Puvimanasinghe (Chairman), L.C. Piyasena, J. Muttupulle and M.N. Gunasekera. Mr. Muttupulle was not present on 21 march 2006. I understand that he was absent from virtually all deliberations of the 'Panel of the Ethics Committee' !"

308. F.H. Puvimanasinghe, 32nd Respondent, **a very senior and respected Chartered Accountant**, has not filed Affidavit controverting the facts pertaining to this matter adduced before Your Lordships' Court, whereby such facts stand admitted.

309. As disclosed by **(P28)** and **(13R6(h))**, J.G.D.R. Muttupulle was not present at the Inquiry, and L.C. Piyasena, who had signed the findings, had subsequently questionably dissented, *vis-à-vis*, Ernst & Young. F.H. Puvimanasinghe, Chairman of the Panel and M.N. Gunasekera had made findings that there were prima-facie cases **both** against Ernst & Young **and** PWC.

- *vide **(13R6(h))** – 6.7.2007*

> "15)Media allegations that one of the members of the Investigation 'Panel of the Ethics Committee' who had signed the final report had subsequently *"dissented"* vis-a-vis the section on E&Y under circumstances that has been described as *"suspicious"*. This has so far not been denied by the member concerned. Another member of the Investigating 'Panel of the Ethics Committee' who had dissented had hardly attended any meetings! The question also arises as to why these two members have not gone public on their 'dissent' ?"

310. The findings of the 4-Member Panel of the Ethics Committee had been submitted to the 10-Member Ethics Committee, who had decided that there are prima-facie cases of professional misconduct against **both** Ernst & Young **and** PWC, as per **(P28)** and **(13R6(h)),** which stand undisputed.

- *vide **(13R6(h))** – 6.7.2007*

> "10)I have learnt from the media and other sources, that the 10-Member 'Ethics Committee' of the ICASL had in early November 2006, endorsed the findings of its Investigating 'Panel' of a 'Prima-Facie' case of 'Professional Misconduct' against PwC and its Senior Partner - Mr. Deva Rodrigo and E&Y and its Senior Partner - Mr. Asite Talwatte as well as their other Partners and had recommended to the 'Council' that a 'Disciplinary Committee' be appointed towards concluding the investigation and that the 'Council' has to date not appointed the statutorily mandated 'Disciplinary Committee' as per Section 17 (2) (b) of the Act of incorporation of the ICASL."

> "11)Section 17 (2) (b) of the Act of incorporation of the ICASL clearly stipulates that when an 'Investigation Committee' appointed by the 'Council' *"reports to the Council that a prima facie case of professional misconduct has been made out against a member, the Council shall appoint a disciplinary committee for the purpose of inquiring into the conduct of such member". "*

311. Statements in paragraphs 188 to 213 of the Counter-Affidavit dated 9.1.2008 of the Petitioner, together with Documents **(P28)** and **(P29),** deals with this matter and the facts stated stand undisputed.

312. **31st Respondent ICASL President's Affidavit is without any documents annexed to support the statements therein**.

313. It had been disclosed that **there had been an attempt in December 2007 by Ernst & Young and PWC to take control of the Council of the ICASL, given the pending Ethics Committee findings against them**.

- *vide* ***(13R6(h))*** *– 6.7.2007*

> "13)The unprecedented appointment of the Senior Partner of E&Y - Mr. Asite Talwatte to the key decision making 'Council' of the ICASL, subsequent to the unprecedented unlawful premature termination of the period of office of another 'Council' member on the eve of the mandated inquiry by a 'Disciplinary Committee' of the 'Council' itself of Mr. Talwatte amongst several others."

- *vide* ***(P28)*** *– 14.12.2007, read with* ***(P29)***

> "I am also informed that Mr. Asite Talwatte – Senior Partner, Ernst & Young has proposed Mr. Sujeewa Mudalige, as a Vice Presidential Candidate and Mr. Channa Manoharan, as a 'Council' Member at this Elections."
>
> "Mr. Sujeewa Mudalige and Mr. Channa Manoharan are both Partners of Price Waterhouse Coopers and it is not without significance, that both of them were in the Sri Lanka Team that comprised the PwC Indonesia Team that carried out the scandalous privatization of Sri Lanka Insurance Corporation Ltd., causing a colossal loss to the Government of Sri Lanka."
>
> "In addition, Mr. Lasantha Wickremasinghe – Partner, B.R De Silva & Co., is another Candidate proposed by Mr. Asite Talwatte, as a 'Council' Member. Significantly, Senior Partner of B.R. De Silva & Co. Mr. Lincoln Piyasena was the only questionable dissenting Member of the 'Ethics Committee' who made a futile did to defend Ernst & Young. Another Ernst & Young Partner – Ms. Lakmali Nanayakkara is also contesting as a 'Council' Member."
>
> "Mr. Asite Talwatte got himself appointed by Hon. Minister Jeyeraj Fernandopulle, then Minister of Trade to the 'Council' of the Institute, after the unlawful removal of an existing 'Council' Member – Mr. Preethi Jayawardene, in violation of the provisions of the Act of Incorporation of the ICASL."
>
> "This was done after the 'Ethics Committee' had decided, after an inquiry, that there was a prima facie case of 'Professional Misconduct' against Mr. Asite Talwatte and Ernst & Young and Mr. Deva Rodrigo and Price Waterhouse Coopers, further to my 'Complain' to the ICASL as far back as 8 August 2005. Although it is mandatory under the Institute Act and Regulations for the 'Council' of the Institute to have **promptly appointed** a 'Disciplinary Committee', the 'Council' whilst you were President, curiously failed and neglected to do so, bringing the Institute into utter disrepute and also acting against the public interest."
>
> "The Act of incorporation of the ICASL as per Section 17 (2) (b) clearly stipulates that when an 'Investigating Committee' appointed by the 'Council' "reports to the Council that a prima facie case of professional misconduct has been made out against a member, the Council **shall** appoint a disciplinary committee for the purpose of inquiring into the conduct of such member" (emphasis added)."

