In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

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

SC FR Application No. 158/2007

Vasudewa Nanayakkara
Attorney at Law, Advisor to His Excellency the President,
Secretary, The Democratic Left Front,
49 1/1, Vinayalankara Mawatha, Colombo 10.

Petitioner

Vs.

1. K. N. Choksy M.P. President's Counsel,
23/3, Sir Ernest de Silva Mawatha, Colombo 7.

2 Milinda Moragoda M.P.
Former Minister of Economic Reform,
3/2, Allen Methiniyarama Road, Colombo 5.

3 Sripathy Sooriyarachchi M.P. Attorney at Law,
Former Minister of Public Enterprises Reforms,
22, Niwasa Mawatha, Rilaulla, Kandana.

4 Charitha Ratwatte, Former Secretary to the Treasury,
16, Jawatta Road, Colombo 5.

5 Faiz Mohideen, Former Deputy Secretary to the Treasury
5/2, Liberty Plaza Flats, 250, R.A. de Mel Mawatha,
Colombo 3.

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

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

8 Chrishantha Perera, Former Chairman PERC/Sri Lanka
Insurance Corporation Limited (SLIC), 40/10, Lake Garden,
Off Lake Drive, Rajagiriya.

9 M. Kandasamy, Member of the Steering Committee/ General
Manager SLIC, 'Rakshana Mandiraya',
21, Vauxhall Street, Colombo 2.

10 V. Kanagasabhapathi, Chartered Accountant,
Member of the Steering Committee/Former Member of
PERC, 79/3, W.A. Silva Mawatha, Colombo 6.

11 Dayanath Jayasuriya, Member, Steering Committee / Former Director General SEC/ Member PERC, Apt.3/1, Seegul Apartments, 12 Melborne Avenue, Colombo 4.

12 Rani Jayamaha, Member of Steering Committee/Deputy Governor Central Bank, 30, Janadhipathi Mawatha, Colombo 1.

13 Nihal Sri Amarasekera, Chartered Accountant, Former Chairman PERC, 167/4, Vipulasena Mawatha, Colombo 10.

14 M.D Bandusena, Chairman, PERC, 11/01, West Tower, World Trade Centre, Colombo 1.

15 Shamalee Gunawardene, Attorney at Law, Former Director Legal PERC
500/111, Timbirigasyaya Road, Colombo 5.

16 Aneela de Soysa, Chartered Accountant, Former Director PERC /Later Partner PricewaterhouseCoopers, Sri Lanka, 207/22, Dharmapala Mawatha, Colombo 7.

17 PT PricewaterhouseCoopers FAS
Gedung PricewaterhouseCopers JI
H.R., Rasuna Said, Kav C-3, Jakarta 12920, Indonesia.

18 Rooger de Montfort, Chartered Accountant,
Former Attorney – In Fact PT PricewaterhouseCoopers FAS
Gedung PricewaterhouseCoopers JI,
H.R., Rasna Said, Kav C-3, Jakarta 12920, Indonesia.

19 Devasiri Rodrigo, Chartered Accountant, Former Senior Partner-PricewaterhouseCoopers, 42/8, Rosmed Place, Colombo 7.

20 Y. Kanagasabai, Chartered Accountant, Senior Partner PricewaterhouseCoopers, 100, Braybrook Place, Colombo 2.

21 S. Manoharan, Chartered Accountant, Partner PricewaterhouseCoopers, 100, Braybrook Place, Colombo 2.

22 Asite Talwatte, Chartered Accountant, Senior Partner, Ernst & Young, 201, De Saram Place, Colombo 10.

23 Ruwan Fernando, Chartered Accountant,
Partner - Ernst & Young, 201, de Saram Place, Colombo 10.

24 Distilleries Company of Sri Lanka Ltd.
110. Norris Canal Road, Colombo 10.

25 Aitken Spence & Company Ltd. 305, Vauxhall Towers Vauxhall Street, Colombo 2.

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

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

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

29 Greenfield Pacific EM Holdings Ltd.
C/o Asia Box Consultancy Services (Pvt) Ltd.
61, Club Street, Singapore 069436.

30 Channa de Silva, Director General
Securities and Exchange Commission of Sri Lanka (SEC),
Level 11/01, East Tower, World Trade Centre, Echelon Square, Colombo 1.

31 President, Institute of Chartered Accountants of Sri Lanka,
30A, Malalasekera Mawatha, Colombo 7.

32 F.H.Puvimanasinghe, Chartered Accountant,
Senior Partner, F.H.Puvimanasinghe and Co.
126 – 2/1, 2nd Floor, YMBA Building,
Sir Baron Jayatilleke Mawatha, Colombo 1.

33 Wijayadasa Rajapaksa M.P. President's Counsel,
Chairman, Parliamentary Committee on Public Enterprises (COPE), 17, Wijeba Mawatha, Off Nawala Road, Nugegoda.

34 Inspector General of Police, Police Headquarters,
Colombo 1.

35 Deputy Inspector General of Police, Criminal Investigation Department, 4th Floor, New Secretariat Building, Colombo 1.

36 Chairman, Commission to Investigate Allegations of Bribery and Corruption, 36, Malalasekara Mawatha, Colombo 7.

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

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

Respondents

SC FR Application No. 117/2007

1 Ranaweerage Sarath Nandalal
No. 52/4, Vauxhall Street, Colombo 2.

2 Ariyachakra Bandaranayake
Thewanga Mudiyanselage Ariyawanse Bandaranayake,
'Sampath', Kanumale, Uhumiya.

Petitioners

Vs.

1 Public Enterprises Reform Commission,
No,10-11, West Tower, World Trade Centre,
Echelon Square, Colombo 1.

2 Sri Lanka Insurance Corporation Ltd. 'Rakshana
Mandiraya', No. 21, Vauxhall Street, Colombo 2.

3 Milford Holdings Pvt. Ltd. No. 110, Norris Canal Road,
Colombo 10.

4 Greenfield Pacific EM Holdings Ltd.,
C/o Asia Box Consultancy Services (Pvt) Ltd. 61,
Club Street, Singapore 069436.

5 Distilleries Company of Sri Lanka Ltd. 110,
Norris Canal Road, Colombo 10.

6 Aitken Spence & Company Ltd.
305, Vauxhall Towers, Vauxhall Street, Colombo 2.

7 Aitken Spence Insurance (Private) Ltd.
305, Vauxhall Towers, Vauxhall Street, Colombo 2.

8 P.B.Jayasundera, Secretary to the Treasury, Ministry of
Finance, Colombo 1.

9 Hon the Attorney General, Attorney General's Department,
Colombo 12.

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

Respondents

Before: S.N. Silva CJ
Amaratunga J.
Sripavan J.

Counsel: M.A.Sumanthiran with Viran Corea for the petitioner in FR 158/2007.
J.C.Weliamuna with Maduranga Ratnayake and Ms.Uma Wijesinghe for the petitioners in FR 117/2007.
Nihal Fernando PC with V.K. Choksy for 1st respondent.
Gomin Dayasiri with Minoli Jinadasa for 2nd respondent.
Sanjeewa Jayawardana with Rajeeve Amarasooriya for the 28th respondent.
Palitha Kumarasinghe PC with I. Idroos for 4th, 5th and 6th respondents in (FR117/2007).
Nihal Jayamanne PC with Ananda Lal Nanayakkara and Ms.Noorani Amarasinghe for 29th and 38th respondents.
D.S.Wijesinghe PC with Ms.Kaushalya Molligoda for 5th respondent in (FR117/2007).
Mohan Peiris PC with Ms.Nuwanthi Dias for 12th respondent.
Manohara R. de Silva PC with Avinda Wijesundara and W.D.Weeraratna for 19th respondent.
Faiz Musthapa PC for 20th and 21st respondents.
Romesh de Silva PC with Harsha Amarasekera and Shanaka Cooray for 22nd and 23rd respondents.
M.A.Bastianz with Suhada Jayasundara for 31st and 32nd respondents.
S.Rajaratnam D.S.G. for 7th respondent.
Indika Demuni de Silva D.S.G. for 2nd , 4th,and 34th to 37th respondents.

Argued on: 3.7.2008, 8.7.2008, 10.7.2008 and 15.7.2008

Decided on: 4.6.2009

Amaratunga J.

These two fundamental rights applications have been filed by two parties seeking to impugn the sale of 90% of the shares of the Government owned Sri Lanka Insurance Corporation Ltd. (SLIC) to the private sector companies named as respondents to their applications.

As stated in petition No.117/2007, the two petitioners are ex-employees of SLIC and that they have filed the application on their own behalf, on behalf of all citizens in the country and also on behalf of approximately 1000 former employees of the SLIC who have formed an unincorporated association called the "Organization to Re-establish Sri Lanka Insurance Corporation".

The petitioner in Application No.158/2007 is Mr.Vasudeva Nanayakkara, a national politician, a former Member of Parliament and a former Leader of the Opposition of the Colombo Municipal Council.

In both petitions, the petitioners have alleged, for the reasons set out in their petitions, that the sale of 90% shares of the fully State owned SLIC to the private sector by wrongful, irregular and unlawful executive and administrative action has caused loss to the State and the citizens of Sri Lanka resulting in the violation of the petitioners' and the citizens right to the equal protection of the law, guaranteed by Article 12(1) of the Constitution. In their applications, filed under and in terms of Articles 17 and 126 of the Constitution, the petitioners have relied on the decision of this Court in Senarath vs. Kumaratunga, SC FR Application 503/2005, SCM 3.5.2007; 2007 Bar Association Law Reports 23, and Articles 3 and 4 of the Constitution and Directive Principles of State Policy and Fundamental Duties enshrined in Chapter VI of the Constitution. This Court having considered the two applications separately has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution. The Court also permitted the petitioner in Application 158/2007 to add Mr.D.H.S.Jayawardene as the 38th respondent. Some of the respondents have filed their objections and/or affidavits.

The 13th respondent, Mr. Nihal Sri Amarasekara, a Chartered Accountant and a former Chairman of the Public Enterprises Reform Commission, in his objections has stated that "Though this is titled as a 'Statement of Objections' as required by law, the 13th respondent respectfully states that he concurs and agrees with the contentions of the petitioner and to the grant by Your Lordships' Court, the relief prayed for by the petitioner in his application."

Since both applications relate to the same subject matter, the applications were taken up together for hearing and parties through their counsel made oral and written submissions. The 13th respondent appeared in person and made both oral and written submissions.

Some of the respondents have raised preliminary objections in limine to the maintainability of the applications. I propose to deal with those objections after setting out the relevant facts revealed by the pleadings.

