SC (FR) 534/2011

ADDITIONAL NOTES - 25.11.2011

1. **COMPENSATION CLAIMS BY THE JAPANESE FOR ACQUIRING THEIR SHAREHOLDINGS IN HDL ?**

	No. of Shares
Mitsui & Co. Ltd., Japan	5,530,702
Taisei Corporation, Japan	5,530,702
Other Japanese Investors	1,383,921
Total	12,445,325

12,445,325 Shares @ Rs. 140/- per Share (*Market value prior to acquisition*)

Total Compensation - Rs. 1,742,345,500

2. **HILTON INTERNATIONAL'S MANIPULATIVE FRAUDULENT *'MANOEUVRE'* TO TAKE OVER HDL !**

There was a bomb explosion in October 1997, whereby several buildings in the City, including Hilton Hotel, were extensively damaged.

Consequently, under a 'business interruption insurance policy', Hilton International negotiated a payment of US $ 10 Mn. from the overseas insurers for the re-instatement of the Hilton Hotel.

By Letter dated 16.1.1998, Roy Coxon, Group Risk Manager, Hilton International claimed title to these insurance monies of US $ 10 Mn., paid to HDL for the re-instatement of Hilton Hotel - *vide* Annex X.

On such hypothesis, Hilton International required additional new Shares of HDL to the value of US $ 7 Mn., to be allotted to Hilton International, and the balance US $ 3 Mn., to be re-paid over 30 months, as an increase in the subsequent insurance premia, to the Insurer.

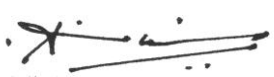
I *refuted such stance* of Hilton International, by my Memorandum dated 28.3.1998 to the HDL Board - *vide* Annex XI.

I successfully established, that such insurance monies of US $ 10 Mn., paid to HDL, rightfully and lawfully, belonged to HDL, and not to Hilton International.

Had it not been for my such *defiant stance*, the US Dollar at that time having been equivalent to SL Rs. 61/-, for US $ 7 Mn., Hilton International would have got additional new Shares of HDL to the value of Rs. 427 Mn., against the nominal Share Capital of HDL of Rs. 452.3 Mn., thereby increasing the nominal Share Capital of HDL to Rs. 879.3 Mn.

Had Hilton International been given additional new Shares, as had been required, to the value of 427 Mn., this would have vested in Hilton International, an ownership of 48.5% of the increased new nominal Share Capital of HDL.

The foregoing fraudulent *manoeuvre* by Hilton International to acquire a 48.5% of the increased new nominal Share Capital of HDL, together with the Shareholdings of Mitsui & Taisei, reduced to 14.2%, would have given a total *'controlling'* Shareholding of 62.7% in HDL to Hilton International and Mitsui & Taisei, *compared against the Government's Shareholding being reduced to 33.4% !*



Nihal Sri Ameresekere

SC (SD) 02/2011 & SC (FR) 534/2011

NOTES ON ORAL SUBMISSIONS

I have filed the above Applications in the national and public interest, and also as a cognizable stakeholder of Hotel Developers (Lanka) PLC (HDL), the only Company scheduled as an "*Underperforming Enterprise*" under Schedule 1 to the impugned Bill.

PREAMBLE

1. If there are so many people there would be so many ideas. Nevertheless, there is only one Constitution.

2. In terms of the Articles 32, 53, 61, 107 and 165 of the Constitution, those who are elected or selected to hold Public Office enter upon such Office, only upon oath / affirmation to uphold and defend the Constitution, which is a 'Fundamental Duty' mandated under Article 28(a) of the Constitution.

3. The 'rule of law' is the very basis of the Constitution, as had been determined by a 7 Member Bench of the Supreme Court in October 2002 – *viz*:

   - "*It had been firmly stated in several judgments of this Court that 'rule of law' is the basis of our Constitution*".

   Hence, we are ruled by the law and not by the President, Government, Cabinet or any other.