314. Upon the 10-Member Ethics Committee having reported that is a *prima-facie* case of misconduct established against Member/s of the Institute, in terms of Section 17 of the ICASL Act No. 23 of 1959, as amended, the Council of the ICASL, is **statutorily mandated** to appoint a Disciplinary Committee for the purpose of conducting an Inquiry – *viz* ICASL Act No. 23 of 1959, as amended, Section 17 (2)(a) and 17(2)(b)

> "(a) Where the Council has reasonable cause to believe, whether on complaint made to it **or otherwise,** that any person who is a member of the Institute has been guilty of professional misconduct, the Council may appoint an investigating committee to inquire into and report to the Council, whether a prima-facie case of professional misconduct has been made against such member" *(Emphasis added)*

"(b) Where an investigating Committee appointed under paragraph (a) reports to the Council that a prima-facie case of professional misconduct has been made out against a member, the Council **shall appoint** a disciplinary Committee for the purpose of inquiring into the conduct of such member." *(Emphasis added)*

315. The **First Schedule** to ICASL Act No. 23 of 1959, as amended, stipulates the **'Rules as to Inquiries by Disciplinary Committees'** and the **Second Schedule** thereto defines, as to what constitutes **'professional misconduct'.** Relevant Items of the **Second Schedule** are cited below:

A. "Professional misconduct" means any of these acts or omissions:

1. for all members

1.1 failing to comply with the Sri Lanka accounting and auditing or other technical standards as adopted by the Council.

1.2 Being grossly negligent in the performance of his professional duties.

1.3 Using information acquired in the course of his practice or employment for the advantage of himself or another person without the consent of his prospective client or employer, or client or employer, or former client or employer.

1.4 Disclosing information acquired from his prospective client or employer, or client or employer, or former client or employer, to another person, without the consent of such prospective client or employer, or client or employer, or former client or employer, or otherwise than as legally or professionally required.

1.5 Failing to keep a record of professional advice given to his client or employer.

1.9 Directly or indirectly being a party to any act which will bring the Institute or the profession into discredit or disrepute.

1.11 Exercising undue influence, directly or indirectly, in securing election or nomination to the Council, including making incorrect or misleading statements, or making an offer or inducement to obtain votes.

2. for all practising members

2.7 Having a mutual business interest with a client for whom he or his partner or firm performs a reporting assignment, or with a proprietor, principal shareholder, director, officer, or employee of such client.

2.14 Sharing his profits or fees directly or indirectly with a person other than another practicing member, provided that a payment based on profits to a person in the employment of the member of his firm, or a retired partner or his nominee or representative, shall not be deemed to be sharing profits.

2.20 Rendering professional services to an illegal business or activity, except as may be necessary to enable such business or activity to render financial statements and opinions thereon prepared by a member for the State or a State agency.

2.21 **Failing to declare to the State or a State agency his position regarding the professional services he renders to an illegal business or activity and the capacity in which he acts.**

316. In terms of Section 17(2)(a) of the ICASL Act No. 23 of 1959, as amended, the ICASL Council **on its own motion** ought to have expeditiously taken action in the face of the damning castigations contained in the COPE Report to Parliament in January 2007.

317. It is evident that the ICASL has failed and neglected to take action, as it ought to have, on the initial Complaint made by a member of public, as far back as **August 2005**, and in the face of the damning castigations in the COPE Report to Parliament in **January 2007**.

- *vide* **(13R6(h))** – 9.7.2007

> "2) One cannot help wonder, whether the apparent ugly 'cover-up' by the ICASL has anything to do with the fact that the statutory auditors of Aitken Spence & Co. Ltd., and Distilleries Company Sri Lanka Ltd. are KPMG Fords, Rhodes, Thornton & Co., of which you are a Partner ?"

- vide (13R6(g)) – 24.7.2007

> "The conduct of the Institute of Chartered Accountants of Sri Lanka on my above 'Complaint', made as far back as 8 August 2005, has been Disgraceful! Your 'investigation' which has still not concluded, has violated with impunity, both the statutory requirements and the spirit of the Act of Incorporation of the ICASL and is an ugly, 'cover-up'.

318. **In the face of the disclosures made before Your Lordships' Court,** the ICASL has now informed Your Lordships' Court, through the 31st Respondent, that a **'Disciplinary Committee'** has now been constituted to inquire into the professional misconduct of **only** PWC **and not** Ernst & Young, who, as Auditors of SLIC had a higher and greater duty of care, obligation and responsibility to the Government, as the sole Shareholder of SLIC, whilst PWC were Consultants in terms of Contract **(P2)**.

319. **The ICASL is an Institute statutorily established, and to which the Government has made / makes grants from the Consolidated Fund, admitted by the 7th Respondent, and to the Council of which, the Government appoints nominees; with the Auditor General being an *ex-officio* member thereof**.

320. In terms of Section 19 of the ICASL Act No. 23 of 1959, as amended, any person aggrieved by a decision of the Council, under Section 16 or Section 18 thereof, could Appeal to the Supreme Court.

321. Thus the Council of the ICASL is a *quazi*-judicial body, in which the Parliament has reposed even greater power than the SEC, where appeals against decisions of which lie to the Court of Appeal.