Sri Lanka Insurance Corporation Ltd. A Brief Profile

Prior to 1961, insurance business in Sri Lanka was in the hands of the private sector companies, both local and foreign. In 1961 the Government in pursuance of its policy of establishing State owned commercial and industrial enterprises, enacted the Insurance Corporation Act No.2 of 1961 which brought into existence a corporate statutory body known as the Insurance Corporation of Ceylon. The Corporation's initial working capital of Rs.20 million was paid out of the Consolidated Fund of the Government. When the Act was fully brought into operation on 1.1.1962, the Corporation, a fully State owned and controlled business enterprise became the institution having the monopoly to carry on the business of insurance of every description in Ceylon. The corporation gradually became a profit earning enterprise with substantial assets and a widespread network of Regional Offices, Branches and insurance agents.

The Corporation continued its monopoly in insurance business until the establishment of the National Insurance Corporation on 1980 under the Insurance (Special Provisions) Act No. 22 of 1979. In 1986 private sector companies were allowed to enter the insurance business. In 1993, under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987, the Insurance Corporation was converted into a fully State Owned Public Limited Liability Company of which the sole shareholder of 100% shares was the Secretary to the Treasury.

With the changes in the economic policy of the Government in post 1990 period, divestiture of State ownership and control of selected State owned business and commercial enterprises was commenced. To bring this privatization programme, first carried out on an ad hoc basis, within a legal framework, the Government established a statutory body known as the Public Enterprises Reform Commission [PERC] under the Public Enterprises Reform Commission of Sri Lanka Act No. 1 of 1996.

Under the provisions of the PERC Act, one of the functions of the PERC is to make recommendations to the Government on the sale or disposal to the public of shares in or assets of, companies registered under the Conversion of Public Corporations and Government owned Business Undertakings into Public Companies Act No.23 of 1987. In the year 2000, SLIC's recorded turnover was around Rs.6 billion with a profit of Rs.321 million *after taxation. Thus SLIC was a profit earning and tax paying business with an estimated 44% of the market for general insurance and 35% of the market for life insurance.*

Privatization of SLIC – Steps

It appears from the documents submitted to Court that in 2001, there was a Core Group appointed by the 7th respondent, P.B.Jayasundera, the then Secretary to the Treasury and the holder of 100% shares of SLIC to recommend on the restructuring of the SLIC.

On 21.1.2002, the 2nd respondent Milinda Moragoda M.P., non Cabinet Minister of Economic Reform, Science and Technology (who became a Cabinet Minister on 28.2.2002) appointed a Steering Committee comprising of the following persons to oversee and facilitate the restructuring of SLIC.

1 Mr.Chrisantha Perera – Chairman – SLIC -	*Chairman*
2 Dr.P.B.Jayasundara – Chairman – PERC -	*Member*
3 Mr.M. Kandasamy – General Manager SLIC -	*Member*
4 Mr.Deva Rodrigo – Partner PricewaterhouseCoopers -	*Member*
5 Mr.S.Kanagasabapathy –Addl. Director General –Dept of Public Finance -	*Member*
6 Ms. Marina Tharmaratnam –Executive Vice President, operations, DFCC -	*Member*
7 Dr. Dayanath Jayasuriya, Director General- Insurance Board of Sri Lanka -	*Member*
8 Dr. Mrs. Ranee Jayamaha, Asst. to the Governor –Central Bank -	*Member*
9 Ms. Aneela de Soysa, Director , PERC	*Secretary*

The 2nd respondent in his affidavit has stated that "an integral part of the privatization process was the setting up of 'Steering Committee' consisting of experts from related fields for each entity to be privatized and for such Steering Committee to make preliminary assessments and preparations for the privatization". Responding to the allegation of the petitioner that the Steering Committee has been appointed without Cabinet approval, the 2nd respondent in his affidavit has stated that "Since the Steering Committees were advisory bodies without executive power that the approval of the Cabinet of Ministers was not required for their appointment. However the Cabinet of Ministers was kept informed of the activities of the Steering Committee appointed by me". Even though the 2nd respondent has stated that Steering Committees were advisory bodies without executive power, it is *manifest from the minutes of the meetings of the Steering Committee that it has exercised executive powers such as the approval of payments from public funds to Financial Advisors.*

It is significant to note that at the time the Steering Committee was appointed, there was no decision by or approval of the Cabinet of Ministers to privatize the SLIC. Even a Cabinet Memorandum seeking the approval of the Cabinet to privatize SLIC was not before the Cabinet at that time.

In the minutes of the 1st meeting of the Steering Committee held on 25.1.2002, it is recorded as follows –

> *" It was noted that approval of the Cabinet was required before any contracts could be entered into to restructure SLIC. Contracts will have to be entered into for the restatement of the accounts, valuations, Financial Advisory and Legal Work. Chairman/PERC informed the Committee that a Cabinet Paper will be submitted by PERC during the Week ending 2nd February to get the necessary approvals."*

At its first meeting itself the Steering Committee has prepared a tentative time table for the privatization of SLIC which envisaged the completion of privatization by 30th November 2002.

In the minutes of 2nd meeting of the Steering Committee held on 13.02.2002 it is recorded as follows.

> *" Chairman/PERC reported that a Cabinet Paper seeking approval in principal (principle ?) for the restructuring of SLIC has been submitted to the Ministry. It is expected that approval will be received within the next two weeks."*

On 28.2.2002, the 2nd respondent submitted a Cabinet Memorandum seeking approval for the divestiture of SLIC. In this Memorandum, the need for reform has been set out as follows.

> *" The company lacks the management and technical skills to compete effectively in the market. The company needs insurance expertise and upgrading of its technology to increase capacity and efficiency of its operations. The private sector is able to address these issues more efficiently than the Government and service better the interests of the policyholders. The Government can effectively carry out its role of*

protecting the policyholders and developing the insurance industry through the regulatory framework that has already been established. With a restructuring of the ownership of the SLIC the revenue generated from the transaction can increase Government revenue at the same time increasing the level of expertise and competitiveness of the insurance industry. This transaction has the potential to attract an international insurance company to invest in Sri Lanka."

The Cabinet Memorandum sought approval of the Cabinet for the following matters.

5.1 To appoint international advisors to assist in the conduct of the transaction including an actuarial valuation and business valuation of SLIC, restate the accounts according to International Accounting Standards and to provide legal advice including the preparation of documents.

5.2 To authorize SLIC to meet payments in connection with the transaction of an amount not exceeding US 2 million and to pay a success fee to the Financial Advisors not exceeding US 2 million upon the realization of the sale proceeds.

5.3 To authorize the Secretary to the Treasury to appoint a Technical Evaluation Committee to evaluate bids for Financial Advisory Services.

5.4 To authorize the Steering Committee to invite 5 internationally reputed audit firms to submit proposals to provide Financial Advisory Services through their corporate advisory services divisions and to award the contract based on the advice of Technical Evaluation Committee.

5.5 To authorize the Secretary to the Treasury to appoint a Tender Board and Technical Evaluation Committee to evaluate the bids to purchase the shares of SLIC.

5.6 To gift to the employees of SLIC 10% of the shares of the company or an amount equivalent in value to 10% of the shares and to divest the balance shares to a strategic investor.

5.7 To authorize PERC to facilitate and initiate action on this transaction.

On 3.4.2002, Cabinet approval was granted to the proposals 5.1 to 5.7 set out above subject to the amendment of proposal 5.5 to read that "the Tender Board to be appointed by the Cabinet." The Minister was requested to report to the Cabinet the feasibility of divesting the ownership of the Sri Lanka Insurance Corporation Ltd, whilst retaining a *minority share by the Government. The Secretary to the Cabinet had conveyed the Cabinet decision to the Secretary, Ministry of Economic Reforms, Science and Technology on <u>18.4.2002</u>.*

However before the Cabinet on 3.4.2002 approved the proposals 5.1 to 5.4 set out in the Cabinet Memorandum, the Steering Committee had taken the following decisions and steps which relate to proposals 5.1 to 5.4.

On 5.3.2002 the Steering Committee decided:

i. *To shortlist the following five International Audit Firms to provide financial advisory services in connection with the privatization of SLIC and to issue tender documents (Requests for Proposals) to them.*

- *Arthur Anderson*
- *Deloitte Touche Tehmatsu*
- *Ernst and Young*
- *KPMG Ford Rhodes Thornton Co.*
- *Pricewaterhouse Coopers*

Requests for proposals were sent to those five Firms to submit their bids before 4 p.m. on 8.4.2002.

ii. *On 22.3.2002 the Steering Committee decided to request the Secretary to the Treasury to appoint a Technical Evaluation Committee consisting of the following members to evaluate the bids for Financial Advisory Services.*

Mr.Sunil Wijesinha, MD, Merchant Bank of Sri Lanka
Mr.Leel Wickramaarachchi, CEO, GM, PSIDC
Mr.C.C. Jayasuriya, Dy.General Manager SLIC
Mr.Warusawitharana, DG,State Accounts, Ministry of Finance

On 27.3.2002, the 4th respondent, the then Secretary to the Treasury appointed the abovenamed persons to the TEC. On 22.3.2002 a pre-bid conference with the representatives of the five Firms was held by the Steering Committee.

In response to RFP, four Firms had submitted bids for providing Financial Advisory Services. According to the evaluation of the TEC only two Firms, namely KPMG Ford Rhodes Thornton Co and Pricewaterhouse Coopers FAS(PwC) were technically qualified. After considering the Financial Proposals of the two technically qualified parties, the TEC had recommended the acceptance of the bid of PwC which secured a score of 88.18 points (being the total of Weighted Technical Score and Weighted Financial Score) as against KPMG Ford Rhodes Thornton which secured a score of 69.88 points. The total fee for Financial Advisory Services, calculated by the TEC according to the Financial Proposals of the two parties is as follows.

PwC FAS	*<u>Quoted Fee</u>*	*USD*	*1,292,493*
	Success Fee (being quoted 0.75% of the sale price) (calculated on the basis of notional sale price of USD 100 million assumed by TEC for the purpose of calculating the success fee)		*750,000*
	Total	*USD*	*2,042,493*
KPMG-	*<u>Quoted fee</u>*	*USD*	*1,015130*
	<u>Success fee</u> (being quoted 2% of the sale price upto USD 50 million and 3% above USD 50 million) (calculated on the basis of notional sale price of USD 100 million assumed by TEC for the Purpose of calculating the success fee	*USD*	*2,500,000*
	<u>Total fee</u>	*USD*	*3515,130*

At the 6th meeting of the Steering Committee held on 11.4.2002, the Committee was informed that the Cabinet approval has been given to the proposals contained in the Cabinet Memorandum. However it is significant to note that the amendment made by the Cabinet to proposal No. 5.5 " that the Tender Board to be appointed by the Cabinet" was not informed to the Steering Committee. In the Minutes of the Steering Committee, where the proposals approved by the Cabinet are set out, proposal 5.5 in its original form has been recorded in the same form i.e. " To authorize the Secretary to the Treasury to appoint a Tender Board and Technical Evaluation Committee to evaluate bids to purchase shares of the SLIC", without noting the important amendment made to proposal 5.5 by the Cabinet to read proposal 5.5 " that the Tender Board to be appointed by the Cabinet."