4. A 7 Member Bench of the Supreme Court in October 2002 determined thus:

   - "*The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution*"

   Hence, if any organ of the Government or body established under the Constitution were to exercise unfettered power then the foregoing Supreme Court Determination would be rendered a 'fiction'

   The cogent question arises, as to whether not this is really what has happened in the instant matters before the Supreme Court ?

5. A 7 *Member Bench of the Supreme Court in October 2002 determined thus:*

   - *"Therefore, shorn of all flourishes of Constitutional Law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and any such transfer, relinquishment or removal would be an "alienation" of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution".*

   - *"The transfer of a power which attributed by the Constitution to one organ of government to another; or the relinquishment or removal of such power, would be an alienation of sovereignty inconsistent with Article 3 read with Article 4 of the Constitution"*

6. A 7 Member Bench of the Supreme Court in October 2002 also determined thus:

   - "*If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective - (Cited from Indian Judgment)*"

   As per Article 121 of the Constitution, the Supreme Court is vested with the sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, *and none other*.

7. Article 4(d) of the Constitution mandates that the sovereignty is vested in the people, which is *inalienable* and shall be exercised and enjoyed, *inter-alia*, with the *fundamental rights* enshrined in the Constitution, *being respected, secured and advanced by all organs of the Government* i.e. *executive, legislature and judiciary*.

INDEPENDENCE OF THE JUDICIARY

8. In my D.C. Colombo Case No. 3155/Spl instituted on 13.9.1990 *vis-à-vis* the major fraud perpetrated on HDL and the Government, as its Guarantor, the Defendants were very politically powerful and influential parties. District Judge, P. Wijeyaratne demonstrating the independence of the judiciary was simply blind and cared not, as to who those Defendants were.

Thus District Judge, P. Wijeyaratne issued Interim Injunctions on 28.10.1991 in the aforesaid Case restraining payments to the Japanese Consortium, also by the Government under the State Guarantees, *inter-alia*, observing that;

- *"persons are exercising the influence, that they have gained in society, acting together with the Company, to prevent the raising of the questions concerning the matters of the work in connection with the Contracts, the Prospectus ..."*

- *"they having prevented such correct examination, were attempting to, howsoever, effect the payment of monies."*

- *"the significance, that is shown herein, is that generally, the Company which has to pay money, would be raising questions, in respect of such situation, and would not allow other parties to act arbitrarily...If the position, that explains this is correct, then this actually, is an instance of acting in fraudulent collusion".*

In the instant matters before the Supreme Court, the cogent question arises, *as to whether persons who have gained influence and power, are acting in a manner to subvert the rule of law* ?

7. In like manner, District Judge, S.J.W. Ambepitiya in his Order of 30.7.1998, in my D.C. Colombo Case No. 19849/MR, filed against then Minister of Justice & Deputy Minister of Finance G.L. Peiris, *inter-alia*, observing as follows, *struck out the Justice Minster's Answer* and fixed my Case for *ex-parte* Trial - *viz*:

"A fact that is evident thereby is that, whilst the Defendant on the one hand, states that the documents relevant to the case in his capacity as a contesting party in the case, are in his possession, on the other hand states that they are not in his personal possession. It is the conclusion of this Court that the Defendant is not entitled to hold on to both these arguments at one and the same time."

"According to the facts set out hereinabove, this Court holds that the Defendant has defaulted complying with the order made by this Court under Section 102 for declaration of documents. Accordingly, in terms of my application, acting under Section 109(1), I strike out the Defendant's answer and fix the case for ex-parte trial. I entitled to recover costs of this inquiry from the Defendant."