322. Schedule containing **'Dicta'** from relevant **Judgments** on '**Duties and Responsibilities'** of '**Auditors and Accountants**' is attached hereto marked **"A".**

323. The foregoing **'Dicta'** from well known Judgements, **which even a student learning auditing ought be conversant with**, pertains to the following:

- **integrity, duties *vis-a-vis* window dressing of accounts;**
- **professional negligence and careless approach of accountants and auditors;**

- **auditors duty when suspicion and fraud is aroused and their duty when put upon inquiry 'to probe to the bottom';**

- **in respect of implied terms which the law imports into an contract, which terms the parties have left unstated because they considered them too obvious to express;**

- **duty to take care in word as well as in deed is not limited to contractual relationship or to relationship of fiduciary duty, but include also relations which are 'equivalent to contracts', that is where there is an assumption of responsibility and the onus of the auditors to show that damage had not resulted from any want of duty on their part;**

- **an auditor who gives shareholders means of information instead of information does so at his peril, particularly in relation to something that is seriously wrong;**

- **action in negligence will lie against the auditor when there is a lapse of duty of care owed and the failure to discharge that duty given the foreseeable damage resulting from that failure;**

- **auditor owes a duty of care to shareholders in tort, as well as in contract;**

- **in the case of a professional man the duty to use reasonable care arises not only in contract , but also imposed by the law apart from contract, therefore actionable in tort;**

- **accountants, surveyors, valuers, and analysts, whose professional occupation is to examine records and other things and to make reports which their clients and other people rely in ordinary course of business, owe a duty of care;**

- **professional men have a duty use care in their work which results in their reports;**

- **accountants owe a duty to their clients, who take some actions on their reports:**

- **a document may be false, not because of what it states, but because of what it does not state or what it conceals or omits;**

- **a party seeking information and advice trusting the other to exercise such degree of care as the circumstances required and when he "ought to have known" that the party was relying on what a responsible man could have done, owed duty of care;**

- **there is no good reason why accountants should not accept legal responsibility to parties who rely on financial statements submitted by them;**

- **there is no reason why this duty to disclose should not be imposed upon an accounting firm, which makes representations it knows will be relied upon;**

- **the elements of 'good faith and common honesty' which govern the businessman should also apply to public accountants.**

324. Auditors and Accountants and other professionals, directly or indirectly, wittingly or unwittingly, have contributed to the perpetration of corporate fraud and corruption in our country, more particularly, the pillage and plunder of public resources, which belong to the people.

325. Society has a legitimate expectation that professionals, moreso particularly, Auditors and Accountants, would not act as aforesaid, but on the contrary, would combat fraud and corruption, as they are professionally bound and obligated to do.

326. **This 'transaction in issue' is a 'shocking exposure' of blatant breach of professional duties and obligations and fiduciary expectations by society from Auditors and Accountants**.

327. **Many a privatization in our country have been perpetrated by professional Auditors and Accountants, causing colossal losses and damages to the Government i.e. the public.**

328. Auditors and Accountants, misusing their professional knowledge, being involved in the perpetration of fraud and/or aiding and abetting and/or colluding therewith, is akin to professional Medical practitioners, misusing their professional knowledge, being involved in murder and/or aiding and abetting and/or colluding therewith.

329. **In this instant 'transaction in issue', the inaction on a public Complaint by the ICASL, a *quazi* judicial body, coming under the jurisdiction of Your Lordships' Court, is indeed appallingly shocking. *What redress will the public have* ?**

330. The 'indifference' and 'inaction' of the ICASL on a Complaint made by a member of the public, **as far back as August 2005,** had continued, even after the **damning COPE Report to Parliament in January 2007**, damningly castigating **both** Ernst & Young and PWC, including exposing serious issues of **'Conflict of Interest'**.

331. In the shocking **Enron** fraud, involving the falsification of Accounts, the law enforcement authorities dealt with the Enron Auditors, **Arthur Anderson,** as warranted, resulting in **Arthur Anderson**, a then global giant ceasing to exist !

332. I respectfully urge that Your Lordships' Court be pleased to deal with the **conduct and actions of Ernst & Young, PWC and the ICASL,** and be pleased to make Orders, as Your Lordships' Court shall seem fit and meet, **so that it would be a severe deterrent for professional Auditors and Accountants and the ICASL to so act in the future.**

20. CAUSING LOSS AND DAMAGE TO AND MISAPPROPRIATION OF PUBLIC PROPERTY

333. In terms of Article 28 of the Constitution it is a **'fundamental duty'** of **every person** to preserve and protect public property, and to combat the misuse and waste of public property.

334. Both 'elected' and 'selected' public officers have taken an oath or affirmation to uphold and defend the Constitution.

335. In Judgment in SC FR Applications Nos. 10/07 – 13/07, Your Lordships' Court held that the limitation of the, 'not justiciable stipulation in Article 29 of the Constitution', ***would not be a bar to interpret other provisions of the Constitution***.

336. In this instance, it is respectfully submitted, that likewise, in enforcing the provisions of the **Offences Against Public Property Act No. 12 of 1982**, and the provisions in **Chapter X and Chapter XI of the Penal Code on the Contempt of Lawful Authority of Public Servants**, and False **Evidence and Offence Against Public Justice,** duty and obligation mandated in Article 28 of the Constitution would be relevant and applicable.

337. The Offences Against Public Property Act No. 12 of 1982, as amended by Act No. 28 of 1999, stipulates that any person, whether public servant **or otherwise**, is liable for the following Offences:

1. **Mischief to public property.**
2. **Theft of public property**
3. **Robbery of public property**
4. **Misappropriation or criminal breach of trust of public property**
5. **Cheating, forgery or falsification in relation to public property**
6. **Attempting to commit any one of the above offences**

338. Punishment for any one of the above Offences is **imprisonment not exceeding 20 years and a fine of 3 times (i.e. 300%) the value of the public property in respect of which such offence was committed**.

339. "Public property" is defined in the said Act No. 12 of 1982 thus – *" 'Public property' means the property of the Government, any department, statutory board, public corporation, bank, co-operative society or co-operate union."*

340. **In this instance, the Shares of SLIC, the highly valuable property of the Government had been wrongfully, unlawfully and fraudulently misappropriated, with a dubious and gross under-valuation of SLIC**.