At this meeting the Steering Committee considered the recommendation made by TEC to award the tender for Financial Advisory Services and noted that the total cost USD 2,042,493 quoted by the wining bid (PwC) was within the Budget Estimate (Rs.200 million) approved at the 4th meeting of the Steering Committee on 5.3.2002. Accordingly the Steering Committee decided to award the contract for Financial Advisory Services to PwC. This decision was conveyed to PwC on 12.4.2002 by the 7th respondent. On 6.5.2002, the Acting Secretary to the Treasury (6th respondent) signed the contract with Pricewaterhouse Coopers FAS for financial advisory services.

In mid July, 2002, PERC published notices in the local newspapers in all three languages calling for Expressions of Interest from potential investors for the sale of 90% shares of SLIC. International publicity was given by publishing the notice in 'The Economist' of 10.7.2002 and 'Asian Wall Street Journal' of 16.7.2002. By a subsequent notice published on 9.8.2002 in the local newspapers, the closing date for Expressions of Interest was extended upto 23.8.2002.

According to the said notice, Expressions of Interest should contain the following details.

- *Full name of the company and contact details*
- *Details of ownership structure and company profile*
- *Audited Financial Statements for the last three years*
- *Where relevant operational capabilities :*
    - ** *years of operation in the insurance industry*
    - ** *Total number of policy holders*
    - ** *Range of products and services provided*
    - ** *Details of countries of operation.*

At the hearing the 13th respondent, who was an ex-Chairman of PERC submitted that considering the value of the transaction and the aim to attract international investors, international publicity given to the notice calling for EOI was manifestly inadequate. It is pertinent to note that although the Cabinet Memorandum submitted on 27.3.2003 to obtain Cabinet approval to divest the shares of SLIC to the successful bidder stated that an Information Memorandum on SLIC was distributed to over 100 investors worldwide with a view to promoting investor interest in SLIC, no material was placed before *this Court to substantiate the position that over 100 Information Memoranda were distributed among international investors. On the otherhand the available material indicate that Information Memoranda were provided only to those who have submitted expressions of Interest by 23.8.2002.*

In the meantime, the 6th respondent, N.Pathmanathan, the then Deputy Secretary to the Treasury by letter dated 7.8.2002, addressed to the Secretary, Ministry of Economic Reform, Science and Technology, purported to name a Cabinet Appointed Tender Board to handle the tenders for restructuring SLIC. Since the validity of the appointment of the Tender Board which handled the privatization of SLIC was one of major issues canvassed by the petitioners in their applications, I reproduce below the relevant part of the 6th respondent's letter referred to above.

> *" Restructuring of Sri Lanka Insurance Corporation Ltd.(SLIC)*
>
> *Reference to the letter of the Chairman, PERC dated 29th July 2002, addressed to the Secretary regarding the above matter. I wish to inform you that the following permanent Cabinet Appointed Tender Board has been assigned to handle the above tender. (emphasis added)*
>
> *1 Mr.N.Pathmanathan, Deputy Secretary to the Treasury - Chairman*
>
> *2 Mr.R.Tharmakulasingham, Secretary, Ministry of Assisting Vanni Rehabilitation - Member*
>
> *3 Mr.J.P.Hettiarachchi,Add; Secretary, Ministry of Cooperatives – Member*
>
> *(Later due to the inability of participation of Mr.Tharmakulasingham, Mr.Dissanayake, Secretary, Ministry of Eastern Development and Muslim Affairs was appointed to the Tender Board.)*

By the same letter, the 6th respondent appointed the following officers to the Technical Evaluation Committee.

1 Mr.Sunil Wijesingha, MD, Merchant Bank of Sri Lanka, Chairman

2 Mr.Leel Wickremaarachchi, CEO/GM Private Sector Infrastructure Development – Member

3 Mr.G.G. de Silva, Legal Consultant Central Bank of Sri Lanka - Member

4 Dr. R.H.A. Samaratunga, Director, Dept. of National Planning (Treasury Representative)

(After Mr.Sunil Wijesingha and G.D.D. de Silva indicated their inability to serve in the TEC Messers E. Arumugam, Director, Dept. of Public Enterprises and Nanda Meemaduma, Director General Ministry of Economic Reform, Science and Technology were appointed to the TEC on 21.01.2003)

At the end of the period fixed for submitting Expressions of Interest i.e. 23.8.2002, 17 parties have submitted Expressions of Interest. Those parties were given the Information Memorandum containing the details of SLIC and requested to submit their Preliminary Technical Proposals by 5.00 p.m. on 17.9.2002.

When Preliminary Technical Proposals were opened at 5.00 p.m. on 17.9.2002, there were five proposals submitted by the following parties.

Commercial Bank and DFCC

CT Smith Stockbrokers and Aitken Spence Insurance

Eagle Insurance

Asia Capital and Asian Alliance Insurance

Janasakthi Insurance and National Insurance Company

Another proposal submitted by AMCO Group after 5.00 p.m. on 17.9.2002 was found to be incomplete as it did not include audited financial statements and details of its insurance credentials. The Technical Evaluation Committee which met on 19.9.2002, after obtaining assistance from the Financial Advisors (PwC) made the following recommendations to the Cabinet Appointed Tender Board.

I *To immediately shortlist the five parties which submitted the proposals to move forward into the final bidding stage.*

II *Not to shortlist the AMCO Group at that stage and to notify them to submit the required particulars to be evaluated by the PwC and the TEC.*

The Tender Board at its meeting on 23.9.2002 approved the recommendation of the TEC.

It appears from the material placed before Court that as at 21.3.2003, there were three final bids (both technical and financial) received for the purchase of shares of SLIC. Those parties were, 1 *Commercial Bank/DFCC Consortium*

2 *Distilleries Consortium*

3 *Janashakthi Insurance.*

According to the evaluation made by the TEC Janashakthi Insurance was not technically qualified. Commercial Bank / DFCC Consortium was technically qualified while Distilleries Consortium was conditionally technically qualified subject to its clarifications with regard its technical support arrangements. Accordingly, on 24.1.2003, Financial Bids of Commercial Bank / DFCC Consortium and the Distilleries Consortium were opened. The original bid prices contained in the financial bids of those two parties were as follows.

<u>90% Shares of SLIC</u>

CBC / DFCC – Rs. 3150 million

Distilleries – Rs. 6030 million

Subsequent clarifications and discussions with the two parties resulted in the following increased bid prices.

<u>90% Shares of SLIC</u>

CBC / DFCC - Rs. 3600 million (Rs.80/-per share)

Distilleries - Rs. 6050 million (Rs.134/- per share)

It is also on record that the Distilleries provided an undertaking to purchase all shares offered by employees of SLIC. (10% shares represented by 10 million shares at Rs.134/- per share.)

As a part of its sale advisory services, PwC has prepared an indicative valuation of the SLIC to be used as a benchmark for the evaluation of financial bids. According to the documents placed before Court, this indicative valuation was a confidential document kept with the PERC until the final financial bids were opened. According to a report submitted by the PwC to the TEC (Document 7R5) this indicative valuation was " the product of a 'base-case' scenario which includes no major future revenue or cost initiatives being implemented. The indicative valuation represents the value of the business (both life and general insurance) going forward if it continued to operate on the same basis as present. This base case indicative valuation does not capture any of the 'up side' value from a more optimistic scenario for SLIC's future operations. Rather it shows the value the GOSL should at least *expect in order to reflect the future value of SLIC were it to remain in government ownership."*

According to the PwC indicative valuation, the fair market value of SLIC general and life insurance business was as follows.

	High	*Low*
Rupees million	*5377*	*5102*
US Dollars million	*55.7*	*52.8*

(Exchange Rate as at 29.11.2002 – 1 USD – Rs.96.56)

The PwC in its report to the TEC and CATB gave its conclusion as follows.

" The CBC bid price (90%) of Rs.3600 million is well below the PwC indicative valuation and would represent less than full value for the future operations of SLIC.

The Distilleries bid price 90% of Rs.6050 Million is significantly above the PwC indicative valuation and would represent a premium to the GOSL over and above that to be expected from the future operations of SLIC were it to continue in its current form.

In conclusion, Distilleries Consortium clearly provides a price well above the PwC benchmark indicative valuation and very considerably above that of the other Bidder."

The PwC therefore recommended that the Government of Sri Lanka

* *Accept the bid from the Distilleries Consortium*
* *Quickly move to contemporaneously execute Share Purchase Agreement and reach financial close.*

The TEC which met at 9.30 a.m. on 25.3.2003, having considered the Report submitted by the Financial Advisers ((PwC) decided to recommend the acceptance of the Distilleries Consortium's bid for 90 % shares of the SLIC at a price of Rs.6050 million. The Tender Board which met at 10.00 a.m. on the same day agreed with the recommendation of the TEC on the sale of 90% of the shares of SLIC at a price of Rs.6050 million to the *consortium comprising Distilleries Co. Ltd, Aitken Spence Co. Ltd, Aitken Spence Insurance together with Institutional Investors along with the Technical Partner ING Institutional and Government Advisory Services B.V. (Holland).*

Thereafter, Minister Milinda Moragoda the 2nd respondent, submitted a Cabinet Paper dated 27.3.2003, recommending the sale of 90% shares of the SLIC to the Distilleries Consortium. I quote below the relevant part of the recommendation of the Minister set out in the Cabinet Memorandum.

> *" The privatization to SLIC is a lead transaction of the Government's privatization programme for 2002/03. It has been implemented in a background of a relatively unfavourable global economic environment. Despite this situation, it has been possible to secure an investor consortium led by a domestic investor group technically supported by ING-IAG to provide management skills to SLIC. The Distilleries Consortium, in addition to securing an internationally reputed Technical Partner, has offered the highest bid price of Rs.6050 million which is in excess of the business valuation, in the range of Rs.5100 – 5400 million. The transaction has also taken necessary steps to transfer to the Government any increase in additional working capital over and above the position disclosed to the investor .... . Therefore I recommend that Cabinet grant approval to divest 90% of SLIC to Distilleries Consortium for the value of Rs.6050 mn.*
>
> *In view of the above, the Cabinet is invited to authorize the Secretary to the Treasury to execute the Share Sale and Purchase Agreement annexed to this Cabinet Memorandum and divest 90% of SLIC to the Distilleries Consortium."*

On 2.4.2003, the Cabinet approved the recommendation of the 2nd respondent Minister. The relevant part of the Cabinet decision reads as follows.

> *" Approval was granted to authorize the Secretary to the Treasury to execute the Share Sale and Purchase Agreement annexed to the Cabinet Memorandum and divest 90% of SLIC to the Distilleries Consortium. Cabinet noted the observations of the President on this subject contained in the Cabinet Memorandum dated 2.4.2003."*

The relevant part of the then President Chandrika Kumanatunga's Memorandum reads as follows.

