

## Case Study 3.1

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# The Colombo Port City Project

## How Chinese Investment Interacts with Local Public Law

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### 1 Overview

The Colombo Port City Project (CPC or “the Project”) is the most prominent Chinese direct investment in Sri Lanka. This case study highlights the prospects and resilience of a Belt and Road Initiative (BRI) project in the cyclical process of democratic decay and consolidation in a host state with democratic dispensation and welfare commitments. It is a case study in which geopolitics of the day and dynamics between transnational discourse on human rights and investment manifest. From a Chinese perspective, it is a reminder of the contingencies of each BRI project and the inherent entanglement between the politics of the Chinese state and Chinese corporations involved in the BRI with the sociopolitical realities of a host state. From a Sri Lankan perspective, this case study reveals the different political and legal narratives around the Project, the challenges these generated for the Chinese from a host state, and the resilience of a BRI project.

The case study combines a legal doctrinal approach with a short commentary on the political economy of the Project. The doctrinal analysis focuses on the litigation and legislation concerning the CPC and offers insights into the prospects for dealing with foreign investment-related legal disputes through the public law of a host state. It also sheds light on the interface (or the lack thereof) between public law (e.g., judicial review) and international law. In this way, the case study attempts to capture the methods by which the domestic legal sphere of a host state responds to the BRI.

### 2 Introduction

Since the adoption of an open and market-based economic policy in 1977, successive governments in Sri Lanka have given political prominence to foreign direct investment (FDI). FDI has been projected as a method that would guarantee rapid economic development. The Sri Lankan Constitution, perhaps uniquely, provides constitutional protection and status for any investment treaty or agreement if it is

tabled before the House.<sup>1</sup> Despite the political rhetoric, the substantive legal, institutional, and policy reform required to facilitate foreign investment has been the exception and the highest level of FDI in Sri Lanka was just 2.8% of GDP in 1997.<sup>2</sup> Unsustainable borrowing and excessive spending over a long period of time have brought Sri Lanka's economy to a debt and balance of payment crisis, resulting in a sovereign default in April 2022 and severe human suffering and political unrest.

Sri Lanka is, in many ways, a paradox. On the one hand, it is the oldest democracy in Asia and universal suffrage was introduced in 1931. Strong welfare policies adopted since 1930 have placed Sri Lanka's human development index on a par with developed states. On the other hand, Sri Lanka has also struggled with ethnic violence, two insurrections, and a three-decade-long war due to severe socio-economic inequality as well as the failure to ensure self-determination for its largest ethnic minority. Constitutions and the rule of law have been instrumentalized in these processes by successive governments to undermine democratic governance. An excessive public service, a diverse range of loss-making and underperforming sets of state-owned enterprises (SOEs), and a heavy defense budget have characterized the Sri Lankan state more recently, giving rise to very serious concerns about corruption and poor governance.

The city of Colombo has been a hub for the political and economic life of Sri Lanka particularly since colonial rule.<sup>3</sup> The new Colombo Port City sits at a key geographical, cultural, economic, and political location in Colombo adjacent to the port, facing Sri Lanka's first parliament (which now houses the Presidential Secretariat and Treasury), and in close proximity to the country's financial hub. Providing an eye-level view of the centrality of Colombo Port City, it is within sight of the Galle Face Hotel (one of the most prominent hotels built during British rule) and the Galle Face Green (a promenade dedicated to the women and children of Colombo by the British). It is also within sight of the recently built Shangri-La Hotel. Finally, the main site for the *Aragalaya* (people's struggle) of 2022 was at one end of the Galle Face Green, between the Port City and the Presidential Secretariat.

### 3 The Case

#### 3.1 China-Funded Infrastructure Projects in Sri Lanka: Background

Over the past decade, the Chinese presence in Sri Lanka's economy has been on the rise, mainly manifested through large-scale infrastructure development

<sup>1</sup> Investment treaties that are approved with a two-thirds majority in the Parliament become part of law in Sri Lanka under Art 157 of the Constitution of Sri Lanka (the Constitution).

<sup>2</sup> The World Bank, 'Foreign Direct Investment, net inflows (% of GDP) – Sri Lanka' <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2021&locations=LK&start=1970&view=chart>.

<sup>3</sup> Sri Lanka has been impacted by colonization since 1505. The Portuguese and the Dutch colonized the maritime provinces, and the British ruled the entire island from 1815 to 1948.

projects funded by China.<sup>4</sup> For China, establishing critical infrastructure facilities in a country like Sri Lanka, which is strategically located in the Indian Ocean, is crucial for pursuing its ambitious 21st Century Maritime Silk Road. It is one of the main routes for the BRI that cross the Indian Ocean Region. For Sri Lanka, advancing the country's infrastructure facilities was central to realizing the development agenda led by the then Rajapaksa regime (2005–2015), which repeatedly vowed to make Sri Lanka a dynamic commercial hub in South Asia.<sup>5</sup> This regime relied predominantly on commercial borrowings to finance its infrastructure development agenda, which accelerated after the end of the three-decade-long war in 2009.<sup>6</sup>

As will be shown in this case study, several internal and external economic and political factors prevalent in the postwar scenario compelled the Rajapaksa regime to rely increasingly on bilateral sources of financing. Against this backdrop, China became Sri Lanka's main bilateral sovereign lender, surpassing the country's traditional lenders such as the Asian Development Bank.<sup>7</sup> The lion's share of this capital was allocated to develop specific sectors in Sri Lanka's economy: power and energy, transport and telecommunications, port development, and irrigation. Some of the leading development projects in these sectors commenced even before China officially launched the BRI in 2013. Examples include the Norochcholai Coal Power Plant (2006), the Moragahakandha Development Project (2007), the Hambantota Seaport (2007), the Colombo-Katunayake Expressway (2009), the Mattala International Airport (2010), and the Colombo Lotus Tower Project (2012).

Chinese-funded development projects in Sri Lanka are often labeled as "Chinese investments."<sup>8</sup> Although it is possible to characterize transitional loans as "investments,"<sup>9</sup> this characterization does not reflect the fact that most

<sup>4</sup> Sri Lanka's contemporary relationship with China is multidimensional and includes political relationships and cultural exchanges in addition to the economic. The two regions and their people have a much longer history as well.

<sup>5</sup> For Mahinda Rajapaksa's political view in this respect, see the three versions of his election manifesto, namely *Mahinda Chintana* (2005) [www.mfa.gov.lk/images/stories/pdf/mahinda\\_chintana\\_eng.pdf](http://www.mfa.gov.lk/images/stories/pdf/mahinda_chintana_eng.pdf), *Mahinda Chintana: Vision for the Future* (2010) [www.preventionweb.net/files/mahinda\\_chintana\\_vision\\_for\\_the\\_future\\_eng%5B1%5D.pdf](http://www.preventionweb.net/files/mahinda_chintana_vision_for_the_future_eng%5B1%5D.pdf), and *Mahinda Chintana: Path to Success* (2015) <https://groundviews.org/wp-content/uploads/2014/12/mahinda-chinthana-path-to-success-2015.pdf>.

<sup>6</sup> The military defeated the separatist movement, the Liberation Tigers of Tamil Eelam (LTTE).

<sup>7</sup> Umesh Moramudali and Thilina Panduwawala, 'From Project Financing to Debt Restructuring: China's Role in Sri Lanka's Debt Situation' (*Daily FT*, 17 June 2022) [www.ft.lk/columns/From-project-financing-to-debt-restructuring-China-s-role-in-Sri-Lanka-s-debt-situation/4-736258](http://www.ft.lk/columns/From-project-financing-to-debt-restructuring-China-s-role-in-Sri-Lanka-s-debt-situation/4-736258).

<sup>8</sup> See, e.g., Ganeshan Wignaraja, Dinusha Panditaratne, Pabasara Kannangara, and Divya Hundlani, 'Chinese Investment and the BRI in Sri Lanka' (March 2020) Asia-Pacific Programme Research Paper [www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf](http://www.chathamhouse.org/sites/default/files/CHHJ8010-Sri-Lanka-RP-WEB-200324.pdf).