341. **Furthermore, on the basis of surreptitiously retrospectively falsified Accounts of SLIC owned by the Government, attempt had been made to fraudulently claim Rs. 2,100 million from the Government by several Respondents, with several other Respondents aiding and abetting and/or acting in collusion in the making of such colossal fraudulent claim from the Government**.

342. Both **'elected' and 'selected' public officers**, and **all those of the private sector** would be liable for punishment in terms of the Offences Against Public Property Act No. 12 of 1982 and the applicable Sections of the Penal Code, for any proven commission of any such offences, in relation to the perpetration of the transaction in issue.

343. Since the Offences Against Public Property Act No. 12 of 1982 **is applicable to any citizen**, it would apply also to those from the **private sector**, and in the case of **corporate bodies**, in this instance, 24th Respondent, 25th Respondent, 26th Respondent, 27th Respondent, 28th Respondent and 29th Respondent, then it is respectfully submitted, that relevant **Directors of such corporate bodies** would carry the liability for punishment for any proven commission of any such offences stipulated in the said Act, as well as in the applicable Sections of the Penal Code; **so also would it be applicable to Partners of Ernst & Young and PricewaterhouseCoopers (PWC).**

344. In Judgment in SC (FR) Applications Nos. 10/07, 11/07, 12/07 and 13/07 Your Lordships' Court, *inter-alia*, observed thus:

> "The relevant principle of interpretation with particular reference to the interpretation of provisions in a Constitution is set out in Bindra's Interpretation of Statutes – 9th Ed, page 1182 as follows:
>
> > ***"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument."***
>
> "In applying these principals of interpretation I am of the view that the broad phrase "National Policy" appearing at the top List II should be interpreted together with the relevant provisions in Chapter VI of the Constitution which contains the "Directive Principles of State Policy."
>
> "**The limitation in Article 29 which states that the provisions of Chapter VI are not justifiable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution**. Article 27 of Chapter VI lays down that the 'Directive Principles of the State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministries in the enactment of 'laws and the governance of Sri Lanka for establishment of a just and free society." Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert."

345. In the foregoing context, the question is most respectfully posed to Your Lordships' Court, as to whether, **a person, who has blatantly violated the fundamental duties obligated to be performed in terms of Article 28 of the Constitution**, in this instance – 'to preserve and protect public property, and to combat misuse and waste of public property', **could enjoy fundamental freedoms**, in this instance – 'the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise' in terms of Article 14 of the Constitution, since Article 28 stipulates, that the exercise and enjoyment of rights and freedoms is **inseparable** from the performance of duties and obligations, and accordingly it being the duty of every person in Sri Lanka to duly perform the fundamental duties in terms of Article 28 of the Constitution ?

346. **It is respectfully submitted that the perpetration of fraud on the Government and the public and/or the misappropriation of public property and/or collusion therewith or any attempt to have done so are grave crimes warranting deterrent punishment, and any attempt to have covered-up such crime would be a far graver crime, also warranting deterrent punishment**.

347. Those Respondents, who have held and/or are holding elected and/or selected public office, and some of whom have evaded filing Affidavits in these proceedings to assist Your Lordships' Court and/or to explain their conduct and actions, **ought to be held accountable, responsible and liable, for the any offences aforesaid, under and in terms of the law, and dealt with severely and punished, as a stringent deterrent to those others, to prevent the pillage and plunder of public resources, which rightfully belong to the people of the country**.

348. It is respectfully submitted that, **in the given facts and circumstances**, the Petitioner stands well and truly entitled to all the reliefs prayed for in his Petition in the interest of the people of the country, and that therefore, Your Lordships' Court be pleased to grant all the said reliefs, **annulling this transaction in issue in its entirety and recovering funds and/or assets of SLIC, which may have been siphoned out of SLIC, and punishing and/or causing to be punished under the law all those Respondents, who have been involved in perpetrating a colossal fraud on the Government i.e. the people, and also attempting to perpetrate a colossal fraud by making a fraudulent claim of Rs. 2,100 million from the Government i.e. the people.**

21. 'STRICT ENFORCEMENT' OF THE 'RULE OF LAW' GLOBALLY AGAINST COMMERCIAL / 'WHITE COLLAR' FRAUDS / CRIMES

349. As a Member of the

- International Consortium on Governmental Financial Management,
- International Association of Anti-Corruption Authorities, and
- Association of Certified Fraud Examiners,

I receive information on instances in other countries of fraud, involving well known corporates, and actions taken thereon by the relevant law enforcement authorities, **disclosing that international corporate status and/or standing and/or reputation, is no bar and/or shield against investigation, prosecution and punishment by the law enforcement authorities**. I respectfully annex reports in relation to some of such instances, Scheduled marked **"C",** for the kind attention of Your Lordships' Court.

350. The last Case cited, as per Schedule **"C"**, is a Case, as far back as 1991 / 1992 in Singapore, **a celebrated public prosecutor, Knight Glenn Jeyasingam, a recipient of a Gold Medal for Public Administration and Director of the Commercial Affairs Department**, dealing with 'White Collar Crimes', **was prosecuted for offences of far lesser gravity, than those disclosed in this instant transaction in issue**.

351. Previously, 4 Cabinet Ministers of Singapore had been sacked and a Finance Minister had committed suicide being unable to face the consequences.

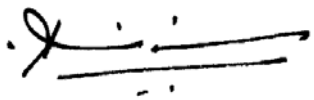
352. The foregoing were during the growing and developing years of Singapore, and **such strict enforcement of the 'rule of law' had not deterred Singapore attracting foreign investors**, whereas on the contrary, ***Singapore forged ahead attracting foreign investors to reach great heights of development, as seen today***.