" I wish to state that both as a matter of principle and practicality, I am not in favour of the divestiture of shares of the Sri Lanka Insurance Corporation Ltd. The Memorandum itself sets out the magnitude of this business undertaking in terms of market share, number of employees, turnover and above all, profits accruing to the Government. As against this, the only plausible reason given for its sale to the private sector is that insurance coverage in general in the country has not kept up to the level of our neighbours such as India. If the lack of factors such as managerial capacity are the reasons for this situation, then those are matters that can be put right, by proper direction from the Government.

I would request the Cabinet of Ministers to reconsider the divestiture of 90% of the SLIC shares, recommended by the Minister."

On 28.3.2003, a company named Greenfield Pacific E M Holdings Ltd, 29th respondent, has been incorporated in Gibraltar under the Companies Ordinance of that country. According to the information supplied to the PERC by the Authorized Officer of the Distilleries – Spence Consortium (by his letter dated 8.4.2003) the beneficial shareholder of this company is Hambros Bank (Gibraltar Nominees) Ltd, incorporated in Gibraltar.

On 31.3.2003 Milford Holdings (Pvt) Ltd was incorporated in Sri Lanka. According to the same letter referred to above, sent by the Authorized Officer of the Distilleries – Spence Consortium, the beneficial owners of Milford Holdings (Pvt) Ltd are Distilleries Company of Sri Lanka Ltd, Aitken Spence and Company Ltd, Aitken Spence Insurance (Pvt) Ltd and Stassen Exports Ltd.

On 11.4.2003, the Sale and Purchase agreement for the sale of shares of SLIC was signed by Faiz Mohideen, Acting Secretary to the Treasury on behalf of the Government of Sri Lanka and by D.H.S.Jayawardene, the 38th respondent on behalf of the buyers Milford Holdings (Pvt) Ltd and Greenfield Pacific E M Holdings Ltd. The said D.H.S. Jayawardene also signed as guarantor on behalf of Distilleries Company of Sri Lanka Ltd, Aitken Spence and Company Ltd and Aitken Spence Insurance (Private) Ltd.

The Share Sale and Purchase agreement refers to the First Completion date and the Second Completion date of the transaction. According to the Share Sale and Purchase Agreement (SSPA), Clause 4A, the First Completion shall take place at the Office of the Secretary to the Treasury, the Secretariat, Colombo 1, on the date of signing of this Agreement (the First Completion Date) or at such other time and on such other date as the Seller and the Purchasers may agree. Second Completion means the completion of the sale and purchase of the Remaining Sale of Shares in accordance with the agreement.

The account set out above relating to the divestiture of 90% of shares of SLIC, is a general account of the transaction appearing on the face of the material placed before this Court. The petitioners, in their petitions have challenged the regularity and the legality of the executive and administrative actions connected with this transaction, which, as alleged by them, resulted in the infringement of their and the other citizens' fundamental rights guaranteed by Article 12(1) of the Constitution. In the petitions as well as in the submissions made by the petitioners several allegations have been made against several parties, who in many ways were involved in the transaction leading to the sale of 90% shares of SLIC. The petitioner in SC FR 158/2007 has produced marked P26 a copy of the Hansard dated 12.1.2007 which contains an extract of the Report of the Committee On Public Enterprises (COPE) setting out alleged irregularities in the sale of shares of SLIC.

The task of this Court in the present application is to examine the material placed before it and decide whether the alleged executive or administrative actions were wrongful and/or illegal and whether such actions resulted in the infringement of the fundamental rights of the petitioners and the citizens as alleged by the petitioners. Allegations relating to the conduct of those who were involved in the transaction leading to the sale of shares of SLIC, which by themselves do not constitute executive or administrative actions may be relevant only in so far as they relate to the impugned executive or administrative actions.

The tenor of the petitioners' case is that from the very commencement of the transaction leading to the sale of shares of SLIC , the process was tainted with illegal or irregular executive actions which culminated in the violation of their and the citizens fundamental right guaranteed by Article 12 (1) of the Constitution.

The petitioners have alleged that the 2nd respondent Minister appointed a Steering Committee to restructure SLIC at a time when there was no decision by or approval of the Cabinet to restructure the SLIC by divesting 90% of the shares of SLIC to the private sector. As already pointed out, the appointment of the Steering Committee was made on 21.01.2002 and the Cabinet Memorandum seeking the Cabinet approval to privatize SLIC was submitted on 28.2.2002. The Cabinet approval to the proposals set out in the Cabinet Memorandum including approval to authorize PERC to facilitate and initiate action on the transaction was granted on 3.4.2002. The Steering Committee was informed of Cabinet approval only on 11.4.2002. Between 21.1.2002 and 11.4.2002 the Steering Committee had taken the following decisions and steps relating to restructuring of SLIC

* *At the very first meeting of the Steering Committee held on 25.1.2002 it prepared a tentative time table for the privatization of SLIC which envisaged the completion of the transation by 30th November 2002.*
* *On 5.3.2002 the Steering Committee estimated the fees payable for Financial Advisory Services to be around Rs.200 million. It was decided that this payment would be made by the SLIC out of the funds that would be otherwise transferred to the Treasury in the form of dividend declared to the shareholder (who is the Secretary to the Treasury).*
* *On the same day at the same meeting the Steering Committee shortlisted five Audit Firms from which the Committee sought bids to provide financial advisory services in connection with the privatization of SLIC.*
* *On 22.3.2002, the Steering Committee decided to request the Secretary to the Treasury to appoint a Technical Evaluation Committee consisting of persons named by the Steering Committee to evaluate bids for Financial Advisory Services.*
* *On 27.3.2002 the 4th respondent, the then Secretary to the Treasury appointed a Technical Evaluation Committee consisting of the persons named by the Steering Committee.*
* *On 11.4.2002, on the recommendation of the TEC, the Steering Committee decided to award the contract for financial advisory services to Pricewaterhouse Coopers.*

Although the 2nd respondent Minister in his affidavit has stated that since Steering Committees are advisory bodies without executive power, Cabinet approval for their appointment was not necessary, the list set out above indicates that the Steering Committee had taken several decisions which should have been taken by the executive arm of the

Government. The Steering Committee was an ad hoc body not responsible to anyone including the Minister who appointed it. The Steering Committee had continued to approve payments to the Financial Advisors out of the Funds provided by SLIC owned by the Government.

Although the 2nd respondent Minister in his affidavit has stated that he kept the Cabinet informed of the appointment of the Steering Committee, the Cabinet Memorandum does not contain even the names of the members of the Steering Committee. The Cabinet Memorandum submitted by the Minister states that "I have appointed a Steering Committee to <u>advise and assist</u> in restructuring the SLIC". (emphasis added) The Cabinet was not informed of the decision making role to be played by the Steering Committee. Although one may contend that the eventual approval granted by the Cabinet on 3.4.2002 to the proposals contained in the Cabinet Memorandum (fully set out in the earlier part of this judgment) covers the steps taken by the Steering Committee prior to the Cabinet decision, the manner in which the Steering Committee had conducted its affairs indicates that the Committee proceeded on the basis that the Cabinet would approve all such acts as a matter of course!

The task assigned to the Steering Committee is in fact a function of the PERC as set out in section 5(e) of the PERC Act No.1 of 1996 which reads as follows.

> *" to make recommendations to the Government on the sale or disposal to the public, of shares in or assets of, companies registered under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No.23 of 1987".*

When there is a statutory body created by an Act of Parliament, and responsible to the Government, to handle matters coming within the purview of aforesaid section 5(e) of the PERC Act, the appointment, without the Cabinet approval, of an ad hoc Committee not responsible to anyone, was, to say the least, highly irregular. The petitioners have highlighted this irregularity to point out that from the beginning, the privatization process deviated from the proper manner in which Government business should have been conducted. When the PERC Act lays down the functions of the PERC, the Court would strike down any discretionary or arbitrary action of the executive if the procedural requirement of the said Act is disregarded. The function assigned to the PERC by law has been given by the 2nd respondent Minister to an ad hoc Committee not responsible to anyone.

The petitioners, in their challenge to the legality of the sale of 90% shares of SLIC, rely mainly on two alleged wrongful executive actions, namely the appointment of the Tender Board to handle the tenders (bids) for the sale of SLIC and sale of the SLIC to Milford Holdings (Pvt) Ltd and Greenfield Pacific EM Holdings Ltd. I shall now deal with those two aspects separately.

The Tender Board

By clause 5.5 of the Cabinet Memorandum dated 28.2.2002, the Minister sought the approval of the Cabinet.

> *" To authorize the Secretary to the Treasury to appoint a Tender Board and Technical Evaluation Committee to evaluate the bids to purchase the shares of SLIC."*

The Cabinet granted approval to the proposals contained in the Cabinet Memorandum, subject to the amendment of proposal 5.5 to read that the Tender Board to be appointed by the Cabinet. Thus it is clear that while the Cabinet authorized Secretary to the Treasury to appoint a TEC to evaluate the bids to purchase shares of SLIC, the Cabinet specifically reserved to itself the task of appointing the Tender Board to evaluate the bids to purchase SLIC. The meaning of the words 'the Tender Board to be appointed by the Cabinet' is clear and specific. The words "to be appointed by the Cabinet" clearly conveys an action to be taken by the Cabinet itself in future. No one in his proper senses and having a knowledge of the English language could give any other interpretation to the words "to be appointed by the Cabinet."

The 6th respondent, N.Pathmanathan, the then Deputy Secretary to the Treasury (now retired) by his letter dated 7.8.2002, addressed to the Secretary, Ministry of Economic Reform, Science and Technology named a Tender Board to handle bids for the sale of shares of SLIC. I quote again the relevant part of the said letter.

> *" Restructure of Sri Lanka Insurance Corporation Ltd (SLIC)*
>
> *Reference to the letter of the Chairman, PERC dated 29th July 2002, addressed to the Secretary regarding the above matter.*

2 *I wish to inform you that the following Cabinet Appointed Tender Board has been assigned to handle the above tender.*

1	*Mr. N.Pathmanathan* *Deputy Secretary to the Treasury*	*Chairman*
2	*Mr.R.Tharmakulasingham* *Secretary, Ministry Assisting Wanni Rehabilitation*	*Member*
3	*Mr. J.P.Hettiarachchi* *Addl.Secretary, Ministry of Co-operatives*	*Member"*

The letter of the Deputy Secretary to the Treasury naming the Tender Board refers to the letter of Chairman, PERC, dated 29.7.2002. It is clear therefore that the Tender Board was named in response to the said letter. The 6th respondent or the 7th respondent P.B.Jayasundera, the then Chairman, PERC, had not produced a copy of this letter, for reasons best known to them.

The 6th respondent has filed an affidavit in which he has given his explanation regarding the naming of the Tender Board. Before I deal with his explanation, I wish to refer to the account given by him about the appointment of Tender Boards by the Cabinet. Paragraph 22 of the 6th respondent's affidavit gives the following account relating to the appointment of Tender Boards by the Cabinet.