<sup>9</sup> Transnational loans have been characterized as "investments" by investment arbitral tribunals established under the 1965 Washington Convention. See, e.g., *Fedex N.V. v Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997).

of the capital flows are loans. Many projects have been financed by commercial borrowings from Chinese banks, mainly the China Development Bank and the Export-Import Bank of China.<sup>10</sup> Only a handful of projects have been financed as direct Chinese investments and the CPC is the only infrastructure development project that can be classified as an FDI. Contrary to loans, FDI does not oblige the host country to repay the capital invested in a project since it is a form of equity finance that ensures foreign capital flows into a given country. Consequently, the Chinese capital invested in the Project cannot be included in the debt that Sri Lanka must repay to China, subject to the ongoing debt restructuring program.

### 3.2 Chinese Interest in the Project

The Project illustrates the way in which a capitalist approach to foreign investment by a one-party state can play out. Even though the investment is carried out by a company, or a legal entity separate from the Chinese government, it is an enterprise owned by the state and therefore presumably also controlled by the state and subject to its politics. As will be explained, the Chinese investor submitted an unsolicited bid to the Government of Sri Lanka (GOSL) at a time when the government was looking for alternative development partners and approaches. This was due to (1) Sri Lanka being designated as a middle-income country and therefore being unable to obtain loans on concessionary terms, (2) isolation by other powerful states due to allegations of human rights and rule of law violations, and (3) the emergence of an intensified conflation between state, party, and family in governance.

At the time, the Chinese approach to foreign investment converged with the prevailing political and economic dispensation in Sri Lanka. The Chinese economic interests were driven by the political priorities of the Chinese government, resulting in arguably poor investment choices. It is also evident today that, in making such an investment, the Chinese did not have a strategy in place for managing potential risks such as political resistance to projects or domestic legal disputes. However, the Project survived a project suspension and renegotiation and, as will be seen, the Chinese approach in this instance was to be flexible, to negotiate and adapt, rather than to rely on their original contractual rights.

### 3.3 The History of the Project

The Project itself has its own troubled history and includes at least three narratives. First is the narrative of FDI-led development in a carved-out legal and physical location. Second is the political and economic implications of the

<sup>10</sup> Moramudali and Panduwawala (n 7).

BRI project. Third is the narrative that the Chinese were flexible in adapting this project to the infrastructure development approach of the first and second Rajapaksa regimes (2006–2015 and 2019–2022) as well as to the seemingly prodemocratic approach of the good governance (*Yahapalanaya*) regime between 2015 and 2019.

The idea of reclaiming land off the Colombo coast adjacent to the Colombo Port to expand the Central Business District has a long history. It was initially proposed in 1991 by the then Minister of Industries, Science and Technology, Ranil Wickremesinghe (who is the current president of Sri Lanka).<sup>11</sup> The main purpose of this endeavor was to release land for real estate development. However, changes in domestic politics resulted in the Project stalling for several years; it regained prominence only in 2001 when Wickremesinghe returned to power as prime minister.<sup>12</sup> CESMA International Pte Ltd., a Singapore-based urban planning consulting company, was assigned to develop the “Western Region Megapolis Plan,” which envisioned developing the entire Western province of Sri Lanka as a single megapolis. This development plan was completed in 2004, and a call for expressions of interest from investors to reclaim approximately 145 ha of land from the sea to the south of the proposed Colombo South Port breakwater by 2010 (see later in this section) was issued.<sup>13</sup> However, the Project went unimplemented for the second time due to the political changes in 2004.<sup>14</sup>

In the meantime, in 2009, the 5.14 km South Port breakwater was constructed as part of the Colombo Port Expansion Project (CPEP), partially funded by the Asian Development Bank. The newly built breakwater made it technically and financially feasible to reclaim land to the south, and thus, in April 2010, the Sri Lanka Ports Authority (SLPA) commissioned an “Initial Technical Feasibility” study to that effect.<sup>15</sup> While the SLPA acted as the project proponent in this regard, the reclamation work was supposed to be carried out as a state-funded project. In June 2010, SLPA commissioned an Environmental Impact Assessment (EIA) for the reclamation of 200 ha south of the newly built breakwater.<sup>16</sup> The National Environmental Act makes it mandatory to conduct an EIA for all projects with a significant environmental impact,<sup>17</sup> and for projects

<sup>11</sup> Asanga Gunawansa, ‘Creation of New Urban Land by Reclaiming the Sea in Colombo Port City, Sri Lanka’ in Katherine Cashman and Victoria Quinlan (eds), *Strengthening Environmental Reviews in Urban Development* (UN-Habitat, 2018) 98.

<sup>12</sup> *ibid.* See further, Supplementary Environmental Impact Assessment (SEIA) Report of the Proposed Colombo Port City Development Project, Colombo, Sri Lanka (December 2015) 2.

<sup>13</sup> Gunawansa (n 11) 98–99; SEIA (n 12) 2.

<sup>14</sup> The cohabitation government fell apart. The election of Mahinda Rajapakse as president signaled a shift including a renewed effort to militarily defeat the LTTE.

<sup>15</sup> SEIA (n 12) 3.

<sup>16</sup> *ibid.* Moreover, in October 2010, the Urban Development Authority completed a “Master Plan Study” based on the “Initial Technical Feasibility Study.”

<sup>17</sup> See generally, Sumudu Atapattu et al. ‘Colombo International Financial City’ in Sumudu Atapattu et al. (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press 2021).

within Sri Lanka's coastal zone, the Department of Coast Conservation and Coastal Resources Management is the Project Approving Agency (PAA).

Meanwhile, in April 2011, SLPA was approached by a Chinese SOE called China Communication Construction Company Ltd. (CCCC), a Chinese SOE with more than sixty wholly owned subsidiaries working on infrastructure-related constructions, operations, and investments, with an unsolicited proposal (USP) to reclaim the seabed between the southern end of the CPEP and the northern part of the Colombo Galle Face Green.<sup>18</sup> In other words, this proposal was initiated by the CCCC itself. The fact that CCCC is a Chinese SOE made this USP distinctive because most unsolicited proposals for developing infrastructure facilities are initiated by private sector entities, not state-affiliated ones. This USP suggested reclaiming a total area of 233 ha as a direct Chinese investment worth US\$1.4 billion without any financial commitment from the GOSL.

While this USP was under consideration, in December 2011, the EIA commissioned by the SLPA for land reclamation was approved by the Department of Coast Conservation and Coastal Resources Management.<sup>19</sup> According to the 2014 Annual Performance Report of the Ministry of Highways, Ports and Shipping, the USP was reviewed by the Standing Cabinet Appointed Review Committee (SCARC) according to the Guidelines on Government Tender Procedure – Part II (Revised Edition – January 1998) and Public Finance Circular No. 444 (i) dated 16 May 2011.<sup>20</sup> SCARC was appointed in June 2010, *inter alia*, to assess unsolicited or standalone development proposals and advise relevant line ministries or government agencies on matters related to such proposals.<sup>21</sup> Accordingly, the line ministers were required to submit unsolicited proposals they received to the SCARC for an initial assessment and recommendation.<sup>22</sup> They were required to do so when such proposals were deemed competitive and advantageous to national interests.

The 1998 Guidelines are applicable for private sector infrastructure development projects initiated by both solicited and unsolicited proposals. Concerning unsolicited proposals, the Guidelines explicitly require calling for further proposals by advertisement, while providing the original company a chance to improve on their submission as part of the invitation for bids/offers.<sup>23</sup> Such

<sup>18</sup> Gunawansa (n 11) 101. <sup>19</sup> SEIA (n 12) 4–5.

<sup>20</sup> Ministry of Highways, Ports and Shipping, *Annual Performance Report-2014*, 69 [www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-highways-ports-and-shipping-2014.pdf](http://www.parliament.lk/uploads/documents/paperspresented/performance-report-ministry-of-highways-ports-and-shipping-2014.pdf). The Ministry of Highways, Ports and Shipping was responsible for the development of road and port sectors and the SLPA was assigned to it.