8. The Court of Appeal granted Leave to Appeal in CA LA Nos. 206 & 208/1991 against District Judge, P. Wijeyaratne's Order, having wrongly permitted the Attorney General, representing HDL, and Counsel, representing K.N. Choksy P.C., M.P., to participate in the Court of Appeal, notwithstanding that they had not participated in the District Court inquiry, *observing that the Court of Appeal normally grants Leave in most cases* !
9. Nevertheless, the Supreme Court Bench comprising Justices Tissa Bandaranayake, K.M.M.B. Kulatunga and S.W.R. Wadugodapitiya in SC (Spl) LA Nos. 18 and 19/1992 on 27.5.1992 upheld the objections of my Senior Counsel H.L. de Silva, P.C., and sternly refused to permit the Attorney General and Counsel representing K.N. Choksy P.C., M.P., to participate and be heard, asserting that they were not necessary parties.

10. Consequently, the Supreme Court, Bench in SC Appeals Nos. 33 & 34/1992 comprising Chief Justice G.P.S. De Silva and Justices A. R. B. Amerasinghe and K. M. M. B. Kulatunga, after an Hearing delivered Judgment on 2.12.1992, upholding the Order of the District Judge P. Wijeyaratne and the issuance of the Interim Injunctions, *inter-alia*, observing that;

"I had a reasonable and real prospect of success, even in the light of the defences raised in the pleadings, objections and submissions of the Defendants"

"my prospect of success was real and not fanciful and that he had more than a merely arguable case"

"Interim Injunctions were granted to prevent the "syphoning out of money" from HDL and the Country"

*"**it might be pointed out that it could not entirely be a matter of indifference to the Government** ..... the Government made itself eventually responsible for the repayment of the monies borrowed by HDL" (Emphasis added)*

11. The words "***it could not entirely be a matter of indifference to the Government***" succinctly demonstrated the independence of the judiciary, and *its right to arrest any wrong-doing on the part of the Government,* and to state that – '***the Government can do no wrong'*,** demonstrating the task of the judiciary of keeping every organ of the State, within the limits of the law, and thereby making the rule of law meaningful and effective, as had been determined by a 7 Member Bench of the Supreme Court in October 2002.

12. Often cited are the fearless words righteously told to his very close personal friend President J.R. Jayawardene by Chief Justice Neville Samarakoon – "*JR our friendship is at home – please don't interfere with my duties as Chief Justice* !"

ROLE OF ATTORNEY GENERAL

13. The Bar Association Law Journal Vol. 1 Part IV 1984 on the Centenary of the Attorney-General in Sri Lanka 1884 - 1984, *inter-alia*, had stated as follows:

> "In civil proceedings also, the Attorney General's function is to assist the Court to reach the correct decision and not to endeavour to somehow obtain a judgment in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between government department and citizens if that would meet the ends of justice.
>
> In advising the government, he has to form his opinion after considering the legal principles as well as the practical effect of his advice. This does not mean that his advice should besides being correct be somehow favourable to the government. Thus where any question in respect of which his advice is sought has arisen out of political, controversy or has political overtones, his opinion should be objective and fair to the parties affected. No doubt he must have due regard to the desire of any government to realise its legitimate aspirations and the political problems ministers have to contend with. However, it is his duty to advise the government to act within the law in implementing its policies."

14. Article 134 of the Constitution mandates that the Attorney General be noticed and be heard in the Supreme Court in the exercise of its jurisdiction under Articles 120, 121, 122, 125, 126, 129(1) and 131 of the Constitution, presumably as *amicus curiae*. The question arises, as to whether the Attorney General could play a role of *duality* in such instances ?

15. In SC (FR) Nos. 158 & 209/2007 wherein the Supreme Court annulled the privatizations of SLIC & LMSL as wrongful, unlawful, illegal and fraudulent the Attorney General having been noticed as mandated as aforesaid, appeared for the miscreants and opposed the said Applications, whilst in the instance case, the Attorney General had made submissions ironically to support the impugned Bill *targeting alleged wrongful privatisations* !