353. **Hence, the puerile proposition that strict enforcement of the 'rule of law', will deter foreign investors is baseless and is adduced to cover-up those fraudulent and corrupt**.

354. **Absence of the strict enforcement of the 'rule of law' would be a deterrent to attract serious foreign investors, and would only attract 'cabals', who would rob the country, impoverishing the people**. This 'phenomenon' has now been identified, as **'economic terrorism',** and those involved referred to as **'economic terrorists'** / **'economic hit-men'**, who pillage and plunder the resources of a country, impoverishing the poor, resulting in social injustice, leading to insurrection, and creating fertile ground for **'military terrorism'**.

355. The penultimate Case cited, as per Schedule **"C"** is a recent instance case, where the **European Union has cut-off financial assistance to Bulgaria, for not meaningfully and effectively taking action against corruption and organised crime**.

Colombo, 4th day of August 2008



13th Respondent

A

DUTIES & RESPONSIBILITIES OF AUDITORS AND ACCOUNTANTS

'DICTA' FROM RELEVANT JUDGMENTS

Appellate Court in the American Case of *Board of Country Commissioners of Allen Country v. Bakery,* 102 P. 2d 1006 (1940), at page 1010:

> **"When reliance can no longer be placed on an auditor's report, the coin of the audit's value has become counterfeit."**

A document may be false 'in a material particular' in that, although as Wright J. stated in his charge to the jury in *R. v. Kylsant and Morland* (1931), Acct. L.R. 109, it is not false:

> **"in the sense of what it states but in the sense of what it conceals or omits ….. the documents as a whole may be false, not because of what it states, but because of what it does *not* state and because of what it implies."**

In the American Case of *Ryan v. Kaune* (1969), 170 MW2d 395, Lawson J.:

> **"… it is clear to us that accountants … must perform those acts that they have agreed to do under contract and which they claim have been done in order to make the determinations set forth and presented in their report…if…a party limits the investigation of an independent accountant …. the accountant can note this in his report and thus limit the basis upon which an aggrieved party can obtain relief against him …"**

Duty of the auditor after signing his Report. In *Fischer v. Keltz* (1967), 266 F. Supp.180, the auditors duly reported upon the company's accounts. Thereafter the auditors were instructed to carry out a special study of the company's income and expenditure, both past and present. The work started shortly after the audit was completed. During the course of the work the auditors discovered matters which showed the audited accounts were in fact inaccurate. The auditors did nothing but waited until their special study was released over a year later. Meanwhile the company issued interim accounts based upon the continuingly inaccurate internal accounts. **The trial judge held that the auditors could be held liable for failure to disclose to the public sooner that the earlier audited accounts were wrong**.

In re The Republic of Bolivia Exploration Syndicate Ltd (1914), I Ch. 139, at page 171:

> **" … when it is shown that audited balance sheets do not show the true financial condition of the company and that damage has resulted, the onus is on the auditors to show that this is not the result of any want of duty on their part."**

In *Irish Woolen Co. Ltd. v. Tyson, et al.* (1900), 26 Acct. L.R. 13, the auditors were held to be negligent for not being put upon inquiry by entries (of which they knew) raised after the books had been ruled off at the balance sheet date, **but dated previous thereto**.

In *Esso Petroleum v. Marden* (1976), Q.B. 801, Lord Denning:

> **"… in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort."**

American Cases such as *Rusch Factors Incorporated v. Levin* (1968), 284, F. Supp. 85, where it was held by Pettine J. that an accountant should be liable in negligence for careless financial misrepresentation relied upon by actually foreseen and limited classes of persons. Also in *Ryan* (see paragraph 13) Lawson J. after specifically approving *Rusch supra* said :

> **"We know of no good reason why accountants should not accept the legal responsibility to know third parties who reasonably rely upon financial statements prepared and subsequently submitted by them."**

In *re Kingston Cotton Mill,* Lopes L.J. considered the degree of care and skill required when he said at page 288 :

> **".....It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case."**

In the American Case of *Tenant's Corporation v. Max Rothenburg & Co.* (1970), 36 A.D. 2d 804;

> **"… even if [the] defendant were hired to perform only "write-up" services, it is clear beyond dispute that it did become aware that material invoices … were missing, and accordingly, had a duty to at least inform [the] plaintiff of this."**

Court of Appeal in *Candler v. Crane Christmas & Co.* (1951), 1 All E. 426 Denning L.J. (now Lord Denning) at page 433, 434, 435 :

> **"… First, what persons are under such duty? My answer in those persons, such as accountants, surveyors, valuers and analysts whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people – other than their clients – rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports."**
>
> **" They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity as accountants ... but they are ... under a duty to use reasonable care in the preparation of their accounts and in making of their reports."**
>
> **"…take accountants….They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent."**
>
> **"…It extends, I think, only to those transactions for which the accountants knew their accounts were required."**

The importance of the judgment of Denning L.J arises from the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd* (1964), A.C. 465, when the decision of the majority in *Candler's* case was expressly overruled and Denning L.J.'s dissenting judgement was approved as correctly stating the law. H*edley Byrne* expressly overruled the principle upheld by the majority of the Court in *Candler's* case that a duty of care was restricted to those cases where a contractual or fiduciary relationship existed. Lord Devlin, at page 528, said :

> **"I think, therefore, that there is ample authority to justify … saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relations which … are "equivalent to contract", that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract."**

Hedley's case has in one respect extended the scope of the duty beyond the limits stated by Denning L.J. Thus Lord Reid, at page 486, said in relation to the limits of duty:

> **"…I can see no logical stopping place short of all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done."**

In the American Case of *McBride's Ltd. v. Rooke and Thomas* (1941), 4 D.L.R. 45, 49 MacLean J.:

> **"… Apart from his legal duties it appears that the duty of an auditor on commencing his duties with any client is to familiarise himself with the system of bookkeeping conducted by his client. In doing so he should get his information from direct examination of the books, with such explanation from employees in charge of records as may be required to supplement that examination, as may be necessary for proper examination of the bookkeeping system. The auditor should ascertain in his examination of the bookkeeping system whether the bookkeeping operates as an internal check, then the extent and thoroughness of that internal check … If there were no internal check he should have to commence his work from the earliest point …"**

The purpose of an audit was succinctly stated by Lindley L.J. in *re London and General Bank* (No. 2) (1895), 2 Ch. 673, at page 682, 683, 684, 685:

> **"It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit."**
>
> **"duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company."**
>
> **"… A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms …"**
>
> **"… An auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril and runs the very serious risk of being held judicially to have failed to discharge his duty."**

"… The duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement."

"… I have no hesitation is saying that [the auditor] did fail to discharge his duty to the shareholders in certifying and laying before them the balance sheet … without any reference to the report which he laid before the directors and with no other warning than is conveyed by the words "the value of the assets as shown on the balance sheet is dependent upon realisation"

Lord Russell C.J. in *Thomas v. Devonport Corporation* (1900), 1 Q.B. 16, at page 21

" …. I do not subscribe to the doctrine that [the auditor's] sole duty is to see whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report …"

Moffitt J. in the *Pacific Acceptance* case *supra page 53, 62, 64, 65, 75, 76, 77*

"... auditors perform their duty by making communication ... to the ... management or directors, during the course of the audit ... They do not perform such duty if, having uncovered fraud or having suspicion of fraud in the course of the audit, they fail promptly to report it to the directors and perhaps in the first instance ... immediately to management. If it involves a senior executive or a director ... the board should ... be informed without delay.'"

"If during an audit, there are a substantial number of irregular or unusual matters encountered … and some, singly or in combination, indicate the real possibility that something is wrong, then to separate each off into watertight compartments and pose the question whether it individually raises a suspicion of fraud and on receiving a negative reply … [the auditor] does nothing further … denies both the true tests of legal duty of care and common sense."

"'The duty to pay due regard to the possibility of fraud has been recognised by the Courts and by the auditing profession and by the very nature of some of their procedures - for example, the surprise nature in an "unannounced cash count ".

"An auditor pays due regard to the possibility of fraud or error by framing and carrying out his procedures, having in mind the general and particular possibilities that exist, to the extent that if a substantial or material error or fraud has crept into the affairs of the company he has a reasonable expectation that it will be revealed."

"… if the auditing profession or most of them fail to adopt some step which despite their practice was reasonably required of them, such failure does not cease to be a breach of duty because all or most of them did the same."

> **"[The auditor] does not contract to provide or work to a written programme … However, if he does not work with the tools usually regarded as necessary for efficiency and has no written programme, … then if the work done is found to have errors and omissions it is somewhat easier to infer … negligence … a written programme … serves many purposes. It acts as a direction to clerks as to the checks they are required to make. It acts as a document against which the reviewing audit manager or audit partner can check and review the work of those under him."**
>
> **"If the programme is to serve its intended purpose it is obvious that a person of sufficient seniority must take responsibility for its content either by drawing it up or at least by approving it after a careful review."**

The unrestricted view of the auditor's liability was expressed in the American Case of *Fischer v. Kletz supra.* There District Judge Tyler said:

> **"Generally speaking to I can see no reason why this duty to disclose should not be imposed upon an accounting firm which makes representations it knows will be relied upon by investors. To be sure certification of a financial statement does not create a formal business relationship between the accountants who certifies them and the individual who relies upon the certification for investment purposes. The act of certification, however, is similar in its effect to a representation made in a business transaction: both supply information which is notionally and justifiably relied upon by individuals for decisional purposes. Viewed in this context of the import of non-disclosure on the injured party, it is difficult to conceive that a distinction between accountants and parties to a business transaction is warranted. The elements of "good faith and common honesty" which govern the businessman presumably should also apply to the statutorily independent public accountant."**

Lord Denning in *Fomento Ltd v. Selsdon Ltd.* (1958), 1All E.R. 11, at page 23, defined the auditor's proper approach to his work thus :

> **"…..he must come to it with an inquiry mind – not suspicious of dishonesty…… but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none."**

In *Pacific Acceptance v. Forsyth* (1969), 1 M.F.W.R. 299, **the auditors were held liable for accepting without further inquiry the explanations given by the company's general manager for 'numerous' irregularities**.

In re Thomas Gerrard & Son Ltd (1967), 3 W.L.R. 84, at page 97, Pennycuick J. :

> **"I will assume in [the auditor's] favour that [he] was entitled to reply on the assurances of [officers of the company] until he first came upon the altered invoices, but once these were discovered he was clearly put upon inquiry and I do not think he was then entitled to rest content with the assurances of [such officers] however implicitly he may have trusted [one of them]."**

Lord Alverston in the *London Oil Storage Co. Ltd.* case supra described the extent of the auditor's duty when put upon inquiry very succinctly :

> **"if his suspicion is aroused, his duty is to "probe to the bottom ….."**

B

Excerpts of Opinion on 'Conflict of Interest' as per submissions to COPE by Mr. Suhada Gamalath, Secretary, Ministry of Justice as Member, PERC

The legal principles relating to conflicts of interest. I think, to start with biblical statements, it says that 'you cannot serve two master's at the same time and the person who does it will end up in serving none.'

That is the basic principle and that comes from that particular concept. It is an age old principle. The most germane to the entire concept is the definition that should be given to the world 'fiduciary' and the obligations on the part of the professional who is performing some kind of a duty, where there is some trust placed on him.