<sup>21</sup> Department of Public Finance, 'Supplement – 23 to the Procurement Guidelines, Part II Reference: 237' (12 May 2011) [www.treasury.gov.lk/api/file/5c891efb-a1cb-4098-aba5-4d4360a5cedb](http://www.treasury.gov.lk/api/file/5c891efb-a1cb-4098-aba5-4d4360a5cedb).

<sup>22</sup> Ministry of Finance and Planning, 'Public Finance Circular No. 444' (4 August 2004) [www.treasury.gov.lk/api/file/2a31a18c-c5a6-4095-952c-8d65e00d2a8a](http://www.treasury.gov.lk/api/file/2a31a18c-c5a6-4095-952c-8d65e00d2a8a).

<sup>23</sup> Ministry of Finance, Economic Stabilization and National Policies, *Guidelines on Government Tender Procedure-Part II* (Revised Edition January 1998) para. 237 [www.treasury.gov.lk/api/file/9f9c06c1-59c4-4d7c-b43e-870c3d71803a](http://www.treasury.gov.lk/api/file/9f9c06c1-59c4-4d7c-b43e-870c3d71803a).

bids/offers should be called once the relevant line ministry determines the need for a development project as suggested by the USP. This procedure was not followed in this case,<sup>24</sup> as, after receiving the SCARC approval for the USP submitted by the CCCC, the Cabinet of Ministers permitted the CCCC to sign a Memorandum of Understanding (MOU) with the SLPA. This MOU was to discuss the key terms of the draft agreement relating to the investment for reclaiming land adjacent to the Colombo Port.

Following the signing of the MOU, CCCC submitted a detailed project proposal to SLPA, while the SCARC recommended to the Cabinet of Ministers that SLPA enter into a Concession Agreement with CCCC to implement the project, subject to approval by the Attorney-General. In January 2014, the Cabinet of Ministers sanctioned the key terms of the Concession Agreement negotiated between the SLPA and CCCC. Nevertheless, as pointed out by the Attorney-General, the SLPA could not be a party to this agreement for two main reasons. Firstly, the SLPA does not have the legal authority to engage in seabed reclamation for commercial projects. Secondly, under Sri Lankan law, only the president of Sri Lanka has the power to reclaim any part of the foreshore or the seabed.<sup>25</sup> Consequently, a cabinet decision was made permitting the Secretary to the Ministry of Highways, Ports and Shipping to enter into an agreement with the Chinese investor.<sup>26</sup> Terms of this agreement, referred to as the GOSL Contract Agreement, were akin to those in the original Concession Agreement, which was integrated into the GOSL Agreement as a binding annex. This Agreement was to remain in effect until SLPA was granted the legal authority to be a part of the Concession Agreement.

The GOSL Agreement included a provision to the effect of amending the SLPA Act within one year.<sup>27</sup> The amendment to the SLPA Act did not take place as planned due to the subsequent political changes and policy adjustments as will be discussed.<sup>28</sup> However, it is striking that the Project was supposed to affect Sri Lanka's domestic law, enabling a state entity to be a part of a commercial activity that did not originally come under its legal competence. At the same time, CHEC Port City Colombo, the locally incorporated subsidiary of CCCC (the Project Company), entered into the investment agreement with the Secretary to the Ministry of Highways, Ports and Shipping. This agreement was signed on 16 September 2014 during the Chinese president's state visit to Sri Lanka and in the presence of both Chinese and Sri Lankan presidents. The reclamation work began on the same day, making one of Sri Lanka's long-held development proposals a reality. Meanwhile, government borrowings began to increase, and other

<sup>24</sup> See generally, Gunawansa (n 11); SEIA (n 12). <sup>25</sup> Section 60 of the State Land Ordinance.

<sup>26</sup> See generally, Gunawansa (n 11). <sup>27</sup> *ibid.* See further Clause 2 of the GOSL Agreement.

<sup>28</sup> Instead, the Cabinet of Ministers decided to extend the GOSL Agreement for a further period of six months from 15 March 2016.

controversial large-scale infrastructure development projects were underway, including the Hambantota Seaport and the Mattala Airport.<sup>29</sup>

### 3.4 The 2014 Concession Agreement for the Project

An investment contract is the beginning of the “life” of most foreign investments.<sup>30</sup> There are different types of investment contracts, and a Concession Agreement is used to finance large-scale projects such as the development of infrastructure facilities. Some scholars describe Concession Agreements as the “heart of any infrastructure investment.”<sup>31</sup> This is firstly because they provide the contractual or legal framework for a project. Secondly, they cover almost all aspects of the project, including the rights and obligations of the parties to the agreement. Thirdly and importantly, it is a manifestation of the bargaining power of the parties to the agreement.

In terms of rights, the 2014 Concession Agreement granted the Project Company an array of entitlements, including land ownership. For context, the Project Company was given the right to hold 108 ha of “Marketable Lands” from the reclaimed landmass.<sup>32</sup> Accordingly, the investor was entitled to hold 20 ha of “Marketable Lands” on a freehold basis with the remaining 88 ha held by the Project Company or its nominee on a leasehold basis. The Project Company was further entitled to select an engineering procurement construction (EPC) contractor without adhering to public procurement guidelines and procedures.<sup>33</sup> Consequently, the Project Company designated another wholly owned subsidiary of the CCCC as the EPC responsible for designing and building the CPC.<sup>34</sup>

The Project Company was given a set of “Development Rights.”<sup>35</sup> This set of rights included the right to study, investigate, design, engineer, finance, and carry out the first phase of the Project, that is, land reclamation. In addition, they entitled the Project Company to benefit from and generate revenue from all Project Land in which it has a freehold or leasehold interest and from all other activities.<sup>36</sup> However, “Development Rights” were not absolute since they were subject to restrictions by the SLPA, or any other governmental authority, based on the grounds stipulated in the agreement itself.<sup>37</sup> These grounds for

<sup>29</sup> Both located in Sri Lanka’s Southern Province, home to the Rajapaksa family.

<sup>30</sup> C. L. Lim, Jean Ho, and Martins Paporinkis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (2nd edn, Cambridge University Press 2021) 37.

<sup>31</sup> Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013) 228.

<sup>32</sup> Clause 24.1 of the 2014 Concession Agreement. <sup>33</sup> Gunawansa (n 11) 102.

<sup>34</sup> The designated wholly owned subsidiary was China Harbour Engineering Company Ltd. (CHEC).

<sup>35</sup> Clause 2 of the 2014 Concession Agreement.

<sup>36</sup> The definition of Project Land includes both freehold and leasehold lands. See Schedule I Part I of the 2014 Concession Agreement.

<sup>37</sup> Clause 2.4 of the 2014 Concession Agreement.

restriction included (1) the development had to protect public health and the safety or the environment; (2) it had to protect national security; and (3) any breach of the Concession Agreement or any applicable permits by the Project Company would also terminate the Project.