" *During the period 13.4.1998 to November 1999, I functioned as the Director General, Department of Public Finance in the General Treasury. The Department assisted the Secretary to the Treasury in matters dealing with CATBs. The arrangement regarding appointments of CATBs at the time I became DG/PF was that every request by a Minister for the appointment of a CATB was handled directly by the Cabinet of Ministers, which caused immense delay.*

Therefore the then President H.E.Chandrika B. Kumaratunge, who was also the Minister of Finance, realizing the undue delays in appointing CATBs, directed the ST to recommend to her ten (10) groups of Senior Officials, mostly at Secretary or Additional Secretary level, including a representative of the ST, to be termed as Permanent CATBs. The Cabinet Memorandum on the "Appointment of Permanent CATBs" submitted by her was approved by the Cabinet of Ministers in 1998. The Secretary to the Treasury issued the Public Finance Circular No. FIN 358 - July 02, *1998 titled "Enhancing the Effectiveness of Procurement Procedures and Strengthening Procurement Capacity" conveying the appointment of these Permanent CATBs to facilitate the acceleration of the procurement process, to all concerned. I state that these Permanent CATBs were thereafter considered as Tender Boards appointed by the Cabinet of Ministers and the ST assigned them on an equitable basis whenever requests for appointment of CATBs were made by Ministers."*

The above account given by the 6th respondent very clearly shows that there existed Permanent Tender Boards appointed by the Cabinet to handle Government Tender matters. At the time the Cabinet considered the Cabinet Memorandum for the sale of shares of SLIC the Cabinet could have, without saying "the Tender Board to be appointed by the Cabinet" directed that bids for the purchase of shares of SLIC shall be evaluated by a Cabinet Appointed Tender Board. The decision that "the Tender Board to be appointed by the Cabinet" clearly indicates that the Cabinet intended to appoint the Tender Board which should evaluate bids for the sale of shares of SLIC.

With regard to the letter of 7.8.2002, nominating a Tender Board and appointing a TEC, the 6th respondent in paragraph 7(e) has stated that " I had neither signed the letter dated 7.8.2002 nor appointed TEC to handle such an evaluation process.

It is true that the letter dated 7.8.2002 nominating a Tender Board and appointing a Technical Evaluation Committee does not carry the signature of the 6th respondent. At the bottom of the letter the following words appear.

"Sgd. N.Pathmanathan
Deputy Secretary to the Treasury"

Alongside that entry, W.D.Jayasinghe, Addl. Director General of Public Finance has singed the letter and it is copied to 6th respondent by name and designation. If the 6th respondent did not sign the letter, the question arises as to why he failed to immediately question Mr.Jayasinghe regarding the authority Mr.Jayasinghe had to use his name to nominate a Tender Board and to appoint a Technical Evaluation Committee. Without doing that, the 6th respondent had participated in the tender evaluation process upto its very end. Therefore the inevitable conclusion deducible from the conduct of the 6th respondent is that his assertions that 'he did not sign the letter of 7.8.2002 and that he did not appoint himself as the

Chairman of the Tender Board (paragraph 7(c) and (e) of the 6th respondent's affidavit) are false and false to his knowledge!

If on the other hand the 6th respondent's assertion that he did not sign the letter of 7.8.2002 and that he did not appoint the TEC is accepted as true, then the appointment of the TEC (which according to the Cabinet decision had to be made by the Secretary to the Treasury) was invalid, resulting in rendering all acts done by the TEC invalid and illegal.

Having attempted to distance himself from the act of nominating the Tender Board and appointing the TEC, the 6th respondent has tried to justify the nomination of the Tender Board with himself as the Chairman. In paragraph 22(1) of his affidavit, the 6th respondent has stated as follows.

> *" I state that in paragraph 5.5 of his Cabinet Memorandum, the Minister of Economic Reforms, Science and Technology had sought the approval of the Cabinet of Ministers "to authorize the Secretary to the Treasury to appoint a Tender Board"...the Cabinet of Ministers very rightly authorized the Cabinet to appoint a CATB. This prevented the ST from appointing a Tender Board but did not preclude the ST from assigning a Permanent CATB already approved by the Cabinet of Ministers. Hence the allegation in paragraph 6 (c) of the FR Application that I disregarded the Cabinet decision is false and totally incorrect."*

Thus the 6th respondent, having first disowned the letter of 7.8.2002, thereafter tried to justify the assignment of a CATB by the same letter.

In the next paragraph [para 22(ii)] of his affidavit, the 6th respondent has again attempted to disown any connection with the letter of 7.8.2002. In paragraph 22(ii) he has stated that

> *" I state that the letter No.PF/PSB/CT/B54/04 dated August 7,2002 sent by the Dept. of Public Finance has been signed by Mr.W.D.Jayasinghe, Addl.Director General of Public Finance and I have not signed this letter. It is therefore wrong and false to state that I appointed myself as the Chairman of the CATB. The letter shows that the signatory was me but in fact it had been countersigned for me. I deny that I made any order to appoint myself as the Chairman of the CATB. I also state that the said letter was not a letter of appointment of a Tender Board. But it only*

assigned a permanent CATB which was already in existence, to handle the said tender."

It appears from the conflicting explanations given by the 6th respondent that he was confused in his own mind as to the explanation he should provide to justify his action in nominating a Tender Board, with himself as the Chairman, in violation of the specific and express decision of the Cabinet that "the Tender Board is to be appointed by the Cabinet."

The 6th respondent has taken up the position that "At any event the same cabinet of ministers subsequently accepted the appointment of the Tender Board concerned and acted on its recommendations and if it was appointed in violation of the Cabinet directive, they would not have ratified the board decision." (paragraph 7(f) of the affidavit of the 6th respondent).

In the Cabinet Memorandum dated 27.3.2003 submitted by the 2nd respondent Minister to obtain the approval of the Cabinet to sell shares of SLIC to the bidder selected by the Tender Board, there was no reference whatsoever to the decision of the Cabinet made on 4.3.2002 that the Tender Board was to be appointed by the Cabinet. The Cabinet Memorandum dated 27.3.2003 contains the following statement.

> " A Cabinet appointed Tender Board (CATB) Chaired by a Deputy Secretary to the Treasury assisted by a Technical Evaluation Committee (TEC) was also set up to ensure that a proper procedure is followed in the selection, particularly since the transaction is complex and involves high financial values."

When the Minister in the above statement referred to the complexity of the transaction and its high financial value, he, being a member of the Cabinet which specifically decided that the Tender Board was to be appointed by the Cabinet, should have realized the importance of the Cabinet decision to appoint the Tender Board by the Cabinet itself. But, for reasons best known to him, the Minister has refrained from reminding the Cabinet of its own decision with regard to the appointment of the Tender Board. Although the petitioners have highlighted the irregular appointment of the Tender Board in violation of the Cabinet decision, the Minister, in his affidavit has not sought to offer an explanation to the allegation made by the petitioners with regard to the appointment of the CATB.

On a consideration of the material placed before this Court with regard to the appointment (or the so called assignment) of the Tender Board, this Court finds that the Tender Board which handled the bids for the sale of shares of SLIC had not been properly appointed in accordance with the Cabinet decision of 3.4.2002. It follows therefore that the Tender Board acted without jurisdiction and accordingly it had no legal authority to perform any function with regard to the sale of shares of SLIC.

Process of Selecting a Purchaser of the Shares of SLIC

At the hearing the petitioners and the 13th respondent submitted that considering the high value of the transaction

- *i.* *publicity given for the Expressions of Interest for the purchase of shares of SLIC was inadequate and*
- *ii.* *that the transaction was concluded with undue haste.*

On the material placed before Court it is clear that the notice calling for Expressions of Interest for the purchase of shares of SLIC were published in the Economist of 10.7.2002 and in Asian Wall Street Journal of 16.7.2002. Apart from the international publicity given in the abovenamed two journals, there was no international publicity given to the notices calling for EOI.

The Cabinet Memorandum dated 27.3.2003 stated that "During the preliminary marketing phase, an Information Memorandum of SLIC was distributed to over 100 investors worldwide with a view to promoting investor interest on SLIC". However no material was placed before this Court to substantiate the position that an Information Memorandum on SLIC was distributed to over 100 investors worldwide. On the other hand, the very first page of the Information Memorandum furnished to the parties who submitted expressions of interest indicates that it was a strictly confidential document provided only to those parties who had submitted expressions of interest only after those parties signed a confidentiality undertaking with the PERC. In view of this, it is not possible for this Court to accept the position that during the initial marketing phase, there was unsolicited distribution of this highly confidential document to over 100 investors world wide. In any event the Information Memorandum, prepared in August 2002, could not have been available when expressions of interests were invited in July 2002.

With regard to the submission that this transaction had been concluded with undue haste, the Court wishes to make the following observations. At the time Expressions of Interest were invited in 2002, the SLIC was the market leader in insurance business with

* *a market share of both general and life insurance, 34% and 42% respectively.*
* *A strong brand equity as a financially stable respectable institution with a history of 40 years existence.*
* *The most intensive insurance distribution network with 75 branches and over 10,000 independent insurance agents serving throughout the country.*

It was a profit earning Government venture which, according to 2001 audited accounts, recorded a net profit of Rs.1162 million after paying Rs.405 million as tax. The proclaimed need for restructuring the SLIC was to enhance its management and technical skills to raise its level of expertise and competitiveness which would ultimately contribute to the development of the insurance industry resulting in providing a better service to the policyholders.

However the documents available to the court reveal the existence of another agenda behind the proclaimed need for restructuring the SLIC. As already pointed out earlier, the Steering Committee at its very first meeting held on 25.1.2002, when there was no Cabinet decision or approval to privatize SLIC, prepared a tentative time table which envisaged the completion of the privatization process by 30th November 2002.

In the minutes of the 5th meeting of the Steering Committee held on 22.3.2002 under the heading 'IMF Requirements' it is recorded as follows.

" Ch/PERC informed the Steering Committee that the privatization of Sri Lanka Insurance Corporation has been included in the reform agenda agreed with the International Monetary Fund (IMF) as scheduled to be completed in 2002. Furthermore, the privatization of SLIC is also a major component of the PSD credit arrangement with ADB where the disbursement of funds is conditional on meeting the targets. Therefore it is imperative that the proposed schedule be adhered to.