    In SC (FR) 404/ & 481/2009 the Attorney General opposed my Applications on the illegal purported Oil Hedging Deals, and consequently I understand that the State has incurred costs over Rs. 300 Mn., in foreign legal costs, air travel, etc. The Current Expenditure Budgets for 2012 for Judges of the Superior Courts is Rs. 146.5 Mn., (2009 - Rs. 46.5 Mn.) and for the Attorney General's Department Rs. 371.7 Mn. (2009 - Rs. 380.9 Mn.)

ADVOCATED POLICY

16. I emphatically state that I am not against the policy and objective of Government that privatized public enterprises must be accountable to achieve the objectives of such privatizations. In this regard, as PERC Chairman in 2004, I initiated a review of all the 98 privatizations carried out from 1986 to 2004, and identified to the extent possible ,the post privatization issues and post privatization litigations, as borne out by the PERC Annual Report 2004 to Parliament – *vide* Annex I. Nevertheless, PERC was closed thereafter.

In fact, it is such investigation on the privatization of SLIC and LMSL, which led to the adverse COPE Reports thereon in 2007, resulting in SC (FR) Cases Nos. 158/2007 and 209/2007, wherein the Supreme Court annulled these privatization as wrongful, unlawful, illegal and fraudulent.

Now ironically institutions have been listed violating norms of natural justice, as failed privatisations. <u>But what about those persons who carried out these privatisations and had failed to monitor their performance to protect the public interest</u> ?

Regrettably, the rule of law was not enforced against the miscreants. I cite Section 214 of the Penal Code.

> "214. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

On the contrary, persons who ought to have been arraigned before the law, have been appointed to public office, *making the rule of law a mockery*.

17. The Fundamental Duties stipulated in Article 28(d) of the Constitution to preserve and protect public property and to combat misuse and waste of public property had been correctly articulated, but this should not be mere pontification or a selective process; *all being equal before the law*.

18. The Offences Against Public Property Act No. 12 of 1982 is a very potent of law, but regrettably not enforced. The Offences Against Public Property Act No. 12 of 1982, stipulates that any person, whether public servant <u>*or otherwise*</u>, 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

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

"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."*

DIRECTIVE PRINCIPLES OF STATE POLICY & FUNDAMENTAL DUTIES

19. Attention is drawn to the following Articles 27(1), 27(2) (a), 27(2) (f), 27(4), 27(6), 27(15), 28(a), 28(d) and 28(e) are set out below:

"27.(1) The Directive Principles of State policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include-

(a) the full realization of the fundamental rights and freedoms of all persons;

(f) **the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka**;

(4) **The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.**

(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

(15) The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, **and shall endeavour to foster respect for international law and treaty obligations in dealings among nations**.

"28. The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka-

(a) to uphold and defend the Constitution and the law;

(d) to preserve and protect public property, and to combat misuse and waste of public property;

(e) **to respect the rights and freedoms of others**;

SOVEREIGNTY IS IN THE PEOPLE AND IS *INALIENABLE*.
PARLIAMENT HAS BEEN CONFERRED WITH ONLY LIMITED LEGISLATIVE POWER
Viz: Determination of 7 Judge Bench of the Supreme Court Bench in October 2002

20. As enshrined in Articles 3 and 4 of the Constitution the sovereignty is in the people, and is *inalienable*. The sovereignty in the people which is *inalienable* shall be exercised and enjoyed

(a) by the legislative power of the people ,exercised by Parliament and by the **people, themselves at a Referendum**
(b) by the executive power of the people, exercised by an elected President

(c) by the Judicial power of the people, exercised by Courts established by law

21. The People have conferred only a **limited legislative power** on Parliament not an unlimited power, in that,

    (a) certain laws can be enacted by Parliament by a simple majority
    (b) certain laws have to be enacted by Parliament by a 2 / 3rd majority
    (c) certain laws can be enacted by Parliament, **only after approval by the people at a Referendum**
    (d) certain laws cannot be enacted by Parliament in view of the specific bar contained in Article 75 of the Constitution

ENACTMENT OF LAWS

22. The following Articles of the Constitution are cited *vis-à-vis* enactment of laws by Parliament

    78. (1) **Every Bill shall be published in the Gazette at least seven days before it is placed on the Order Paper of Parliament**.