Where the impact of any such restrictions by the GOSL is greater than twenty-four hours for any single event or an aggregate of seventy-two hours in any six-month period, the Concession Agreement designates said impact as a “Compensation Event” under the provision of Clause 33. This clause, *inter alia*, identifies any action by any third party in a court of law resulting in a “material delay” in carrying out the reclamation work, or preventing or delaying the Project Company in its work, as events that warrant compensation.<sup>38</sup> The 2014 Concession Agreement moreover barred the GOSL, including the courts of law, from directly or indirectly interfering with the Project Company, its assets located in Sri Lanka dedicated to the Project, its shareholders’ interests in the Project Company, or its interest in the Project Land by way of nationalization, expropriation, confiscation, or compulsory acquisition.<sup>39</sup>

Concerning dispute resolution, the 2014 Concession Agreement provided several methods including amicable settlement, mediation, expert resolution, adjudication, or arbitration.<sup>40</sup> Sri Lankan law was chosen as the governing law of the Agreement.<sup>41</sup> Notably, under the Agreement, the SLPA was responsible for conducting environmental studies related to the reclamation work and sand extraction, as well as for obtaining required permits.<sup>42</sup> This responsibility was applicable even during the period leading to the signing of the agreement. As mentioned, the SLPA had successfully completed the EIA up to reclaiming the land, yet it covered an area of only 200 ha, not the 233 ha as specified in the Agreement. Additionally, the SLPA had unsuccessfully commissioned the National Aquatic Resources Research and Development Agency to undertake two Initial Environmental Examination studies to secure permits for sand extraction before signing the Agreement.<sup>43</sup>

### 3.5 Controversies Surrounding the Project

The rosy picture of the Project began to fade in the months following its commencement. Controversies over the Project revolved around four main

<sup>38</sup> However, legal proceedings that arise as a result of any breach of the agreement or applicable law by the Project Company were excluded from the purview of this clause.

<sup>39</sup> Clause 38 of the 2014 Concession Agreement. It should be read alongside the definition of the term “expropriation” included in Schedule I Part I of the same agreement.

<sup>40</sup> Clause 39 of the 2014 Concession Agreement.

<sup>41</sup> Clause 57 of the 2014 Concession Agreement.

<sup>42</sup> Clause 3 of the GOSL Contract and Clause 12 of the 2014 Concession Agreement. See further, SEIA (n 12) 3–6.

<sup>43</sup> SEIA (n 12) 4–5.

concerns. These include the following: first, adverse socioeconomic and environmental impacts of reclaiming the land; second, failure to adhere to Sri Lanka's environmental laws applicable to a development project with significant environmental impacts; third, procedural flaws associated with awarding contracts; and fourth, possible security-related risks posed by an investment driven by a Chinese SOE.

The Project garnered strong opposition. Opposing civil society groups included affected fisherfolk living along the western coast of Sri Lanka from Moratuwa to Negombo.<sup>44</sup> In their opinion, the Project was an undemocratic, illegal, and catastrophic venture that should be abandoned.<sup>45</sup> While arguing that its socioeconomic and environmental impacts have not been adequately studied, opponents underscored the adverse impact of land reclamation and sand dredging which included damaging fish breeding areas and coral reefs and increasing coastal erosion. However, given the nature of these consequences, correlation, not causation, was established. Nevertheless, the fisherfolk claim that they have suffered from a loss of income and that their livelihoods have been affected.<sup>46</sup>

Concerns raised by the affected communities were further reinforced by environmentalists who opposed the Project on the basis that it violated applicable environmental laws in Sri Lanka.<sup>47</sup> First, environmentalists challenged the adequacy of the EIA done by the SLPA in 2011 because it focused predominantly on the impact of land reclamation of 200 ha. It did not address the impact of the sand extraction and quarrying of stones required for the reclamation. Second, they challenged the credibility of the Addendum Report to the 2011 EIA prepared to assess the impact of the proposal to reclaim an additional 33 ha (233 ha in total). In September 2013, the SLPA had submitted this Addendum Report to the PAA without public scrutiny. Public scrutiny is required by Sri Lanka's environmental law and has been consistently emphasized by the Supreme Court.

Thirdly, environmentalists raised concerns over the fact that reclamation work commenced without obtaining required permits for sand excavation. They pointed out that the Development Activity Permit issued by the PAA, following the submission of the Addendum Report to the 2011 EIA, required the SLPA to obtain approval separately for extraction of sand from the Central

<sup>44</sup> Environmental Justice Atlas, 'Fisher Folks, Environmentalists and Religious Leaders against the Colombo Port City, Sri Lanka' (*EJAtlas*, 30 July 2023) <https://ejatlas.org/print/fisherwomens-mobilization-against-the-port-city-sri-lanka>.

<sup>45</sup> See generally, People's Movement Against Port City, *පොර්ට් සිටියේ ඇත්ත නැත්ත* [*Truth and Myth of the Port City*] (Akura Publications July 2018).

<sup>46</sup> According to local news reports, Rs. 550 million was allocated as livelihood support to be distributed among fishermen. See Sheain Fernandopulle, 'Negombo Fishermen Hit by Port City Project' (*Daily Mirror*, 23 February 2020) [www.dailymirror.lk/print/plus/Negombo-fishermen-hit-by-Port-City-Project/352-183623](http://www.dailymirror.lk/print/plus/Negombo-fishermen-hit-by-Port-City-Project/352-183623).

<sup>47</sup> See generally, Atapattu et al. (n 17); SEIA (n 12).

Environmental Authority (CEA).<sup>48</sup> Even though the permit for dredging sand should have been sought before the commencement of the Project, it was not obtained before signing the 2014 Concession Agreement as the SLPA had failed to secure the consent for the compensation program for the fisherfolk. This consent was necessary for the CEA to grant the required sand extraction permits.

Some politicians also resisted the Project. Opposing politicians argued that it was necessary to call for bids/offers from other interested parties in the Project.<sup>49</sup> The opacity of awarding the contract was central to the heated political debates over the growing Chinese-funded infrastructure development projects under the Rajapaksa regime. They challenged the decision to give the Chinese investor 20 ha of land on a freehold basis. They further questioned the jurisdiction over this plot of land given its possible threats to national security. Similar security-related concerns were raised by several other regional and global superpowers premised on the concerns that China was using the Project to consolidate its regional presence through numerous additional BRI investments along the 21st Century Maritime Silk Road.<sup>50</sup>

### 3.6 Suspension and the Resumption of the Project

All the controversies surrounding the Project and other Chinese-funded infrastructure development projects in Sri Lanka gradually culminated in a massive public outcry against the allegedly pro-Chinese Rajapaksa regime. Such projects provoked concerns over the impact on the country's constitutional governance, democratic processes, and the possibility of supporting an authoritarian regime. These concerns were successfully capitalized on by the opposition to discredit the Rajapaksa regime: First, for entangling Sri Lanka in a Chinese "debt trap" by excessive commercial borrowings from China to finance economically unviable infrastructure development projects such as the Hambantota Seaport and Mattala Airport. The myth about the Chinese debt trap has prevailed all the way into the 2022 economic crisis in Sri Lanka.<sup>51</sup> However, analysts have pointed out that the

<sup>48</sup> SEIA (n 12) 4–5. <sup>49</sup> See generally, Gunawansa (n 11).

<sup>50</sup> See, e.g., Teshu Singh, 'The Geopolitics of Chinese Investments in Sri Lanka' (*Institute of Peace and Conflict Studies*, 13 April 2015) [www.ipcs.org/comm\\_select.php?articleNo=4862](http://www.ipcs.org/comm_select.php?articleNo=4862); Asanga Abeyagoonasekera, 'Before the Phoenix Nest: Questions Surrounding the Port City of Colombo' (*LSE*, 8 July 2021) <https://blogs.lse.ac.uk/cfi/2021/07/08/before-the-phoenix-nest-questions-surrounding-the-port-city-of-colombo/>.

<sup>51</sup> Bart Klem and Dinesha Samararatne, 'Sri Lanka in 2021: Vistas on the Brink' (2022) 62 *Asian Survey* 201. For a dispelling of this myth, see Moramudali and Panduwawala (n 7) 11. See further Umesh Moramudali and Thilina Panduwawala, 'From Project Financing to Debt Restructuring: China's Role in Sri Lanka's Debt Situation' (*Panda Paw Dragon Claw*, 13 June 2022) <https://pandapawdragonclaw.blog/2022/06/13/from-project-financing-to-debt-restructuring-chinas-role-in-sri-lankas-debt-situation/>.

debt owed to China is only 20% of Sri Lanka's external debt stock. The bulk of Sri Lanka's debt is owed to international sovereign bond holders. Second, for endangering Sri Lanka's neutral foreign policy for which the country has often been praised. Third, for placing Sri Lanka's sovereignty and national security at risk due to allowing unprecedented Chinese presence in the country's economy, notably through strategic industries and critical infrastructure facilities.

