



CENTRE FOR POLICY ALTERNATIVES  
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மாற்றுக் கொள்கைகளுக்கான நிலையம்

## **A basic guide to the Colombo Port City Economic Commission Bill and key areas of concern**

**May 2021**

### **Introduction**

Sri Lanka is presently debating the legal framework for the Colombo Port City Special Economic Zone (hereinafter sometimes the Colombo Port City). At the outset it must be noted that the Colombo Port City has the potential for the promotion and advancement of the Sri Lankan economy. However, the process of enacting laws and their substantive contents must be closely scrutinized and debated. The Colombo Port City Economic Commission Bill (hereinafter sometimes the CPCEC Bill) must stand the test of time, as periodic amendments to the act will deter potential investors and lead to uncertainty. It must also be done in adherence to Sri Lanka's Constitution and not create an entity that may override Sri Lanka's democratic institutions and processes. Finally, economic zones must be created to benefit the people of Sri Lanka, and not to provide tax havens and economic benefits for a select few.

In this regard, the Centre for Policy Alternatives (CPA) raises several key governance and rule of law issues in this brief commentary. CPA also notes at the outset that the framework for the Colombo Port City must meet the following criteria which are further elaborated in the document:

- The governance of the Colombo Port City must be based on a rules-based system and not on a system based on broad discretion and excessive powers vested in a few individuals devoid of any checks and balances.
- It must ensure robust Parliamentary oversight.
- It must impose specific criteria for the appointment of key actors to ensure there is no scope of a conflict of interest that may be detrimental to the interest of Sri Lanka.
- It must ensure a law devoid of loopholes that allow for money laundering, corruption, discrimination or economic losses to Sri Lanka.
- It must provide for the jurisdiction of courts, tribunals and other entities.
- It must ensure a framework that meets international and national standards including in areas of labour and environment, among others.

In this brief commentary CPA raises the potential implications of the CPCEC Bill, and highlights some key concerns relating to the Bill, as was Gazetted on the 24<sup>th</sup> of March 2021. When the Bill was challenged before the Supreme Court in SCSD 4 - 23 of 2021, the Additional Solicitor General appearing on behalf of the Attorney General informed court that certain

amendments would be made to the Bill. The final Bill that is put before Parliament and voted on may thus contain changes; both, amendments to incorporate the findings of the Supreme Court on the constitutionality of clauses of the Bill, and any other Committee Stage amendments. At the time of issuing this commentary the Supreme Court determination was not made public and hence not incorporated into the present document.

It must also be noted that in a Special Determination, the role of the Supreme Court is limited to determining how the provisions of the Bill can be passed by Parliament. The Sri Lankan Constitution expressly provides for a mechanism by which even Bills, which are unconstitutional can be enacted into law. While the Supreme Court cannot determine the wider social, economic and political impacts of a Bill, it is the role of the legislature to debate and assess these issues, in light of the contextual realities that prevail in the country, above and beyond the constitutionality of the document.

CPA also notes concerns with the process and the speed with which the CPCEC Bill is moving. Despite the implications the Colombo Port City holds for Sri Lanka and its citizens, there has yet to be a wide discussion on the different components and how they are likely to impact governance, the rule of law, the economy, the environment and fundamental rights in Sri Lanka. CPA is also unaware of stakeholder consultations of the present CPCEC Bill and urges the authorities to do so without further delay. Media reports also indicate that Parliament is to debate the CPCEC Bill on 5<sup>th</sup> May 2021 with only one day allocated for the debate. This is wholly insufficient for a Bill of such magnitude and CPA urges party leaders to reassess this decision and allocate further time so that the legislature is fully abreast of the different dimensions of the Bill.