    (2) **The passing of a Bill or a resolution by Parliament shall be in accordance with the Constitution and the Standing Orders of Parliament. Any one or more of the Standing Orders may be suspended by Parliament in the circumstances and in the manner prescribed by the Standing Orders**.

    80. (1) Subject to the provisions of paragraph (2) of this Article, a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon.

    80. (3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.

    82. (1) **No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution**.

    82. (3) **If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements**.

    82. (6) No provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so interpreted or construed, unless enacted in accordance with the requirements of the preceding provisions of this Article.

    83. Notwithstanding anything to the contrary in the provisions of Article 82 –

(a) a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article, and …..

shall become taw if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.

84. (1) A Bill which is not for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, but which is inconsistent with any provision of the Constitution may be placed on the Order Paper of Parliament without complying with the requirements of paragraph (1) or paragraph (2) of Article 82.

84. (3) Such a Bill when enacted into law, shall not, and shall not be deemed to, amend, repeal or replace the Constitution or any provision thereof, and shall not be so interpreted or construed, and may thereafter be repealed by a majority of the votes of the Members present and voting.

123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

DUTY OF THE SPEAKER

23. Article 82(3) of the Constitution states thus:

82. (3) **If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements**.

Thus, the Speaker stands constitutionally bounden in duty to ensure that a Bill complies with the provisions of the Constitution prior to having placed the same on the Order Paper of Parliament.

I had by Letter dated 8.11.2011 put the Speaker on notice, particularly *vis-à-vis,* the Determinations by a 7 Judge Bench of the Supreme Court interpreting the Constitution and stipulating the limitations referred to above. – Annex II

Notwithstanding having been so put on notice the Bill has been proceeded with by the Speaker.

DUTY OF THE SUPREME COURT

24. Article 123(3) of the Constitution stipulates thus:

123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the**

> **Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

Article 123(3) is specifically in relation to Bills endorsed as 'Urgent Bills' by the Cabinet of Ministers as per Article 122 of the Constitution.

Hence, whilst providing for an emergency / urgency, the Constitution has a specified check put in place, that **if the Supreme Court entertains a doubt** whether the Bill or any provision thereof is inconsistent with the Constitution, that it shall be deemed to have been determined that the Bill or such provisions of the Bill is inconsistent with the Constitution.

The threshold therefore is the question or whether there is in fact any 'doubt'.

In this context, the following are cited:

i) Are not the Schedule to the Bill *ad-hominem and not categorization of groups on 'intelligible differentia'*. **Does this not create a doubt** ? *Privy Council Judgment in Appeal No. 23 of 1965 – Liyanage v Queen attached. – vide Annex IX*

ii) Can HDL be an '*Underperforming Enterprise'* under Schedule 1 simply because the Attorney General has said that there is protracted litigation, whilst the Attorney General had suppressed that there had been an Application to Wind-up HDL in November 2006, which he had opposed and caused the very protraction he now complains of ? **Does this not create a doubt** ?

iii) The Supreme Court Determination has specifically stated that – ' It was submitted that having such litigation does not mean that judicial power would be exercised through the Bill or there would be interference in the exercise of judicial power'. Was not the District Court exercising judicial power to Wind-up HDL ? **Does this not create a doubt** ?

iv) A 5 Member Bench of the Supreme Court had determined that **harsh, oppressive and unconscionable law** prescribing a procedure other than the **ordinary procedure** will be struck down. Was this law not **harsh** ? Was this law not **oppressive** ? Was this law not **unconscionable** ? Can the answers be given without any doubt ? **Does this not create a doubt** ?