Against this background, Chinese-funded infrastructure development projects became politically sensitive.<sup>52</sup> Consequently, reviewing the Project became one of the popular election pledges of the 2015 presidential and parliamentary elections. These elections brought the opposition led by Maithripala Sirisena and Ranil Wickremesinghe into power under the slogan of "good governance." In complying with its election pledge, the good governance administration appointed an evaluation committee to review the CRC Project soon after the presidential election. Based on this Committee's conclusion, the Cabinet of Ministers decided to suspend the reclamation work unilaterally. Civil society groups who had been demanding that the Project be canceled welcomed this suspension. They further credited the newly elected good governance administration for fulfilling its election promise at the cost of Sino-Sri Lanka relations which were at their peak at that time.

Nevertheless, it would be a mistake to perceive this suspension as a move toward complete cancellation of the Project. During its suspension, the good governance administration took several steps, in consultation with the Project Company, to ensure its revival after addressing concerns regarding the Project. First, it was decided to commission a Supplementary EIA (2015 SEIA) taking the alterations made to the Project since the completion of 2011 EIA into account. This also addressed the concern that the Addendum Report to the 2011 EIA was not subject to public scrutiny. Accordingly, the 2015 SEIA was intended to cover a total land area of 269 ha (as opposed to the originally contracted total land area of 233 ha) and address the environmental impact of the sand and quarry material extraction.<sup>53</sup> Second, it was decided to replace the SLPA with the Urban Development Authority (UDA) and thus the Ministry of Urban Development, Water Supply and Drainage became the project proponent for the 2015 SEIA.<sup>54</sup> Although the UDA was assigned to the Ministry of Urban Development, Water Supply and Drainage, it was subsequently brought under the purview of the Ministry of Megapolis and Western Development.

From the Chinese perspective, resuming the Project was essential for safeguarding its economic interest as an investor and China's policy preference to

<sup>52</sup> See generally, Dilini Pathirana, 'The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy' (2020) 10 *Asian Journal of International Law*, 375–408.

<sup>53</sup> SEIA (n 12) 1. <sup>54</sup> *ibid.*

support the BRI at large. Therefore, commercial diplomacy between Beijing and Colombo played a significant role in ensuring the Project's revival contrary to Wickremasinghe's promise to scrap the Project in its entirety.<sup>55</sup> For context, high-level diplomatic engagements took place immediately before the suspension of the Project, including the visit by China's Assistant Foreign Minister in February 2015 who met with then Sri Lankan prime minister Wickremasinghe. This was followed by then Sri Lankan president Maithripala's visit to China in March 2015 soon after the suspension of the Project, signifying Sri Lanka's continued commitment to work with China despite the political changes and policy adjustments that were supposed to be undertaken under the newly elected good governance administration. In the end, after almost one year of suspension, on 9 March 2016 the Cabinet of Ministers permitted the Project Company to recommence the reclamation work.

Understandably, the decision to resume the Project was not welcomed by its opponents. The People's Movement against the Port City (a self-identified social pressure group) continued to protest, underscoring its adverse socio-economic and ecological impact, including the impact on the livelihood of the affected fisherfolk community.<sup>56</sup> Environmentalists continued to dispute the credibility of the 2015 SEIA, highlighting the Project's negative impact on social justice and equity and, therefore, sustainable development.<sup>57</sup> The decision to resume the Project damaged the good governance administration whose domestic reputation and confidence had already been weakened due to perceptions about the tensions within a fragile coalition government.<sup>58</sup> The situation was intensified by the massive public outcry against the leasing of the loss-making Hambantota Seaport to a Chinese enterprise for ninety-nine years. As this port was also to be associated with the establishment of an adjacent industrial zone,<sup>59</sup> the deal gave rise to concerns over potential land grab, particularly in urban and agricultural areas. All these controversies enabled the defeated Rajapaksas, who were seeking reelection, to claim that the good governance administration was selling the country's strategic national properties to China.<sup>60</sup>

<sup>55</sup> Pathirana (n 52). See further 'Colombo Port City Will Be Scrapped: Ranil' (*Daily Mirror*, 16 December 2014) [www.dailymirror.lk/59031/colombo-port-city-will-be-scrapped-ranil](http://www.dailymirror.lk/59031/colombo-port-city-will-be-scrapped-ranil).

<sup>56</sup> Environmental Justice Atlas (n 44). See further, Sheridan Prasso, 'A Chinese Company Reshaping the World Leaves a Troubled Trail' (*Bloomberg*, 19 September 2018) [www.bloomberg.com/news/features/2018-09-19/a-chinese-company-reshaping-the-world-leaves-a-troubled-trail?leadSource=verify%20wall](http://www.bloomberg.com/news/features/2018-09-19/a-chinese-company-reshaping-the-world-leaves-a-troubled-trail?leadSource=verify%20wall).

<sup>57</sup> See, e.g., Atapattu et al. (n 17).

<sup>58</sup> Jonathan Goodhand and Oliver Walton, 'The Tangled Politics of Postwar Justice in Sri Lanka' (2017) 116 *Current History* 135.

<sup>59</sup> 'Protest over Hambantota Port Deal Turns Violent' (*Aljazeera*, 7 January 2017) [www.aljazeera.com/economy/2017/1/7/protest-over-hambantota-port-deal-turns-violent](http://www.aljazeera.com/economy/2017/1/7/protest-over-hambantota-port-deal-turns-violent).

<sup>60</sup> Kinling Lo, 'Sri Lanka Wants Its "Debt Trap" Hambantota Port Back: But will China Listen?' (*South China Morning Post*, 7 December 2019) [www.scmp.com/news/china/diplomacy/article/3040982/sri-lanka-wants-its-debt-trap-hambantota-port-back-will-china](http://www.scmp.com/news/china/diplomacy/article/3040982/sri-lanka-wants-its-debt-trap-hambantota-port-back-will-china).

### 3.7 Access to Investment-Related Information: The 2016 Tripartite Agreement

The decision to resume the Project was followed by the signing of a new investment contract that repealed and replaced the much-disputed 2014 Concession Agreement.<sup>61</sup> From Sri Lanka's perspective, it was essential to remove the controversial contractual terms included in the binding investment agreement. From China's perspective, agreeing to sign a new investment agreement proved its flexibility in adjusting the legal frameworks applicable to BRI investments and showed its willingness to adapt to political changes and policy adjustments in host states. Notably, the Project Company conceded its contractual rights under the 2014 Concession Agreement to receive 20 ha of freehold land.<sup>62</sup> Further, it withdrew claims for compensation arising from the unilateral suspension of the project. There is no publicly known international arbitration brought by the Chinese investor based on the 2014 Concession Agreement or the China-Sri Lanka bilateral investment treaty (BIT) of 1987. (The BIT provides Chinese investors recourse to investor-state arbitration to resolve limited investment disputes such as the amount of compensation payable in an event of expropriation.<sup>63</sup>)

A new Tripartite Agreement was signed on 12 September 2016 (the 2016 Agreement). As mentioned, the SLPA was replaced with the UDA, which was subsequently transferred to the Ministry of Megapolis and Western Development. To date, this agreement has not been made publicly available, giving rise to serious concerns over transparency in investment agreements and the people's access to investment-related information. The lack of access to investment agreements is not limited to Chinese investments in Sri Lanka; agreements relating to other disputed ventures have also not been made publicly available. In doing so, parties invoke confidentiality clauses and commercial confidence. For example, the agreement between the US-based energy company New Fortress Energy Inc. and the GOSL (September 2021) relating to the former's investment in Sri Lanka's energy sector and based on a USP, has not been released to the public.<sup>64</sup>

However, civil society activists and environmentalists continued to demand access to the 2016 Agreement through the legal mechanism established by the Right to Information (RTI) Act. The Act aims to promote transparency and accountability of public authorities, guaranteeing the right of access to information as provided for in Article 14A of the Constitution. During such attempts, UDA and other relevant public authorities have refused to release the agreement for several reasons.<sup>65</sup> They invoked the confidentiality clause in

<sup>61</sup> See generally, Gunawansa (n 11); SEIA (n 12). <sup>62</sup> Gunawansa (n 11) 111.