Further, CPA notes an extremely worrying trend of proposing amendments to Bills after they are tabled in Parliament. In terms of the present Bill, several significant amendments were proposed by the Attorney General in Court, which will need to be addressed by the Supreme Court in its determination. This practice of proposing amendments after the Bill has been tabled in Parliament precludes citizens from fully engaging with and understanding the proposed amendments and permits changes that can be brought in covertly through Committee Stage amendments, as seen in recent times. In addition, CPA also noted another development during proceedings in the Supreme Court when counsel for some intervenient Petitioners proposed amendments to the Bill, seemingly with no involvement of the Attorney General. Such a practice is extremely worrying, and indicative of officials involved in the law-making process being kept out of deliberations, and the process becoming increasingly politicised. Thus, both the process and several clauses of the Bill require careful consideration.

## **Areas of Concern:**

### **The Powers Granted to the Colombo Port City Economic Commission**

The CPCEC Bill seeks to establish the Colombo Port City Economic Commission (hereinafter sometimes the CPCEC or the Commission). It is vested with wide, overbroad powers relating to a variety of matters. Its geographical jurisdiction extends to the entire ‘Area of Authority of the Colombo Port City’, and it wields jurisdiction over a number of subject matters within this

Area of Authority.<sup>1</sup> Amongst the lengthy list of subject matters falling within the purview of the CPCEC, are:

- Overall regulatory authority over all investments in the Area of Authority
- Lease land within the Area of Authority
- Develop and approve environmental standards and plan, monitor and execute environmental improvements
- The granting of licenses and registrations to conduct business
- To identify local assessment rates and any other levies within the Area of Authority
- To facilitate the establishment and operation, within the Area of Authority of the Colombo Port City, any stock, precious metal or commodity, exchange or market<sup>2</sup>

Most of the above fall within the purview of existing regulatory authorities with oversight powers. For example, “Develop and approve environmental standards and plan, monitor and execute environmental improvements” is a function that is already within the purview of the Central Environmental Authority and the Urban Development Authority (UDA), as far as the rest of the country is concerned.

Important note: The powers of the CPCEC are not limited to overseeing the implementation of existing laws but extends to prescribing and establishing standards and regulations to be applicable within the Area of Authority (E.g. in relation to environmental standards<sup>3</sup> and taxation<sup>4</sup> ). This raises serious concerns on procedural and substantive grounds.

### **Composition of the Colombo Port City Economic Commission**

The CPCEC must operate in the best interest of Sri Lankan citizens, respecting their sovereignty. For this, it is important that no single elected official or body is provided unchecked control over the operation of the Port City.

The CPCEC Bill does not stipulate any requirement for Members of the Commission or the Director General to be citizens of Sri Lanka. The only requirements are in relation to the fields of expertise of the Members of the Commission<sup>5</sup>. Furthermore, there does not appear to be a term limit for the post of a Commissioner who can be re-appointed<sup>6</sup> without specifics on an upper term limit. CPA flags need for safeguards to ensure the Members, the Director General and others in key positions are appointed to serve the best interest of Sri Lanka and without a conflict of interest.

### **Existing Regulatory Authorities**

At the outset, it is noteworthy that several national authorities<sup>7</sup> will have no application to the Colombo Port City, on the basis that *‘the subjects dealt with in such enactments have been, mutatis mutandis, set out in this Act, or alternate legal arrangements have been specifically set*

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<sup>1</sup> Clause 3 (1)

<sup>2</sup> For a full list of the powers of the CPCEC, see Clauses 5 and 6 of the Bill

<sup>3</sup> Clause 6(j)

<sup>4</sup> Clause 6(p)

<sup>5</sup> Clause 7 (1)

<sup>6</sup> Clause 9 (1)

<sup>7</sup> The Urban Development Authority Act, No. 41 of 1978; The Municipal Council Ordinance (Chapter 252); The Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000; The Town and Country Planning Ordinance (Chapter 269); The Strategic Development Projects Act, No. 14 of 2008; Public Contracts Act, No. 3 of 1987; The Board of Investment of Sri Lanka Law, No. 4 of 1978

out in this Act, or such enactments are not relevant and are not required to be applicable within the Area of Authority of the Colombo Port City”<sup>8</sup>.