v) Does not my Application in the Commercial High Court HC (C) WP No. 52/2011 under Part X of the Companies Act No. 7 of 2007 demonstrate that there is in fact **ordinary procedure** and that therefore as per the above Determination by the 5 Judge Bench of the Supreme Court there could not be a separate **harsh, oppressive and unconscionable** procedure ? Can this be answered without any doubt ? **Does this not create a doubt** ?

vi) Have not the access to the judiciary enshrined in Article 105 of the Constitution been denied to the affected parties ? Can this question be answered without any doubt ? **Does this not create a doubt** ?

vii) Have the affected parties been denied equal protection before the law ? Can this question be answered without any doubt ? **Does this not create a doubt** ?

viii) Article 154(G)(3) of the Constitution stipulates thus:

154. G (3) No Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the Gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its views thereon, within such period as may be specified in the reference and

(a) where every such Council agrees to the passing of the Bill, such Bill is passed by a majority of the Members of Parliament present and voting; or

(b) where one or more Councils do not agree to the passing of the Bill, such Bill is passed by the special majority required by Article 82 :

Therefore, can it be said without any doubt, that the foregoing Article has not been violated ? **Does this not create a doubt** ?

The Supreme Court in SC (FR) No. 209/2007 at pages 46 to 50 (*vide* – Annex III) has dealt with this matter upholding the right of the Provincial Councils. Hence, would not a subsequent Determination thereon be bound by the said Judgment ? The Attorney General was a party in the said Application and it appears that the matter had been suppressed.

ix) Article 157 of the Constitution stipulates that *otherwise than in the interests of national security,* **no written law shall be enacted or made**, and no executive or administrative action be taken, in contravention of the provisions of such Treaty or Agreement.

x) HDL itself has large Japanese Investors and several other foreign investors are reported to have complained in other instances.

In the Determination it is stated that providing for prompt, adequate and effective compensation could enable written law to be enacted. If that be the case would not such provision have been included in Article 157 in like manner, as in the interest of national security ? Such is not the case. **Does this not create a doubt** ?

Would not the foregoing have given rise to several doubts, thereby as mandated by Article 123(3) of the Constitution the impugned Bill had to be determined by the Supreme Court as inconsistent with the Constitution ?

UNDER PERFORMING ENTERPRISE UNDER SCHEDULE 1 - HOTEL DEVELOPERS (LANKA) PLC (HDL)

25. As per Section 9 "*Underperforming Enterprise*" has been ***intriguingly*** defined as an enterprise engaged in protracted litigation.

26. It is the Attorney General, appearing for the State, who had protracted the Winding-up Application filed by me in November 2006, and in fact has called for discussions to consider possibility of a Settlement – *vide* Annex IV.

27. The Deputy Secretary to the Treasury had written to HDL Letter dated 10.5.2011 requiring the Claims of Rs. 12,098 Mn. **be paid preferably within two years** – *vide* Annex V. Hence, how could HDL have been itemized under Schedule 1 ? Is this reasonable ? **Does it not deny natural justice** ?

28. The foregoing comprises of approximately Rs. 4000 Mn., Capital and Rs. 8000 Mn., as Interest, and approximately Rs. 4000 Mn., of which Interest could not be chargeable from HDL after the Winding-up Application was filed in November 2006 in terms of Section 364, read with Section 277 of the Companies Act No. 7 of 2007 - *viz*:

> **364.** (1) The amount of a claim may include interest up to the commencement of the winding up—
>
> *(a)* at such rate as may be specified or contained in any contract that makes provision for the payment of interest on that amount; or
>
> *(b)* in the case of a judgment debt, at such rate as is payable on the judgment debt.
>
> (2) If any surplus assets remain after the payment of all admitted claims, interest shall be paid at the prescribed rate on those claims from the date of commencement of the winding up to the date on which each claim is paid. If the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.
>
> (3) If any surplus assets remain after the payment of interest in accordance with subsection (2), interest shall be paid on all admitted claims referred to in subsection (1), from the commencement of the winding up to the date on which the claim is paid, at the difference between the rate referred to in paragraph (*a*) or paragraph (*b*) of that subsection, as the case may be, and the prescribed rate. If the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.
>
> **277.** (1) Where before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution and unless the court, on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

In any case Section 5 of the Civil Ordinance mandates that interest shall not exceed the Capital.