The Words "Ch/PERC" appearing at the beginning of the above passage referred to the then Chairman of PERC, P.B.Jayasundara, the 7th respondent. The Minutes of the Steering Committee meeting containing the above passage was attached to the petition in FR 158/2007 marked P16(d). The 7th respondent in his affidavit filed in this Court has not denied the correctness of the statement attributed to him and its truth. It is clear *therefore that the primary motivating factor behind the sale of shares of SLIC was the need to conform to the reform agenda agreed with the IMF and the need to complete the transaction to obtain the credit facilities arranged with the Asian Development Bank! I do not think that this was a secret to the Cabinet when it considered the two Cabinet Memoranda relating to the sale of shares of SLIC.*

A statement contained in the Cabinet Memorandum dated 27.3.2003 also shows that the sale of the shares of SLIC took place at a time when the global economic environment was not favourable to go through a transaction of this nature. The Cabinet Memorandum states that

> *" market sentiments were not favourable to mobilize large investor interests on SLIC. The principal reason was that the global insurance industry was going through a period of consolidation and cost cutting, rather than expansion of activities. The main reason for this trend have been September 11th, 2001 events which resulted in large payouts having to be made from insurance companies and also the weakening of stock markets worldwide resulting in lower investment returns to insurance companies."*

Selection of a Party to Sell the Shares of SLIC

At the closing time for receiving Expressions of Interest for the purchase of shares of SLIC (17.00 hrs 23.8.2002) there were 17 parties who had submitted EOI. Aitken Spence Insurance (Pvt) Ltd and CT Smith Stock Brokers Pvt Ltd and Asia Box Consultancy Services Ltd, who later figured in the bid of the Distilleries Consortium were two parties who had submitted EOI. The Distilleries Consortium or the Distilleries Company was not among the parties who had submitted EOI. Although the Distilleries Co in its objections has stated that it submitted an EOI a copy of its EOI or any other material to substantiate its assertion has not been submitted to this Court.

Information Memorandum on SLIC were given to the parties who had submitted EOI and were requested to submit preliminary technical proposals. On 17.9.2002 at 5.00 p.m. when the Preliminary Technical Proposals were opened there were only five proposals submitted by,

- *Commercial Bank/DFCC*

- *CT Smith Stock Brokers and Aitken Spence Insurance*
- *Eagle Insurance*
- *Asia Capital and Asian Allian Insurance*
- *Janashakthi Insurance and National Insurance Company.*

The names of the five parties set out above appear in the Minutes of the Meeting held at 5.00 p.m. on 17.9.2002 for opening Technical bids. The name of Distilleries Company or Distilleries Consortium does not appear in that list, marked 7R4B produced by the 7th respondent P.B.Jayasundara.

The 24th respondent, Distilleries Company in its objections has stated that it submitted an Expression of Interest. However its name is not in the list of parties who have submitted expressions of interest as at the closing time, i.e. 5.00 p.m. on 23.8.2002. The 24th respondent has not produced a copy of the EOI submitted by it or any other documentary proof to substantiate its position that it submitted an EOI.

The 24th respondent in its objections has stated that it submitted a preliminary technical proposal. It has annexed a copy of the Technical proposal said to have been submitted by it, marked 24R9A. This document in its cover page gives the month and the year as "September, 2002" without a date. Therefore whether it is a document submitted on or before 17.9.2002 is not apparent from the face of this document. Page 1 of this document begins as follows:

> *" The bid to acquire 90% to 100 % Stake of SLIC is submitted by the consortium comprising of the following parties.*
> - *Distilleries Co of Sri Lanka Ltd.*
> - *Aitken Spence Insurance Pvt Ltd and Aitken Spence Insurance Ltd*
> - *CT Smith Stock Brokers (Pvt)Ltd and Asia Box Consultancy Services (Pte) Ltd."*

Even the cover page of the Technical Proposal (24R9A) carry the names set out above. If this document was there at the time of bid opening at 5.00 p.m. on 17.9.2002 the Committee consisting of Mr.Leel Wickramarachchi and Dr.R.H.S. Samaratunga, two Members of the TEC, could not have failed to notice that the Distilleries Company is a bidder and include its name in the list of the parties who have submitted technical proposals.

There is a copy of a letter, attached to the technical bid 24R9A as appendix I. It is addressed to the Chairman, Cabinet Appointed Evaluation Board on Privatization of Sri

Lanka Insurance Corporation through CT Smith Stock Brokers Ltd, by the Finance Manager of the Distilleries Company. The complete text of this letter, faxed at 14.48 hrs on 17.9.2002 is reproduced below.

17th September 2002

To
The Chairman
Cabinet Appointed Evaluation Board on
Privatization of Sri Lanka Insurance Corporation

Through CT Smith Stock Brokers Ltd.,

Dear Sirs

PARTICPITPATION IN THE CONSORTIUM TO PURCHASE SHARES OF INSURANCE COPORTAION OF SRI LANKA LTD.

This has reference to the terms specified in the documentation with regard to the submitting of technical proposals.

We confirm that this company is participating as the lead partner in the consortium also comprising of Aitken Spence Co.Ltd, Aitken Spence Insurance (Pvt) (Ltd., CT Smith Stock Brokers (Pvt) Ltd., and Asia Box Consultancy Ltd., on our own account and we are not representing any person or a company domiciled in Sri Lanka or overseas.

Yours faithfully
DISTILLERIES COMPANY OF SRI LANKA LTD.
Sgd.
Damien Fernando
FINANCE MANAGER
For MANAGING DIRECTOR

If the Distilleries Co. having submitted an EOI was already in the bidding process on their own right there was no necessity to fax this letter at 14.48 hrs on 17.9.2002, just 2 hours and 12 minutes before the closing time for submitting technical proposals. Was it an attempt to enter the bidding process through CT Smith Stock Brokers who had submitted an EOI?

On 19.9.2002, the TEC, at a meeting held along with the PERC and the Financial Advisers PWC considered the technical proposals opened on 17.9.2002. In the TEC report annexed to 7R4B, the TEC recommended to short list the same five parties who had submitted technical proposals on 17.9.2002 to move forward into the final bidding stage. The name of the Distilleries Consortium or the Distilleries Company is not among the five short listed parties. If the technical proposal of the Distilleries Consortium 24R9A was there the TEC would have noted and referred to it. The absence of any reference to a technical *proposal by the Distilleries Consortium in the TEC report very clearly establishes that a technical proposal submitted by the Distilleries Consortium was not there even on 19.9.2002.*

Having shortlisted the five technical proposals to move into the final bidding process the TEC has made the following recommendation.

> " *Continue with a final bidding process that would provide for well credentialled financial and/or insurance parties to join with existing shortlisted parties. This would leave open the opportunity for:*
>
> *(i) Existing shortlisted groups merging/ consolidating – and with possibly some parties dropping out of this evolving arrangements.*
>
> *(ii) <u>New parties who have not submitted EOI and/or preliminary proposals possibly joining with the shortlisted groups</u>."(emphasis added)*

This recommendation of the TEC to allow new parties – who have not submitted EOIs or Technical Proposals – to come into the bidding process by joining with the shortlisted groups was designed "to provide for well credentialed financial and/or insurance parties to join with existing short listed parties. As I have already indicated, the documentary evidence clearly establish that the Distilleries Consortium had not submitted an EOI within the time fixed for submitting EOIs. The minutes of the TEC meeting held on 19.9.2002 shows that even on 19.9.2002 there was no technical proposal submitted by the Distilleries Consortium. In the light of this, the letter of the Distilleries Company sent through CT Smith Stockbrokers Ltd (faxed) just 2 hours and 12 minutes before the closing time set for submitting technical proposals assumes significance. One can reasonably connect that letter with TEC's recommendation to provide an opportunity to well credentialed financial and/or insurance parties to join with existing shortlisted parties to enter the bidding process even if they had not submitted an EOI or a technical proposal.

Having made a recommendation to allow new parties to join the bidding process, the TEC has made a further recommendation as follows

> " *It is noted that many of the reputed international insurance companies that expressed interest have been unable to get the necessary internal clearances to submit Preliminary Proposals by the due date. It is therefore recommended that the closing date for submission of Preliminary Proposals be extended until 1st October to provide opportunity for additional parties to submit proposals..."*

It is a question as to how the TEC came to know that many of the reputed international insurance companies that expressed interest had been unable to get the necessary internal clearances to submit Preliminary Proposals by the due date. There is no material at all to support that position and as such the only reasonable conclusion is that it was a mere cover to justify the extension of time till 14th October to provide an opportunity for additional parties to submit proposals.

The recommendation of the TEC to allow new parties to enter the bidding process and to extend the closing time till 14th October for additional parties to submit preliminary proposals was approved without any change by the Tender Board on 23.9.2002.

The above account shows how the TEC and the Tender Board had manoeuvred the process, to admit new parties after the closing date, i.e.17.9.2002 for submission of preliminary proposals. Thus on the material available, it is perfectly clear that the Distilleries Consortium's formal entry into the bidding process was after the Tender Board decision taken on 23.9.2002. It is also significant to note that the decision to extend the closing time for submitting Preliminary Proposals was not given any publicity by the Tender Board, the PERC or by PwC.

In the light of the facts set out above, the petitioners and the 13th respondent submitted at the hearing that that the Distilleries Company had entered the bidding process "through the backdoor". I have examined the written submissions filed on behalf of the 24th respondent Distilleries Co. The written submissions merely reiterate the position taken up by it that it submitted an EOI and a technical proposal within the stipulated time periods (which assertion is clearly contradicted by the documentary evidence) without attempting to refute the allegation of "back door entry". Transparency in the bidding process would go a long way in achieving public expectations of equal treatment. Lack of transparency in the bidding process is in itself sufficient to hold that the entire process is a nullity and void ab initio.

In the brief account of the events that culminated in the sale of SLIC to the Distilleries Consortium I have described the steps that followed the Tender Board decision dated 23.9.2002, but for the sake of convenience I briefly repeat those steps: The Distilleries Consortium and the other bidders submitted enhanced technical bids and financial bids and as the financial bid of the Distilleries Consortium was above the indicative valuation prepared by the Financial Advisers, the Tender Board decided to accept the bid of the

Distilleries Consortium which was higher than the bid of the Commercial Bank/DFCC Consortium. The Tender Board decision to sell 90% shares of SLIC to the Distilleries Consortium was approved by the Cabinet on 3.4.2003 perhaps on the assumption that due process had been followed. When the Tender Board lacks initial jurisdiction, the nullity of its decision is not cured by the mere fact that the said decision was affirmed by the Cabinet subsequently. A nullity cannot be revived or ratified on any account.

Indicative Valuation

This is a valuation done by the Financial Adviser PWC as part of its financial advisory services for the restructuring of SLIC. The purpose of the valuation was to provide a benchmark against which PERC could assess the offers received from the potential investors for 100 % shareholding of SLIC. The availability of a valuation to be taken as a benchmark for the evaluation of the bids for the sale of an ongoing business enterprise is an essential feature in transactions of this nature.

The indicative valuation report prepared by PwC had been finalized on 29th November 2002 to reflect the fair market value of 100% shareholding of SLIC as at 31.12.2001, which was the latest date before the issuance of the report at which audited accounts of the SLIC were available. According to the briefing note of the PwC (Document7R5), the indicative valuation shows the value the Government of Sri Lanka should at the least expect in order to reflect the future value of SLIC were it to remain in Government ownership. The indicative valuation represents the value of the business, both life and general insurance, going forward if it continued to operate on the same basis as at the time of the preparation of the valuation.