<sup>63</sup> For a detailed discussion on the China-Sri Lanka BIT of 1987 see Pathirana (n 52).

<sup>64</sup> Newswire, 'CEB Explains Why Contents of Yugadanavi Power Plant Agreement Cannot Be Disclosed' (Newswire, 4 November 2021) [www.newswire.lk/2021/11/04/ceb-explains-why-yugadanavi-us-power-plant-agreement-cannot/](http://www.newswire.lk/2021/11/04/ceb-explains-why-yugadanavi-us-power-plant-agreement-cannot/).

<sup>65</sup> See generally, *M. F. A. Mansoor v Ministry of Urban Development, Water Supply and Housing Facilities (Ministry of Megapolis and Western Development) RTIC Appeal (in Person)*/1108/2019. (Hereinafter, *Mansoor v Ministry of Urban Development*).

the 2016 Agreement and Section 5(1)(d) of the RTI Act, which permits denial of access to information based on several grounds including commercial confidentiality. Moreover, the Project Company has also raised an objection as a third party against the release of the agreement on the basis that it contains confidential and price-sensitive information.

Nevertheless, in the case of *Mansoor v Ministry of Urban Development*, the Commission decided that the general confidentiality clause in an agreement does not preclude the right to access to the entire agreement. In its Interim Order in 2022, the Commission emphasized the ability to release an agreement “subject to redaction of commercially sensitive information” as provided in the RTI Act. The Commission further decided that the clauses in the 2016 Agreement that are of public interest should be made public. While comparing the 2016 and 2014 Agreements, the Commission determined that many clauses in the former are identical or similar to those included in the latter, which is already in the public domain. In its final Order dated April 2023, the Commission directed the relevant public authorities, including the Ministry of Investment Promotions, to release the 2016 Agreement before 4 May 2023.<sup>66</sup> However, the Project Company has filed an appeal against this Order before the Court of Appeal.<sup>67</sup>

### 3.8 Litigation before Domestic Courts

The Project was challenged before Sri Lanka’s domestic courts in two cases. The first case was the Fundamental Rights Petition filed by the All Ceylon Fisherfolk Trade Union.<sup>68</sup> The petitioners argued that the Project would affect their right to engage in a lawful occupation. The Supreme Court dismissed the petition on the basis that the complaints were vague and lacking in scientific evidence.<sup>69</sup> The second lawsuit was a writ petition filed before the Court of Appeal by a local nongovernmental organization, the Centre for Environmental Justice.<sup>70</sup> It sought a writ of certiorari to quash the 2011 EIA and 2015 SEIA, the 2014 Concession Agreement between the SLPA and the Project Company, and the Development Permit issued by the Director General of the Coast Conservation to the SLPA. It also sought a writ of mandamus to compel the Project Company to conduct a new “comprehensive

<sup>66</sup> This decision was premised on several grounds including the failure of the relevant public authorities to discharge its burden in terms of Section 32(4) of the Act, while the public interest has been satisfactorily established by the Appellants.

<sup>67</sup> Interview with a lawyer involved in the litigation against the CPC as well as the right to information request (online, 19 May 2023).

<sup>68</sup> SC (FR)151/2015. This Petition was filed under Art 126 of the Constitution.

<sup>69</sup> ‘Supreme Court Terminates Proceedings in the Case against Colombo Port City Project’ (*The Sunday Times*, 17 July 2016) [www.sundaytimes.lk/160717/business-times/supreme-court-terminates-proceedings-in-the-case-against-colombo-port-city-project-200940.html](https://www.sundaytimes.lk/160717/business-times/supreme-court-terminates-proceedings-in-the-case-against-colombo-port-city-project-200940.html).

<sup>70</sup> Art 140 of the Constitution.

EIA.”<sup>71</sup> This petition was dismissed although the judgment on the writ petition has not yet been issued by the Court. This then resulted in difficulties for the petitioner in appealing against the dismissal. However, an appeal has been filed and the matter is pending before the Supreme Court.<sup>72</sup>

In the fundamental rights matter, the petitioners invoked the Public Trust Doctrine (PTD) recognized by the judiciary in Sri Lanka under the right to equality clause in making a complaint against the violation of their fundamental rights.<sup>73</sup> As with the writ petition, they complained that the required approvals had not been obtained as per the applicable law and that the SLPA had no authority to enter into an agreement on land reclamation. Proceedings in this matter were discontinued in July 2016 on the basis that the petitioners were “free to come back” to Court if they had “any further concerns” regarding any legal or constitutional violations. The Court noted that the Directive Principles of State Policy required the state to “protect, preserve, and improve the environment for the benefit of the community” and noted “[i]n the same breadth, the Court is concerned about the rapid development of the whole country.”<sup>74</sup> The Court further noted that “[t]he organs of the States are guardians to whom the people have committed the case of preservation of the resources of the people. The Court is mindful in upholding the cause of environment as an independent right of both the present and future generations.”<sup>75</sup>

The Court then commented on two developments. First, it commented that the 2015 SEIA had proposed to the government the payment of compensation to “meet the requirement of the Fisher community, their income support and benefits.” It further opined that any concerns that the community may have over the compensation could be taken up with the relevant ministries. Second, the Court noted that if petitioners require any documents “by which approvals were granted,” then they could be obtained through the Attorney-General’s Department from the Secretary of the Ministry.

In both petitions, a key issue was the challenge faced by petitioners in establishing causation between the environmental impact of the proposed project and the actual harm to the environment. In both cases, it appears that the Court was not convinced that the evidentiary burden was satisfied by the petitioners. However, the judicial responses in these two petitions contrast with the approach adopted by the Supreme Court in the *Chunnakam* case where the Court recognized and enforced the precautionary principle in affirming

<sup>71</sup> *Centre for Environmental Justice v Sri Lanka Ports Authority CA(Writ) 112/2015*. The relevant legislation is the Coast Conservation Act 57 of 1981 (as amended) and the Sri Lanka Ports Authority Act 51 of 1979 (as amended).

<sup>72</sup> Interview with one of the lawyers representing a petitioner (online, 19 May 2023).

<sup>73</sup> Art 12 of the Constitution.

<sup>74</sup> SC (FR) 151/2015, order Supreme Court Minutes 7 July 2016.

<sup>75</sup> SC (FR) 151/2015, order Supreme Court Minutes 7 July 2016.

the duty of the state to protect the environment.<sup>76</sup> Moreover, the Sri Lankan judiciary has in the past declared government transactions that have violated applicable procedures to be null and void. In these cases, the Court invoked the PTD to hold that public power can only be used in trust and for the benefit of the people.<sup>77</sup> In the litigation involving the CPC, however, the petitions have been dismissed and the reasons for the dismissals are not yet available in the public domain.