Now, the world 'fiduciary' is coming from the word fiducial, and the Webster's Dictionary defines the word 'fiducial, as, 'nature of faith or practical confidence and that is the dictionary definition of the word fiduciary. What is very relevant to the 'fiduciary' is '(1) pertaining to a position of trust or confidence. (2) unwavering, trustful, undoubting relying on the confidence of the public for paper currency or value.'

That is the dictionary definition of the word fiduciary. That is very relevant to the whole tapestry of the concept relating to conflict of interest in the legal sense.

Now, I have this book with me 'Conflicts of Interest and the Chinese Walls' second edition by Charles Holvendor and Simens Salsdor. It is supposed to be one of the Authorities on the subject and for your edification, I will now read out some passages from the book, so that it is self-explanatory and it is very simply stated, what it means to be the conflict of interest in a legal matter. I am quoting.

> "the term ' conflict of interest' is used in a number of wholly different contexts and to mean a number of different things. It is necessary therefore to be precise and to define the terms which will be used throughout this book.
>
> The first type of conflict is an existing client conflict. The professional who acts for two clients at the same time will normally owe fiduciary duties to both"

There, the word 'fiduciary' comes and it is very germane to this.

"The precise scope and extent of the fiduciary duty may depend upon the terms of the retainer. But, the most notable feature of the fiduciary duty is an obligation of loyalty."

I would like to emphasize on that. The crux of the matter is that there is an obligation on the part of the retainer to observe that amount of loyalty.

> "Where the professional is asked to act for two clients with conflicting interests at the same time the fiduciary obligations of loyalty owe to each will clash and there is an existing client conflict. If he accepts instructions from both he will then be in breach of fiduciary duties to one or both clients and unable to carryout his obligations to both. The conflict is a conflict of the firm, partnership or company and not merely of the

individual partner. For this reason, the conflict extends beyond the individuals within the firm who acts for the clients to the firm it self. It follows to accept instructions from a second client where there is a conflict of interest gives rise to an automatic breach of fiduciary duty unless both clients have consented. Even when both clients have consented there will be circumstances in which the professional cannot act or continue to act because he would be professionally embarrassed in doing so. These principles are nothing to do with whether the professional has obtained relevant confidential information. They are based on the fiduciary obligation of loyalty."

So, it is the very basic premise upon which the whole concept has now been developed.

Hon. Sirs, I think this matter was very lengthily dealt with in one of the judgments in the U.K. That is a famous case called Bolkiah Case where the Sultan of Brunei's brother was involved in some kind of breach of confidentiality matter and their Lordships had gone into the matter very extensively and finally summarized the principles involving this whole matter in the following manner. Now I quote from the judgment.

1. An existing client conflict, if he accepts instructions from both he will then be in breach of fiduciary duty to one or both clients and unable to carryout his obligations to both. The problem is one of conflict, not merely confidential information. The conflict is the conflict of the firm, partnership or company and not merely of the individual partner. For this reason the conflict extends beyond the individuals within the firm, who act for the client to the firm itself.

2. The professional who has an existing client conflict may not act without the informed consent of both clients. There are numerous ways of obtaining consent expressly or by implication. If he has consent in principle he may act. But, there will be circumstances where the conflict is such that he cannot act even with consent.

3. "Where the conflict is between an existing client and a former client, there are no competing fiduciary duties because there is no fiduciary obligations of loyalty to the former client. Although, there is an obligation to protect confidentiality."

   This is very important. Once a person has left the organization and joined another organization which also has similar kind of interest in existence, how should a person be acting?

   That is a very clear principle behind this matter. Although there is an obligation to protect confidentiality, breach of this obligation been classified as breach of fiduciary duty. So even if you have moved out of that particular institution and assumed duties at another place, you are not supposed to break that amount of confidentiality that has been based on the information relating to that first company's activities.

4. "The professional who receives relevant confidential information from a former client may not act for a client whose interest conflicts with the former client unless the firm can show that there is no real risk of disclosure. The risk must be a real one, not one that it is merely fanciful or theoretical."

5. The professional may be able to discharge his high burden by showing that effective internal measures are in place which will prevent disclosure. The effect of such arrangements will be to provide the firm within a firm. But these measures will really be effective if organized to an *ad hoc* basis as opposed to being part of the organizational structure of the firm.

Those are the five guidelines given by the judgment as the first case on conflict of interest reached by the House of Lords obviously require special attention. So these are the basic principles relating to this matter.

And then, what are the duties involved in this kind of a matter is the second question. Now I have explained what conflict of interest means and then come to the other point what are the duties involved in a situation like this and how should one be observing these duties in his capacity as an employee of a company where this confidentiality is a very important matter. It stares:

> "Not surprisingly different authorities expressed the duties in slightly different terms but one will not go far wrong in focusing on four facts of the obligation.
>
> 1. There should be no conflict.
> 2. There should be no profit.
> 3. There should be undivided loyalty.
> 4. There should be absolute confidentiality."

So if you have moved out from one company to another company, from one institution to another institution, these four cardinal principles are still there to guide you in your activities in your capacity as an employee of that particular place and the very important factor is that fiduciary obligations and confidentialities are the most important cardinal principles that should be taken in to account in determining these to maintain the confidentiality.

> "Breach of the obligation of confidentiality gives rise to equitable remedies such as accountant an account of profits. In Walk Investment Limited versus Mclain, the Privy Council left opened the question whether the obligation not to misuse confidential information was properly classed as a fiduciary duty. What was important was the content of the duty, not its label."

That is the most important principle. What is important is that the content of the duty that has to be preserved by adhering to this need to observe confidentiality.