The PwC report states that the PwC used a Discounted Cash Flow (DCF) as the primary methodology to value the general business based on financial projections for the period 31 December 2002 to 2006. It was cross checked by comparing the earnings multiple implied by DCF valuation to the multiples on which comparable companies in the industry were trading. The report goes on to state that as a further check PwC also had regard to an assets based approach (i.e. implicit Net Tangible Assets multiples).

In the Indicative Valuation Report a summary of the fair market value of the SLIC general and life insurance business as at 31.12.2001 (after adjustment for special dividends paid to the Treasury) is given as follows.

	High	*Low*
Value of general insurance	*4292*	*4017*
Value of life insurance (mid)	*1086*	*1086*
Equity value of SLIC (Rs.million)	*5377*	*5102*
Equity Value of SLIC (US Dollars million)	*55.7*	*52.8*

(on the basis of exchange rate as at 29.11.2002 1 USD = Rs.96.56)

The petitioners have challenged the correctness of the indicative valuation. In the affidavit of the petitioner in 158/2007, it was specifically alleged in paragraph 8(c) that the net assets value of SLIC has been reckoned on historical book values, which disclose the Land, Buildings, Plant and Equipment only at Rs.275 million. The 7th respondent P.B.Jayasundara in paragraph 32 of his affidavit has admitted the averment set out in paragraph 8(c) of the petitioner's affidavit. In the audited accounts of the SLIC as at 31.12.2001 (Document P 14) fixed assets had been given a book value of Rs.329.3 million (Rs.274.9 million + Rs.54.4 million). In 2002 the SLIC has obtained the services of Valuers (selected from a list furnished by the PERC) to value lands and buildings owned by the SLIC. After the valuations, the Manager (Premises) has set out in the report dated 20.8.2002 the total value of the lands and buildings valued by the valuers. Copies of the valuation reports have been produced marked 20R 26 and 24R10. According to the valuation report the value of lands and buildings as at 20.8.2002 was Rs.2086 million! (Rs.2086,438,000/-) The 24th respondent Distilleries Co in its objections has stated that the valuation report as at 20.8.2002 (20R26 and 24R10) was made available to bidders at the "data room" for their perusal before submitting bids. However the allegation of the petitioners is that in the audited accounts as at 31.12.2001 used for preparing the indicative valuation the book value given was only Rs.275 million. (The book value as set out above was Rs.329.3 million Rs.274.9 + Rs.54.4 million). Thus the actual value of lands and buildings was Rs.1762 millions more than the book value shown in the accounts for the period ending on 31.12.2001.

The new valuation of lands and building was complete by 20.8.2002, three months before the PwC finalized its indicative valuation. The relevance of market value in assessing a business for the purpose of divestiture has been highlighted by the 27th respondent SLIC in paragraph 29(e) of its objections in the following terms.

> " It is a normal and prudent practice in competitive bids to bid on market value rather than on book values. This is as it is widely known to the professional companies that bidded, that book values do not give an accurate reflection of the value of the assets of the company. It is commonly understood that no divestiture on competitive bidding would take place on book values, inasmuch as prospective buyers are aware of the more realistic market values, particularly of freehold properties."

The 27th respondent has made the above statement to stress the fact that the successful bidder relied on the market value rather than the book value in the preparation of its bid. However if the seller's valuation is based on book values and the bidder's bid is based on realistic market values which are higher than the book values, this would inevitably result in placing the bid price above the seller's valuation. In this respect it is noteworthy to refer to paragraph 29(f) of the 27th respondent SLIC's objections. The said paragraph states that,

> " It is evident that the successful consortium have bid and paid Rs.6.7 billion (over 82% more than the book value) taking into consideration amongst other factors the then current market price of the aforesaid lands and buildings as reflected in the valuations carried out by the respondent."

The complaint of the petitioner's is exactly this: that the PwC valuation was not realistic. It is pertinent at this stage to refer to the statement contained in the Cabinet Memorandum dated 27.3.2003 submitted to obtain Cabinet approval to sell the SLIC to the Highest bidder. At page 1 of the said Cabinet Memorandum it is stated that,

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

The Financial Forecast prepared by PwC as set out in page 38, (paragraph 5.2 of Indicative Valuation Report,) contains forecasts of the profits after tax for the year 2002 as Rs.221 million. The above statement in the Cabinet Memorandum states that as per the *unaudited accounts for the period ending on 31.12.2002 the profit of SLIC after tax is Rs.753 million.*

In paragraph 8(b) of the affidavit of the petitioner in SC FR 158/2007 the petitioner has stated that,

> *" The indicative valuation had been on the basis of a net present value of a Discounted Cash Flow. The net profits of SLIC for the year ended 31.12.2001 had been around Rs.1162 million. A price earnings multiple of around '10' had been considered but on an unexplained adjusted annual profit of SLIC around only Rs.420 million."*

The 7th respondent, P.B.Jayasundara in paragraph 32 of his affidavit has admitted averment 8(b) of the petitioner's affidavit. Pricewaterhouse Coopers FAS, Indonesia, named as the 17th respondent to the application 158/2007, has not appeared and filed objections. However the 24th respondent Distilleries Co, 27th respondent SLIC and 20th and 21st respondents Partners of Pricewaterhouse Coopers Sri Lanka in their objections have pointed out that the basis of the adjustment of net profit from Rs.1162 million to Rs.421 million is contained at page 39 of the PwC Indicative Valuation Report. The report states that, (at page 39),

> *" We have used the 2001 audited financial result and adjusted the NPAT for non recurring revenues. In this period, SLIC has recorded a substantial write-back of provisions against previous investment write-downs amounting LKR 699 million and also a foreign exchange gain arising on USD deposits totaling to LKR 221 million. We have backed these out in order to derive earnings that more accurately reflect the business' operations, thus tax on operation is recalculated at 35% of the adjusted profit before tax."*

The 24th, 27th, 20th and 21st respondents have submitted that the said Rs.699 million and Rs.221 million were neither business profits nor recurring profits but were "one off" gains which were not likely to recur year after year and that such gains should be excluded in arriving at an indicative valuation using the method of net present value of future discounted cash flows.

The adjustment made by the PwC as shown in the Indicative Valuation Report is set out below.

(In LRK million)	*2001 Audited*	*Adjustment*	*2001 Adjusted*
Investment income	*876*		*876*
Other income/ (Expenses)	*694.2*	*(920)*	*(226)*
PROFIT BEFORE TAX	*1,567*	*(920)*	*647*
Tax	*(405)*		*(226)*
NET PROFIT AFTR TAX	*1,162*		*421*

The sum deducted from the profit before tax, Rs.1567 million, was Rs.920 million, being the total of Rs.699 million + Rs.221 million, considered as non recurring revenues. The deduction of Rs.920 million had been made against 'other income' 694.2, which was lower than 920, and as such there was a negative figure of Rs.225.8 million and this was deducted from Rs.876 million which represented investment income, thereby bringing down the Profit before tax to Rs.647 million. After making provision for Rs. 226 million tax, the net profit after tax was adjusted to Rs.421 million.

The 13th respondent in his submissions stated that deduction of the Reversal of Provision for fall in value of Investments was erroneous and not warranted as the audited balance sheet for 31.12.2001 (P14) and the audited balance sheet for 31.12.2002 (P17) reflected the market value of Equity Investments was higher than the book value of such investments.

The 13th respondent has pointed out that according to the audited accounts for the period ending on 31.12.2001 the book value of Equity Investments under Current Assets was Rs.2808 million (page 28 of P14) and the market value of the same had been disclosed to be Rs.3157.8 million, (page 31 of P14) showing that the market value was above the book value by Rs.349.8 million.

The 13th respondent has also referred to the audited accounts for the period ending on 31.12.2002(P17) which shows that the value of Equity Investment under Current Assets was Rs.2783.7 million (Page 28 of P17) and the market value of the same was Rs.4856.7 million (page 32 of P17) showing that the book value has been less than the market value by Rs.2073 million.

The submission of the 13th respondent was that as the market value of Equity Investment was more than the book value, the deduction of Rs.699 million for reversal of provisions for falling value of investments was erroneous and unwarranted. According to his submission this erroneous adjustment had been erroneously carried forward in the PwC's Financial Forecast for five years from 2002 to 2006. According to the 13th respondent's calculation, after a proper adjustment, the net profit after tax for 2002 should have been Rs.567.4 million instead of Rs.420 million. A copy of the PwC's adjusted Financial Forecast up to 2006, marked 'A' and the 13th respondent's calculation of the adjusted Forecast, marked B are annexed to this judgment as Appendix 1.

The 13th respondent has invited the attention of Court to the statement contained in the Cabinet Memorandum dated 27.3.2003 (P10) which at page 1 states as follows.

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

The 13th respondent has pointed out that in the PwC Indicative Valuation the adjusted profit (forecast) for year 2002 is Rs.221 million, and that the above statement shows that the profit after tax for 2002 was Rs.753 million as per the unaudited accounts. It is pertinent to note that in the audited balance sheet for 31.12.2002 (P17) certified on 28.11.2003, after the purchaser took over SLIC, there was a net loss of Rs.418 million! According to the PWC Financial Forecasts (Page 38 of PWC Indicative Valuation Report) the net profit after tax of SLIC for the year 2003 is Rs.265 million. According to the SLIC Audited Balance Sheet for the period ending on 31.12.2003, net profit after tax was Rs.1533 million, that is Rs.1269 million more than the Forecast figure of Rs.265 million!

On the other hand, the 24th respondent's contention is that the PwC Indicative Valuation was seller friendly. The 13th respondent has also submitted that the brand value of SLIC, well established for over 40 years had not been taken into reckoning, considering that the name "Sri Lanka" cannot be used by a company in view of section 17 of the Companies Act No.17 of 1982. It is to be noted that the strong brand equity is one of the factor identified by the buyer as one of the strengths of SLIC (Vide 24R9A). In the Technical *proposal of Distilleries Consortium (document 24R 11A) of January 2003, the brand value of the SLIC has been set out as follows.*

> " *Strong brand equity, widely recognized by Shareholders as being financially stable, trustworthy and respectable. The products introduced by SLICL are trusted over competitor products in the life business. SLICL due to its financial strength and prudent management of funds has gained the most financially stable insurer status in the Island.*

All those matters referred to above regarding the correctness of the Indicative valuation indicate that the TEC and the Tender Board should have turned their attention to the reliability of the indicative valuation of the PwC when it was used as a bench mark to evaluate the financial bids for the sale of SLIC.

Such an approach is all the more necessary in view of Disclaimer and Limitations contained in the Indicative Valuation Report, especially the last paragraph (which appears at page 5 of the report) which states as follows.