29. On the other hand, in Sections 219 and 375 of the Companies Act No. 7 of 2007, such interest if at all is chargeable from and payable by the Directors of HDL, particularly by the Government Directors, who controlled HDL and opposed the Winding-up – *viz:*

> **219.** (1) A director of a company who believes that the company is unable to pay its debts as they fall due, shall forthwith call a meeting of the board to consider whether the board

should apply to court for the winding up of the company and the appointment of a liquidator or an administrator or carry on further the business of the company.

(2) Where a director referred to in subsection (1) fails to comply with the requirement of that subsection and at the time of that failure the company was unable to pay its debts as they fell due, and the company is subsequently placed in liquidation, the court may on the application of the liquidator or of a creditor of the company, make and order that the director shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to carry on its business.

(3) If—

(a) at a meeting called under subsection (1) the board does not resolve to apply to court for the winding up of the company and for the appointment of a liquidator or an administrator;

(b) at the time of that meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due; and

(c) the company is subsequently placed in liquidation, the court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, other than those directors who attended the meeting and voted in favour of applying to court for the winding up of the company and for the appointment of the liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditor of the company as a result of the company continuing to carry on its business.

375. (1) Where any business of a company that has been wound up has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner, shall be deemed to have committed an offence and shall be liable on conviction to a fine not exceeding one million rupees or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

(2) Where in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the liquidator or any creditor of the company, declare that any persons who were knowingly parties to the carrying on of the business in that manner, shall be—

(a) liable to make such contribution to the company's assets; or

(b) personally responsible for such debts or other liabilities of the company,

as the court may think fit.

30. In contrast , my endeavours saved HDL and the Government **Rs. 10,200 Mn., in June 1995**, which today at 12% p.a. interest amounts to over **Rs. 70,000 Mn**. Hence, I am a cognizable stakeholder of HDL having also been one of the promoters. <u>In fact, the Land was lawfully re-vested in the Government in July 1999 at my instance</u>.

31. The CID had deliberately failed and neglected to take action on a major fraud perpetrated on HDL and the Government. The Attorney General had failed to act even with Letter dated 15.3.2007 addressed by the Secretary to the President – *vide* Annex VI.

32. - It is an admitted fact that Foreign Minister, G.L. Peiris, as then Justice Minister & Deputy Minister of Finance is responsible for the financial *debacle* that HDL had got into, and that based on his perverse conduct and actions *highly questionable* prejudicial Order had been made by the Court of Appeal to pay the Japanese, *whilst all other Conditions in the Agreements had been restrained*.

    - Hence, the responsibility for the present financial *debacle* of HDL also lies with the Court of Appeal Judges, who made such perverse Order, against which the Supreme Court granted Leave, but the payments continued to be made to the Japanese under the State Guarantees.

33. Interested and affected parties have attempted to cause *substantial prejudice*, as in a previous instance in the Supreme Court, in respect of which Letter dated 22.11.2011 had been addressed to the relevant media organisation – *vide* Annex VII. The said media organisation had also ridiculed and defamed the present Chief Justice, and had been warned and discharged after an unreserved apology in March 2010.

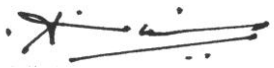
34. The independent Report by the Merchant Bank of Sri Lanka, evaluating the stake of my Company and me was unilaterally independently obtained by the Secretary to the Treasury, on the direction of the Supreme Court – *vide* Annex VIII.

FUNDAMENTAL RIGHTS APPLICATONS

35. The following 'dicta' are cited from the Judgment dated 3.8.2009 delivered by the former Chief Justice J.A.N. De Silva in SC (FR) No. 352/2007.

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

On this 23rd day of November 2011



Petitioner