### 3.9 Establishing the Colombo Port City SEZ

In January 2019, the first phase of the Project – the reclamation of 269 ha – was complete. Parliament then passed a resolution under the Administrative Districts Act to annex the reclaimed land known as “Port City Colombo” to the Divisional Secretary’s Division of Colombo in the Administrative District of Colombo and to alter the limits of the Administrative District of Colombo to reflect the same. Under the same Act, on 5 August 2019, the Minister of Internal and Home Affairs and Provincial Councils and Local Government published an Extraordinary Gazette No. 2135/13 notifying the inclusion of Colombo Port City Land as a part of the Colombo Administrative District. Meanwhile, on 18 November 2019, the Rajapaksa regime returned to power under the leadership of Gotabaya Rajapaksa. President Gotabaya continued with the Project and, marking the inception of its second stage, Parliament published a bill on 19 March 2019 to establish a special economic zone (SEZ) called “Colombo Port City SEZ” and a body corporate called the “Colombo Port City Economic Commission” (CPCEC) for the purpose of its administration.<sup>78</sup>

This bill became the subject of an unprecedented public outcry against the establishment of the CPC SEZ and the CPCEC based on several grounds. First, opponents, mainly civil society groups, argued that these legal and institutional establishments could transform this artificial landmass into a “Chinese colony” that would not be subject to Sri Lanka’s sovereignty.<sup>79</sup> Second, they disputed several provisions of the bill in advancing the idea that CPC will become a satellite Chinese province. They drew attention to the provisions that exempt (or limit) certain Sri Lankan laws from applying to the “Area of Authority”

<sup>76</sup> *Kariyawasam v CEA* [SCFR 141/2015, SC Minutes 04 April 2019]; Dinesha Samararatne, ‘Chunnakam Power Plant Case: Court Recognises the Right to Be Free from “Degradation of the Environment”’ (*Daily Financial Times*, 29 July 2019) [www.ft.lk/columns/Chunnakam-Power-Plant-case--Court-recognises-right-to-be-free-from--degradation-of-the-environment-/4-682834](http://www.ft.lk/columns/Chunnakam-Power-Plant-case--Court-recognises-right-to-be-free-from--degradation-of-the-environment-/4-682834).

<sup>77</sup> *Nanayakkara v Choksy (John Keels case)* [2008] 1 Sri LR 134; *Sugathapala Mendis v Kumaratunga (Water’s Edge case)* [2008] 2 Sri LR 339.

<sup>78</sup> Colombo Port City Economic Commission Bill Gazetted 24 March 2021, [http://documents.gov.lk/files/bill/2021/4/51-2021\\_E.pdf](http://documents.gov.lk/files/bill/2021/4/51-2021_E.pdf).

<sup>79</sup> Dinesha Samararatne, ‘The Port City Bill: Legislative Carving Out from a Constitutional Democracy?’ (*Groundviews*, 4 April 2021) <https://groundviews.org/2021/04/18/the-port-city-bill-legislative-carving-out-from-a-constitutional-democracy/>.

of the CPC SEZ.<sup>80</sup> Thirdly, opponent politicians argued that carving out an SEZ to which the normal regulatory regime of the country will not apply contradicts the signature political slogan of President Gotabaya: “one country, one law.”<sup>81</sup> This allegation damaged the credibility of the Rajapaksa regime and President Gotabaya; in his presidential election campaign sternly criticizing the Hambantota Port lease, he had vowed to protect Sri Lanka’s strategic national resources from foreign powers.

At the regional level too, this bill gained much attention among the regional and global superpowers who were already troubled by China’s increased presence in the Indian Ocean Region largely through Chinese-funded infrastructure development projects in Sri Lanka. According to some, the proposed CPC SEZ will be the “Chinese colony in India’s backyard,” enabling China to find its way to the Indian subcontinent amid the intensified geopolitical rivalry in the region.<sup>82</sup> At the domestic level, the bill’s constitutionality was challenged. In its Special Determination, the Supreme Court held that the bill as it was originally proposed undermined the supremacy of Parliament over legislative matters as well as over public finance. For instance, the bill did not provide for parliamentary approval of “Community Rules and Development Control Regulations” issued by the Commission.<sup>83</sup> Similarly, the bill did not provide for parliamentary approval for decisions of the Commission in granting individual tax exemptions or financial incentives. In certain other instances, the bill proposed authorizing the Cabinet of Ministers to exempt the application of laws specified in Schedule II of the bill to “Business of Strategic Importance.” Those clauses were deemed inconsistent with the Constitution by the Supreme Court in its Special Determination.<sup>84</sup>

In designating the Port City as an SEZ, the bill sought to authorize the CPCEC to regulate entry and exit to the territory, but the Court held that these provisions were inconsistent with the Constitution as they amounted to a violation of the freedom of movement.<sup>85</sup> The bill vested broad discretionary powers with the CPCEC. In fact, the bill proposed to mandate that other administrative agencies “concur” with the decisions of the CPCEC. This proposed provision

<sup>80</sup> Saman Indrajith, ‘Proposed Law Will Turn Port City into a Province of China – JVP’ (*The Island*, 13 April 2021) <https://island.lk/proposed-law-will-turn-port-city-into-a-province-of-china-jvp/>.

<sup>81</sup> Amali Mallawaarachchi, ‘Port City Bill Contradicts One Country, One Law Concept – Sajith’ (*Daily News*, 17 April 2021) [www.dailynews.lk/2021/04/17/local/246819/port-city-bill-contradicts-one-country-one-law-concept-sajith](http://www.dailynews.lk/2021/04/17/local/246819/port-city-bill-contradicts-one-country-one-law-concept-sajith).

<sup>82</sup> Mohamed Nalir Mohamed Faslan, ‘Regional Security Challenges and Chinese Port City Project in Sri Lanka’ (*Instytut Nowej Europy*, 15 November 2021) <https://ine.org.pl/wp-content/uploads/2021/11/Regional-Security-Challenges-and-Chinese-Port-City-Project-in-Sri-Lanka-1.pdf>.

<sup>83</sup> Parliamentary Deb 18 May 2021, vol 283(3), cols 373–374 [www.parliament.lk/uploads/documents/hansard/1621505793027313.pdf](http://www.parliament.lk/uploads/documents/hansard/1621505793027313.pdf). (Special Determinations are published by Parliament.)

<sup>84</sup> Art 148 of the Constitution. *ibid* cols 385–386. <sup>85</sup> Art 14(1)(h) of the Constitution.

clearly disregarded an entire body of the common law that has long established several principles on the limits to the exercise of administrative discretion. It cannot be under dictation, even by prevailing policies of the government of the day. The Court noted that the proposed clauses would amount to a violation of the right to equality as interpreted by the Sri Lankan judiciary.<sup>86</sup>

The Court also noted that “the regulatory structure set out in the Bill lacks clarity and provides for the exercise of arbitrary power by the CPCEC” and is therefore inconsistent with the right to equality. The Attorney-General’s Department responded with proposals for a further set of amendments to the bill. In addition, the Court further determined that the CPCEC “should always obtain the concurrence of the respective Regulatory Authorities” and that those institutions will continue to exercise their powers “unimpeded” in the Port City.<sup>87</sup>

In the Special Determination of the Port City Bill, the Supreme Court departed from its previous view on the question of consulting provincial councils.<sup>88</sup> Previously, the Court had held that where a bill relates to a devolved subject and where one of the provincial councils cannot be consulted because it has not been constituted, the bill can only be passed with a special majority. In the Determination on the Port City, however, the Court took the view that the consultation of provincial council is a “procedural step in the legislative process.”<sup>89</sup> The Court argued that where a provincial council has not been constituted, the principle *lex non cogit ad impossibilia* applies and that it was “not necessary” for the Court to determine whether the bill impacted on devolved subjects.<sup>90</sup> This is a significant inroad into the already weak recognition of devolution in the Sri Lankan Constitution and its implementation.

The bill also required that ordinary courts give priority to legal proceedings arising from the Port City. The Court noted that the objective of establishing the Port City is to create a “conducive environment” for new investments and that the speedy resolutions of disputes is of “critical concern” in this regard. On that basis, the Court determined that this was “a permissible classification.”<sup>91</sup> The bill sought to restrict judicial discretion by providing that where a lawyer is unable to be present in the Court, it “shall not be a ground for postponement of commencement or continuation of the trial” or considered as “an exceptional ground” justifying postponement. During the hearing, the Attorney-General’s Department proposed to revise this clause to require that courts prioritize legal proceedings emanating from the Port City and that those cases be heard daily except where, in the opinion of the Court, exceptional circumstances warrant postponement.<sup>92</sup>

In the Port City, disputes have to be referred to arbitration. The Supreme Court did not consider this as a contravention of the Constitution. The Court relied on the fact that any person within the Port City is “put on notice that

<sup>86</sup> Parliamentary Deb (n 83) cols 365–366. <sup>87</sup> *ibid* cols 369–370.