The jurisdiction wielded by the CPCEC, as stated in the Bill in its present form is to be exercised in concurrence or alongside the jurisdiction of the existing Regulatory Authorities in Sri Lanka. However, as per the Gazetted Bill, the Regulatory Authority is to inform the CPCEC of its concurrence not its decision, implying that the decision of the CPCEC could be conclusive, notwithstanding any discrepancy with the respective Regulatory Authority. It appears that the CPCEC would be able to make decisions contrary to and overriding the advice of the Regulatory Authorities.

The references made in the Bill to the role of the existing Regulatory Authorities is as follows.

Clause 3 (5) states that,

*“The Commission shall, in the exercise, performance and discharge of its powers, duties and functions, where so required by the respective written laws applicable to any Regulatory Authority, obtain the concurrence of the relevant Regulatory Authority in respect of the subjects vested in or assigned to, such Regulatory Authority and to the extent specifically provided for in this Act:*

*Provided that, the concurrence of the relevant Regulatory Authority sought shall be limited to the implementation, within the Area of Authority of the Colombo Port City, of the respective written laws applicable to such Regulatory Authority.”*

According to the above provision, the powers of the relevant Regulatory Authorities have been expressly confined. It is also important to note that CPCEC interprets whether the written laws require obtaining concurrence of the Regulatory Authority. Granting this decision to the CPCEC, may mean that the Commission presides over the question of its own jurisdiction.

The wide powers held by the CPCEC include that of prescribing applicable standards, including environmental standards<sup>9</sup>, applicable assessments and levies<sup>10</sup>. The members of the Commission may not have the technical expertise to prescribe standards in relation to these subjects and there is no stipulation for the Commission to consult with relevant authorities when doing so. Arbitrary standards and regulations in these areas can have serious implications. For example, environmental standards in a geographically valuable location, would have an environmental impact on the entire island.

### **Who is the CPCEC Accountable to?**

The provisions contained in the Bill on the accountability of and oversight over the CPCEC are as below:

<b>Area of Oversight</b>	<b>Responsible Authority</b>
The appointment and removal of the Members of the Commission	The President has powers of appointment and removal of the Members of the Commission (Clauses 7 and 9 of the Bill)

<sup>8</sup> Clause 73

<sup>9</sup> Clause 6 (j)

<sup>10</sup> Clause 6 (p)

The appointment of the Director General	President to be consulted and approve of the appointment (Clause 24 (1))
The submitting of Audit accounts of the CPCEC <sup>11</sup>	(1) The accounts of the Commission shall be audited annually by a qualified auditor in terms of Article 154 of the Constitution. For the purposes of this section, the qualified auditor so appointed may be an international firm of accountants.  (2) The final Audit Report shall be submitted to the President, or in the event that the subject of the Colombo Port City is assigned to a Minister, to such Minister, to be tabled in Parliament. (Clause 15)
The submitting of Annual Reports of the CPCEC	To submit to the President or in the event that the subject of the Colombo Port City is assigned to a Minister, to such Minister, and to the Minister assigned the subject of Finance, an annual report on the operations, income and expenditure of the Commission, to be placed before Parliament (Clause 6 (aa))

The CPCEC appears to be a self-governing, inviolable authority, in most respects, as per the gazetted Bill. If there is no national level oversight of the Commission, this could be inimical to the sovereignty of the People exercised through the Executive, Legislature and Judiciary in terms of the Constitution and the Constitutional supremacy.

### **Powers of the President under the Bill**

The President holds the powers to appoint and remove the Commissioners of the CPCEC who themselves are vested with a wide range of powers. This can compound the powers of an Executive President already strengthened by the 20<sup>th</sup> Amendment.<sup>12</sup> This is most concerning given the limited oversight granted to the Parliament through the present Bill.

### **Accountability and Transparency**

There are several clauses in the Bill, which raise concerns relating to accountability and transparency, the abuse of power, corruption or other nefarious activities.