> "What was important was the content of the duty, not its label. Whether or not it was properly characterized as a fiduciary obligation, the obligation not to misuse confidential information did not carry with it an obligation of loyalty. To that extent it is important, distinguished it from the usual type of fiduciary obligations so that means former clients conflicts do not raise issues of fiduciary relationships. That also affects remedies. It is thus preferable to regard the professional as owing two distinct types of fiduciary duty. The central fiduciary obligation of loyalty will normally terminate with the retainer. The obligation of confidentiality survives the retainer but to the extent that it can be described as a fiduciary obligation it does not in itself carry with it an obligation of loyalty."

So there are two matters. One is that you can terminate your loyalty once you move out of that particular firm to another place. But at the other place, the confidentiality that should be observed in relation to the information you gathered when you were working as an employee at a different place should still be observed. Because that is one of the most important cardinal principles that governs the spectrum of conflict of interest.

I must say, it is a very large subject on which there can be a very lengthy submission on the legal side of it and I would like to now cite another case from the United States which is dealing with the fiduciary duties of a director and this is a judgment by Nelson Justice in the case of "Hospital Products vs United States Surgical Corporation in 1984", I quote.

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations, for example, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company and partners. The critical feature of these relationships is that the fiduciary undertakes to agrees to act for or own behalf of or in the interest of that other person in the exercise of power or discretion which will affect the interest of another person in a legal or practical sense. The relationship between the parties is, therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his possession."

These are very important things to be born in our mind. I would like to read that part again.

> "The relationship between the partner is, therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his possession. The expression for, on behalf of and in the interest of signified that the fiduciary act in a representative character in

> the exercise of his responsibility to adopt an expression used by the court of appeal. It is partly because the fiduciary exercise of the power or discretion can adversely affect the interest of a person to whom the duties owned and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interest of the person to whom it is owed."

So that is the basic premise upon which the whole thing is built up. The edifice upon which the concept is built up is that, it states as thus, once again,

> "It is partly because the fiduciary exercise of the power or discretion can adversely affect the interest of the person to whom the duties owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interest of the person to whom it is owed."

So even if you have left the organization and joined another place there is this obligation still in existence, it persists because there is that not the loyalty, loyalty is for one person, for the employer, but the fiduciary confidentiality, that duty is absolutely necessary to be observed by any person still remain intact and one has to be observing those principles to the letter.

Those are basically the principles governing this. Once again, I would like to go back to another matter. This is about how long the obligations of the fiduciary continue. I will finish it with that comment. The Lord Millot's speech in Bdkiah Case that I cited earlier recognizes that the fiduciary relationship comes to an end with the termination of the retainer. Thereafter, the professional has no obligation to defend and advance the interests of his former client although he has a continuing duty to preserve the confidentiality. This is the most important thing. There is a very fine distinction that has been made between loyalty and preservation of this confidentiality. The confidentiality of information imparted during his subsistence. In some professions, there may not always be a formal retainer although it will usually be relatively easy to tell whether the professional has existing obligations to a client other than the duty of confidentiality. In most cases involved in conflicts of interest therefore, it will be possible to draw a clear line at the end of the retainer. What goes before is governed by the law of fiduciaries and what comes after his concern with confidential information. It is for consideration whether the position is in fact as clear-cut.

Prof. Fin's works contemplate a continued relationship of trust and confidence which may form the basis for relief to prevent the solicitor from acting in the opposite interest even after the termination of the retainer and even when no confidential information has been transmitted. That is a very important one. I will read it again. It is for consideration whether the position is in fact as clear cut. Prof. Fin's works contemplate a continued relationship of trust and confidence which may form the basis for relief to prevent the solicitor from acting in the opposite interest even after the termination of the retainer and even when no confidential information has been transmitted.

C

REPORTS ON THE INTERNET ON SOME INTERNATIONAL INSTANCES OF FRAUD, SOME INVOLVING 'WELL KNOWN' CORPORATES

- EU fines Microsoft record US $1.4 billion
- Former bankers sentenced to 37 months in Enron case
- France : SocGen controls failed, ignored
- Barings Bank - What it's like to lose millions of dollars
- Parmalat - 'Europe's Enron' trial opens amid concerns
- Mitsui to shut Singapore operations after alleged fraud, police report filed
- World Bank 'uncovers India fraud'
- Scandal-Plagued Samsung Chairman Quits
- UK £ 36 million fine for Severn Trent over false data
- Aventis to pay US $190 million to settle drug-price fraud case
- Saudi prince 'received arms cash'
- Swiss prosecutors says FIFA's former marketing partner paid bribes
- Serious Fraud Office to pursue Goldshield price-fixing case
- Bureaucrat guilty in $145 million Canadian Department of National Defence invoicing fraud
- Trusted Australian banker siphoned off $1.4 million, Court told
- Ex-banker convicted in major Dominican fraud case of US $2.2 billion
- SEC Plans to Fine Nortel in Enforcement Policy Test
- SEC Fines Jailed U.S. Hedge Fund Manager $20 million
- US authorities say stock fraud cost overseas investors $50 million
- Feds Investigate Wall Street's Mortgage Mess, involving Goldman Sachs & Morgan Stanley
- UK Insurance bosses jailed for fraud
- S.C. Economist Pleads Guilty in Fraud in US $90 million Investment Fraud Case in the US
- Dell : Cooked Books and Computers
- Indicted CFO : 'PwC Knew We Backdated'
- Accounting scandal rocks Alfred McAlpine
- Woman boss gets death penalty for fraud in east China
- US senior GOP Senator indicted
- Barclays Bank faces US $75 million fraud suit
- Australian Bank Fraud - US $2.2 billion
- Nortel Networks Corp. Canada - Fraud Suit C $27 million
- EU cuts funding to Bulgaria for failing to fight organized crime
- Singapore Case in 1991/92 re - Knight Glenn Jeyasingam, a celebrated public prosecutor