<sup>88</sup> Divineguma Bill Vol X (September 2013) SCDPB 69.

<sup>89</sup> Parliamentary Deb (n 83) cols 353–354. <sup>90</sup> *ibid* cols 357–358.

<sup>91</sup> *ibid* cols 413–414. <sup>92</sup> Colombo Port City Economic Commission Bill (n 78), Clause 63.

arbitration is mandatory in given circumstances.” On that basis, the Court concluded that this provision was consistent with the Constitution.<sup>93</sup>

After making the necessary adjustments to ensure that the bill was consistent with the Supreme Court Determination, it was passed by Parliament on 20 May 2021. With the enactment of the Colombo Port City Economic Commission Act (the Port City Act), a distinctive legal regime was established to deal with matters exclusive to the CPC SEZ. This new legal regime coexists with the general legislative framework for facilitating inward foreign investments in Sri Lanka under the Board of Investment of Sri Lanka Law, 1978 (BOI Act). As mentioned in Schedule III to the Port City Act, which should be read with Section 73 of the same Act, the BOI Act does not apply within the “Area of Authority” of the Port City.<sup>94</sup> Understandably, this is because the Port City Act provides an alternative institutional arrangement for facilitating investors who wish to do business in or from the Area of Authority of the Port City.

The Project itself, notably its first phase, was fostered under the BOI Act and provided with incentives under the Strategic Development Projects Act (SDP Act) No. 14 of 2008. This Act aims to grant special concessions to special projects identified as “Strategic Development Projects.”<sup>95</sup> This identification is done by the BOI in consultation with the relevant line ministries. The Port City is exempted from the SDP Act because Part IX of the Port City Act provides its own mechanism to grant incentives and exceptions to ventures designated as “Business of Strategic Importance.” This designation should be done by the CPCEC in consultation with the Sri Lankan president.<sup>96</sup> In addition, the CPCEC is vested with competence to administrate, regulate, and control “all matters connected with businesses and other operations, in and from the Area of Authority of the Colombo Port City” while acting as a Single Window Investment Facilitator.<sup>97</sup>

According to the Port City Act, the CPCEC consists of five to seven members appointed by the Sri Lankan president.<sup>98</sup> However, the president is expressly required to ensure that the majority of commission members, including the chairperson, are Sri Lankans. One of the main objectives of the CPCEC is to make the Port City an “attractive investment destination” and a prominent SEZ in the region.<sup>99</sup> The CPC SEZ is expected to facilitate the diversification of Sri Lanka’s service economy, promote foreign investment, and generate new employment opportunities within the zone.<sup>100</sup> It is further expected to be an international business and service hub that promotes and facilitates an array of economic activities such as international trade, tourism,

<sup>93</sup> Parliamentary Deb (n 83) cols 411–412.

<sup>94</sup> The boundaries of the Area of Authority of Colombo Port City have been set out in Schedule I to the Port City Act.

<sup>95</sup> Section 2 and 3 of the SDP Act, No. 14 of 2008.

<sup>96</sup> Section 52 (2) of the Port City Act, No. 11 of 2021. However, in an event of the subject of Port City is assigned to a minister, the CPCEC should consult the relevant minister.

<sup>97</sup> *ibid* section 3 and 6 (g) Port City Act. <sup>98</sup> *ibid* section 7 (1).

<sup>99</sup> *ibid* section 5 (a) and (b). <sup>100</sup> Preamble to the Port City Act.

offshore banking and financial services, and shipping logistic operations. In order to achieve these objectives, the first set of regulations have recently been gazetted under the Act, specifying the fees payable to an “Authorized Person” to whom the CPCEC has issued or granted registration, licensing, and authorization as required by the Port City Act.<sup>101</sup> In addition, the CPCEC has issued regulations relating to the incentives and tax exemptions that will be afforded to ventures identified as Business of Strategic Importance as provided in Part IX of the Act.<sup>102</sup> Concerning dispute resolution, the CPCEC has appointed the International ADR Center, Sri Lanka as the designated international Commercial Dispute Resolution Centre required to be established under Section 62 of the Act.<sup>103</sup>

## 4 Conclusion

This case study provides insights into the contested nature of BRI partnerships in a given domestic host state context and raises many issues. In Sri Lanka, the political aspirations for economic development through FDI intersect with anxieties in the public domain about the China debt trap and loss of sovereignty. These political considerations have a broad effect on domestic politics, including on how charismatic leaders and political parties perform during presidential and parliamentary elections. In the legal domain, doctrinal questions about sovereignty emerge. They span international investment law, law of the sea, environmental law, constitutional law, administrative law, zoning law, and labor law. With respect to the Project, concerns of each of these aspects of law and the different legal doctrines have given rise to multiple legal contestations. Over time, these political and legal contestations have evolved and will no doubt continue to develop.

## 5 Discussion Questions and Comments

### 5.1 For Law School Audiences

1. The Port City Act is a law enacted by a sovereign state. On the one hand, this Act falls under the authority of a written constitution and is part of a domestic legal system. On the other hand, it establishes a statutory body, the CPCEC, which has the power to enter into contracts with foreign investors. In this context, what is the relevance (if any) of the Port City Act

<sup>101</sup> Gazette (Extraordinary) 28 September 2022 (2299/47). These regulations are made by the Minister of Finance, Economic Stabilization and National Policies in consultation with the CPEC as required by the Port City Act.

<sup>102</sup> Government (Extraordinary) Gazettes 2023 August (2343/60). These regulations are made by the Minister of Investment Promotion in consultation with the CPEC.

<sup>103</sup> Colombo Port City ADR Center (*International ADR Center, Sri Lanka*) [www.iadrc.lk/index.php?option=com\\_content&view=article&id=74&Itemid=194](http://www.iadrc.lk/index.php?option=com_content&view=article&id=74&Itemid=194).

- and regulations enacted under the Act to the interpretation of any such contracts?
2. What are the significant contractual obligations of the Project on the government and the investor parties? Access the Act and its regulations and consider whether these obligations can be fulfilled within the Port City Act.
  3. In Sri Lanka, the common law as interpreted within its Constitution applies to the judicial review of executive and administrative action. Judicial review of these actions is available under the writ and fundamental rights jurisdictions of Sri Lanka's appellate courts. How should these remedies apply to acts or omissions by executive or administrative actions within and in relation to the Port City?
  4. What is your assessment of the approach to judicial review in the litigation related to the Port City discussed in the case study? How will the availability of judicial review compare and contrast with arbitration provided for through the International Arbitration Centre, as set out in the Port City Act for disputes arising in the course of business therein?

## 5.2 For Policy School Audiences

1. How should the Project be situated in the broader context of BRI as an example of how projects may affect the public law of host states?
2. What lessons can be learned from this case study about the impact of social movements (relating to labor, environment, etc.) on infrastructure development projects driven by FDI?
3. In examining the role played by different actors in this case study, what are the different approaches to development that can be identified? What do these different approaches suggest about the effectiveness of FDI on development?
4. How should policy and governance mechanisms and institutions innovate to deal effectively with the different challenges that are raised through projects such as the Port City?

## 5.3 For Business School Audiences

1. The Colombo Port City has been established as an SEZ with the purpose of accelerating Sri Lanka's economic growth. What role is the Port City Economic Commission expected to play in achieving the fundamental objective of establishing the Port SEZ?
2. There are different political and legal narratives about the Project. How do they impact the investors' confidence in selecting the Port City SEZ as a destination for their investment. The Colombo Port City Act permits the CPCEC to provide selected ventures doing business in and from the Port City SEZ with generous tax incentives and exemptions. The relevant

regulations have been already published. What is the role of such incentives and exemptions in promoting the Colombo SEZ as a business hub and how they would impact Sri Lanka's economy at large? The Port City Act identified alternative dispute resolution, notably commercial arbitration, as the predominant method of resolving disputes. Would such a method contribute to facilitating business to the Colombo SEZ, including fostering and attracting foreign investment?