As provided for in the Constitution, the Auditor-General carries out audits on several of the commissions established by the Constitution, from the Judicial Services Commission and the Parliamentary Council, to the Commissions referred to in Schedule I of Article 41A<sup>13</sup>. However, in terms of the CPCEC Bill, the audit of the CPCEC is not carried out by the Auditor

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<sup>11</sup> The 20<sup>th</sup> Amendment removed the Audit Service Commission, excluded a number of public offices from the ambit of the Auditor General, and made the appointment of the Auditor General one that falls within the wide powers of the President. The CPCEC Bill similarly does not stipulate further criteria than being a “qualified auditor” to be appointed as auditor, and opens the possibility of international firms conducting the auditing. There is no mention of the Auditor General within the CPCEC Bill.

<sup>12</sup> In several places of the Bill there is reference to the powers assigned to the President being assigned to a Minister in the event that the subject of the Port City is assigned to a Minister. It is thus not necessarily the President who will exercise all the powers contained in the Bill.

<sup>13</sup> The Election Commission, The Public Service Commission, The National Police Commission, The Human Rights Commission of Sri Lanka, The Commission to Investigate Allegations of Bribery or Corruption, The Finance Commission, The Delimitation Commission.

General, but ‘a qualified auditor in terms of Article 154 of the Constitution’ and the ‘the qualified auditor so appointed may be an international firm of accountants’<sup>14,15</sup>.

Further, concerns arise as the Bill exempts offshore companies and banks from the Companies Act and Banking Act of Sri Lanka.

Part IV of the Banking Act specifically deals with Offshore Banking Businesses, and includes provisions, which allow for the oversight of such banks. This provision does not apply to offshore banks under the CPCEC Bill<sup>16</sup>, and instead, the President, in consultation with the Minister of Finance and the Monetary Board can make regulations ‘to ensure prudent management and maintenance of confidence in the offshore banking business engaged in, in and from the Area of Authority of the Colombo Port City’<sup>17,18</sup>. Clause 49 of the Bill also gives the Commission certain supervisory powers over offshore banks in the area of the Port City, which under the Banking Act would have been vested in the Monetary Board<sup>19</sup>.

Offshore companies registered under the CPCEC Bill are exempt from having to comply with the provisions of the Companies Act<sup>20</sup>. This means provisions of the Companies Act, which enable transparency, such as Section 120 which allows the public to inspect certain records of a company, will not be applicable to offshore companies registered under the CPCEC Bill. Among the information that is accessible to the public under the Companies Act is the Share Register of the Company, which informs who the ultimate owners of the company are. This information not being accessible for offshore companies registered under the Bill is a cause of concern, and could create a situation in which the Port City becomes a haven for money laundering.

## **The relationship between the Commission and Parliament**

### **Power to make laws**

Clause 68 sets out offences under the CPCEC Bill. Among the offences are the contravention or the failure to comply with any regulation made under the Act<sup>21</sup>. These regulations do not have to be approved by Parliament, and in the case that Parliament rejects such a regulation, a person can still be found guilty of contravening a regulation within the three months before they are placed before Parliament<sup>22</sup>.

More concerning is that the contravening or failing to comply with any rule, code, direction or guideline made or issued in terms of the act, within the area of the CPC<sup>23</sup> is also made an

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<sup>14</sup> Clause 15

<sup>15</sup> It is also noteworthy that ‘an international firm of accountants’ does not fall within the definition of ‘qualified auditor’ in terms of Article 154 of the Constitution, though the wording of this Bill may lead to the interpretation that it does.

<sup>16</sup> Clause 42(1)

<sup>17</sup> Clause 44

<sup>18</sup> These regulations will need to be placed before Parliament for approval within three months of being Gazetted, in terms of Clause 71(4)

<sup>19</sup> Section 31 of the Banking Act

<sup>20</sup> Clause 25(5)

<sup>21</sup> Clause 68(1)(e) within the area of the port city, and Clause 68(3) generally

<sup>22</sup> In terms of Clause 71(4)

<sup>23</sup> Clause 68(1)(f); rule, direction, order outside the area of the CPC, as per Clause 71(3)

offence<sup>24</sup>. Clause 3(4) empowers the Commission to make ‘Community Rules’, which ‘*are to be complied with by the owners and occupiers of Condominium Parcels or premises situated within the Area of Authority of the Colombo Port City, with a view to ensuring the maintenance of harmony and the promotion of a cohesive living environment*<sup>25</sup>’.

These are not regulations which need to be approved by Parliament, and yet the contravention of the same amounts to an offence, thus allowing the Commission the power to create punishable offences. This would amount to a clear abdication of the legislative power of parliament. The fact that these rules can be drafted for a purpose as vague as for ‘the maintenance of harmony and the promotion of a cohesive living environment’ is especially a cause for concern.

Procedurally, this would amount to a usurpation of the law-making powers of the Legislature, and thereby violate the Constitution. It is an affront to, firstly, the legislative supremacy of Parliament recognized in the Constitution<sup>26</sup>, and secondly to the People’s legislative sovereignty exercised through Parliament<sup>27</sup>.

### Parliament’s control over finance

Article 148 of the Constitution vests full control over Public Finance in the Parliament, and further states that no tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or any existing law. Several clauses in the Bill undermine Parliament control over finance and must require careful study.

The Commission, in consultation with the President<sup>28</sup> can identify that a business within the Colombo Port City is a ‘Business of Strategic Importance<sup>29</sup>’, and such business can be given incentives, including tax exemptions, for up to 40 years. The tax exemptions may be granted, either in full or part, and from all or any of the enactments set out in Schedule II of the Bill.

In determining what exemptions they shall be entitled to, the Commission first makes a recommendation to the President<sup>30</sup>, who if satisfied that they meet certain criteria, must, in consultation with the Minister of Finance, inform the Cabinet of Ministers, who must then

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<sup>24</sup> Note that in the course of proceedings before the Supreme Court the Attorney General communicated that there was a willingness to remove this clause from the final Bill.

<sup>25</sup> As per the interpretation provided in clause 74.

<sup>26</sup> Article 76. (1) “Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power.

(2) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance with such law.

(3) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes, including the power –

(a) to appoint a date on which any law or any part thereof shall come into effect or cease to have effect;

(b) to make by order any law or any part thereof applicable to any locality or to any class of persons; and

(c) to create a legal person, by an order or an Act.”

<sup>27</sup> Article 4 (a) “The legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;”

<sup>28</sup> Or the Minister if the subject of the Colombo Port City is assigned to a Minister

<sup>29</sup> Clause 52

<sup>30</sup> Clause 53(1)

approve the exemptions<sup>31</sup>. Once approved by the Cabinet of Ministers, the exemptions must be gazetted within two weeks<sup>32</sup>, and within 30 days of such gazette, be placed before Parliament for information<sup>33</sup>.

In this case Parliament does not approve the granting of these tax exemptions. Further, the criteria based on which businesses can be identified as being of strategic importance is vague, and not based on clear conditions listed out by Parliament. This dilutes Parliament control over finance.

Additionally, Clause 67 provides that no registration, licence, authorisation, permit or other approval granted in terms of the Bill, or any deed of transfer or indenture of lease or agreement executed by the Commission in compliance with the provisions of the Bill, may be terminated or amended in any manner detrimental to the interests of the respective investor, other than upon the expiry or completion of the period or term as specified in the such registration, licence, authorisation, permit or other approval, or such deed of transfer or indenture of lease or agreement.

Clause 71 of the Bill however grants the President<sup>34</sup> the authority to, in consultation with the Commission, make regulations, including those which allow for the determination of the categories of local property rates and other levies to be applicable within the Port City, and the sums payable as rates and other levies<sup>35</sup> as well as specifying any levy as may be required to be paid by a citizen or resident of Sri Lanka on goods purchased at retail facilities within the Port City, at the time of leaving the Port City<sup>36</sup>. While these regulations have to be approved by Parliament, they have to be placed before Parliament within three months of such regulation being made. This allows such rates and levies to be charged for a period of three months in contravention of Article 148 of the Constitution.

The powers to make regulations under Clause 71 include regulations for the procedures and terms based on which various approvals can be granted. In the three months before these regulations are placed before Parliament, approvals can be granted, and even if Parliament rejects the regulations thereafter, the approvals cannot be amended. While it is important for the sake of investor confidence that approvals are not later changed or amended, it is also important that the Commission is not able to bypass the authority of Parliament based on a technicality.

## **Impact on the Judicial System**

The Bill grants priority in legal proceedings for disputes arising out the Port City. Clause 63 (1) states that,

*Priority shall be given by courts, in relation to any legal proceedings instituted on civil and commercial matters, where the cause of action has arisen within the Area of Authority of the Colombo Port City or in relation to any business carried on in or from the Area of Authority of the*

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<sup>31</sup> Clause 53(2)

<sup>32</sup> Cluse 53(3)

<sup>33</sup> Clause 53(4)

<sup>34</sup> Or the Minister if the subject of the Colombo Port City is assigned to a Minister

<sup>35</sup> Clause 71(2)(b)

<sup>36</sup> Clause 71(2)(l)



*Colombo Port City, inter alia to hear such cases speedily on a day-to-day basis to ensure the expeditious disposal of the same.* (Emphasis added)

There is no constitutional or legal basis for giving this kind of judicial priority to disputes arising out of the Port City, and could well amount to an interference with the everyday functioning of the Judiciary, and the interest of other litigants.

Furthermore, the International Commercial Dispute Resolution Centre proposed through Part XIII of the Bill wields jurisdiction over,

*Clause 62 (2) Any dispute that may arise, within the Area of Authority of the Colombo Port City, between –*

*(a) the Commission and an authorised person or an employee of an authorised person where relevant; and*

*(b) the Commission and a resident or an occupier, provided that there exists in relation thereto, an agreement or other legally binding document as between the Commission and such resident or occupier.*

In effect, this amounts to an ouster of jurisdiction of Courts, tribunals, judicial and quasi – judicial authorities, which would preside over disputes in the rest of the country.

It is further stipulated in the Bill that Agreements entered into between the Commission and authorized persons in terms of Section 32, “*shall contain a provision requiring a mandatory reference of any dispute that may arise within the Area of Authority of the Colombo Port City under such agreement, to arbitration, in terms of this section.*” Mandatory arbitration clauses in agreements are considered a waiver of the parties’ right in the first instance to approach the existing mechanisms for dispute resolution within the country. It is further inimical to the principles of party autonomy and of the fact that the arbitral process is consensual.

Moreover, it is unclear whether the Port City Economic Commission Bill will function as a stand-alone law or will be the first of new legislation governing the Area of Authority of the Port City. If more legislation governing the Area of Authority is to be later introduced under and in terms of the CPCEC Bill, the full range of impact of the CPCEC Bill remains to be seen. Within the Bill, any reference to “applicable written law” means all written laws of Sri Lanka, unless otherwise expressly stated to the contrary in this Act.<sup>37</sup>

Furthermore, the Bill specifically mentions the possible involvement of foreign nationals serving in the International Commercial Dispute Resolution Centre.<sup>38</sup> It is of value to contrast that the involvement of foreign nationals in domestic matters and dispute resolution has been staunchly resisted hitherto, on the grounds that this infringes on the sovereignty of the Sri Lankan State and its people.

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<sup>37</sup> As per Clause 74

<sup>38</sup> Clause 62 (6) A citizen of Sri Lanka or a resident may serve in any capacity in the operations or any activities of the International Commercial Dispute Resolution Centre established under subsection (1), while an internationally reputed professional may also be so involved.