> " *The indicative valuation of companies and businesses is not a precise science and the conclusions arrived at in many cases will of necessity be subjective and dependent on the exercise of individual judgment. There is therefore no indisputable single value and we normally express our opinion on the value as falling within a likely range. Whilst we consider our value range of values to be both reasonable and defensible based on the information available to us others may place a different value on the company business."*

The TEC and the Tender Board who are responsible and accountable to the Cabinet had failed to examine, if necessary with the assistance of experts, the validity of the indicative valuation given in the PwC report. There was no attempt at all by the TEC or the Tender Board to satisfy themselves of the correctness and the reasonableness of the indicative valuation given by the PWC before they recommended the sale of a pivotal asset of the State. Thus the Court does not see any rational basis for their recommendations.

The Court also notes that the Government Valuer was completely kept away from this process. At the very first meeting of the Steering Committee [P16(a)] held on 25.1.2002, the Committee has decided that " An internationally reputed firm will have to be commissioned to undertake the actuarial valuation and business valuation".

In the minutes of the 3rd meeting of the Steering Committee held on 18.2.2002 for the specific purpose of meeting with Rodney Lester, International Finance Corporation (IFC), Head of Insurance and Contractual Savings Anchor Team of the World Bank Group, it has been noted under the heading "Government Valuation", that "Since valuation of insurance companies are very complex and need specialized skills, Government valuation of insurance companies have created many problems for privatization due to specialist skills not being available".

Whether the Government Valuer was equipped to undertake the valuation of an insurance company is a matter for the Government Valuer and if his Department lacked the capacity to undertake such a task the Government Valuer could have obtained the services of external experts to assist him. In fact the PwC Indicative Valuation report indicates that to compute the value of life insurance, it has obtained the services of external experts.

The final recommendation of the TEC to sell 90% shares of SLIC to the Distilleries Consortium was made on 25.3.2003 at 9.30 a.m. The minutes of that meeting marked 7R6A indicates that the TEC recommendation was solely based on the recommendation of the PwC (unsigned) reports, referred to in the TEC recommendation as Attachment 1 which has been produced before this Court as 7R6A. I have earlier set out in detail the recommendations of PwC. The Tender Board which met half an hour after the TEC meeting recommended the sale of the SLIC to the Distilleries Consortium. The Tender Board in its decision, marked and produced 7R6B, has failed to give reasons for its decision, supported by material which persuaded it to come to that decision. A decision is not a mere matter of fancy, whim or caprice. It must be related to the object to be achieved and should satisfy the basic requirements such as the notice calling for EOI. The Court therefore reaches the conclusion that both the TEC and the Tender Board have failed to perform their duties and acted as 'rubber stamps' to authenticate the final decision in fact taken by the PwC.

As already stated, the Cabinet approval for the sale of SLIC to the Distilleries Consortium followed the Cabinet Memorandum dated 27.2.2003 submitted by the 2nd respondent Minister. The Cabinet Decision taken on 2.4.2003 indicates that it noted the observations of the then President set out in her Memorandum. (already quoted in the earlier part of this judgment)

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Sale of Shares of SLIC

As already set out in the earlier part of this judgment, after the Cabinet approval was granted to authorize the Secretary to the Treasury to execute the Share Sale and Purchase Agreement (SSPA) to divest 90 % SLIC to the Distilleries Consortium, the SSPA was signed on 11.4.2003 by the 5th respondent Faiz Mohideen, the then Acting Secretary to the Treasury for and on behalf of the Government of Sri Lanka as the seller, and Milford Holdings (Private) Ltd and Greenfield Pacific EM Holdings Ltd as the buyers. The 38th respondent D.H.S.Jayawardene has signed the SSPA for and on behalf of the buyers. The said D.H.S.Jayawardene has also signed for and on behalf of the Guarantors, Distilleries Company of Sri Lanka, Aitken Spence and Company Ltd and Aitken Spence Insurance (Private) Ltd.

The names of buyers, Milford Holdings (Pvt) Ltd and Greenfield Pacific E M Holdings Ltd have never transpired during the bidding process, in the Cabinet Memorandum dated 27.3.2003 and in the Cabinet decision dated 2.4.2003. The buyers were strangers to the bidding process which culminated in the Cabinet decision of 2.4.2003. Milford Holdings had been incorporated in Sri Lanka on 31.3.2003 and Greenfield Pacific EM Holdings has been incorporated in Gibraltar on 28.3.2003.

In view of this, the petitioners have complained that the SSPA has been signed, not with the selected and Cabinet approved parties but with two parties who were not even in existence on the date of the Cabinet Memorandum and as such the SSPA has been executed in violation of the Cabinet decision.

The position taken up by the 24th to 29th and the 38th respondents is that Milford Holdings is a Special Purpose Vehicle (SPV) established for the acquisition of SLIC by the Distilleries Consortium, and Greenfield Pacific EM Holdings is the Institutional Investor referred to in the bid documents and the foreign institutional investor referred to in the Cabinet Memorandum. In the objections of the 24th to 28th respondents they have stated that during the bidding process they informed the Government that the Distilleries Consortium proposed to create a SPV for the purpose of acquiring SLIC and that there would be foreign institutional investors to invest in the venture. The written submissions of the 24th and 27th *respondents emphatically refer to instances where the Distilleries Consortium specifically revealed the possible participation of institutional investors.*

In view of the position taken up by the respondents, it is necessary to refer to the proposed composition of the consortium set out in the bid documents and references contained therein to the sources from which the consortium planned to get the funds necessary for the proposed acquisition of SLIC.

In the 1st technical proposal of the Consortium, marked and produced by the 24th respondent as document 24 R 9A, the composition of the consortium has been described as follows.

"* *Distilleries Co of Sri Lanka Ltd.*

* *Aitken Spence and Company Ltd and Aitken Spence Insurance (Pvt) Ltd.*
* *CT Smith Stockbrokers and Asia Box Consultancy (Pvt)Ltd – This comprises of stakes that will be placed with passive Foreign Institutional Investors."*

The role of CT Smith Stockbrokers and Asia Box Consultancy has been further explained as follows. "The companies will privately place equity stakes in SLIC with passive fund managers. It is envisaged that the equity stake taken up by these investors will be around 5% to 10%" (pages 2 and 10 of 24 R9A – emphasis added) Page 1 of the Technical Proposal contains the specific statement that " The acquisition of SLIC will be funded through internally generated fund and debt".

The next document in chronological order is the Financial Bid of the Distilleries Consortium, dated 29th November 2002, which remained unchanged upto the very end of the bidding process, except for the upward revision of the bid price agreed during negotiations held after the opening of Financial Bids. The letter containing the Financial Bid of the Distilleries Consortium, signed by Damien Fernando, Finance Manager Distilleries Co as the authorized officer of the Consortium has been produced by the 24th respondent Distilleries Company, marked 24 R9B. The Financial Bid, addressed to the Chairman, Cabinet Appointed Tender Board contains the following statements.

" We write on behalf of the consortium comprising of Distilleries Company of Sri Lanka Ltd, Aitken Spence and Company Limited and Aitken Spence Insurance

(Private) Ltd to submit the following financial bid for the purchase of shares of Sri Lanka Insurance Corporation Ltd."

Two matters become clear from the above statement. Firstly, that the consortium comprises of the three companies named therein and no one else. Secondly that CT Smith Stockbrokers and Asia Box Consultancy Services Ltd, who were expected to place stakes with passive foreign institutional investors/ passive fund managers, have dropped out of the arrangement proposed in the Technical Proposal.

Paragraph 10 of the Financial Bid which goes on to set out the funding arrangement is as follows.

> *" The purchase price will be financed both by internally generated funds of the consortium and also on short term and medium term borrowings. We have assessed the amounts of funds that are available within the groups and have indicated to Hatton National Bank Limited (bank) of the funding requirement to meet the purchase price indicated above. After assessing the proposal the bank has issued the letter attaching to this proposal indicating their willingness to syndicate a loan package to the consortium members. There are no conditions attached to the funding by the bank. The consortium will use their extensive asset base to provide collateral for the borrowings."*

It is clear from the above statement that the Distilleries Consortium intended to fund the acquisition with internal funds of the companies included in the consortium and borrowings from the Hatton National Bank as set out in that statement. Participation of a foreign institutional investor or the necessity to find foreign funding provider was never contemplated or suggested.

Another letter written by Damian Fernando, Finance Manager of the Distilleries Company on the same day the Financial Bid was sent i.e. 29th November, 2002, clears the position even further. This letter addressed to the Chairman of the Cabinet Appointed Tender Board through the Chairman PERC has been filed by the 24th respondent. The body of the letter reads as follows.

> *" We write to confirm that Distilleries Company of Sri Lanka Ltd, is participating in the consortium with the ~~Aitken Spence~~ and Co Ltd and Aitken Spence Insurance*

(Pvt) Ltd, to acquire shares of SLICL on our own account as a principal. We confirm that we are not representing any company or a person whether in Sri Lanka or overseas. DCSL will hold the shares of SLICL if successful in the bid, for the foreseeable future except for divestitures of a portion of the holding to the general public at the CSE and/or to institutional investors (with the approval of the PERC) in order to acquire wide based ownership."

It is very clear from this letter, that in the event of the success of the bid, the Distilleries Company was going to hold the shares until future divestitures to the general public and/or to institutional investors.

In January 2003, the Distilleries Consortium has submitted its enhanced Technical Proposal, which has been produced by the 24th respondent marked 24R11A. According to this proposal the composition of the consortium was as follows.

** Distilleries Company of Sri Lanka*

** ING Group, Amstradam, Netherlands*

** Aitken Spence and Co Ltd*

** Aitken Spence Insurance (Pvt) Ltd*

The Technical Proposal goes on to state as follows.

" It is proposed that shares of the SLICL will be held through a Special Purpose Vehicle (SPV) established for the acquisition of SLICL. The intermediate holding company (the SPV) is required as the lead Technical Partner i.e. ING Group will be investing in the equity of SLICL upto 49% at a latter stage. The SPV company will hold 90% - 100% of issued capital of SLICL. The shareholding of the Issued Capital of SPV would be as follows.

Consortium Partner	*The percentage of equity in the company to be held*
Distilleries Company of Sri Lanka Ltd	*41% - 91%*
ING Group	*0% - 49%*
Aitken Spence and Co Ltd	*10%*
Aitken Spence Insurance (Pvt) Ltd	*0%*

The ING Group has stated that depending on ING's worldwide strategy at the time of acquisition, an equity stake would be considered when the envisaged restructuring programme is deemed to have been successful. Hence DCSL would be holding 90% of the equity of the SPV until such time the ING Group purchases upto 49% of the issued capital."

This Technical Proposal also specifically reasserted the position set out in the earlier proposal that "the acquisition of SLICL by the consortium will be funded through internally generated funds and debt."

In the enhanced Technical Proposal, under the heading Future Participants of the consortium the following statement has been made.

" The current consortium, if successful in the purchase, wishes to seek approval of PERC to include premier institutional investors such as DFCC Bank, National Development Bank of Sri Lanka, Employees Trust Fund Board and Employees Provident Fund to hold significant interest in SLICL. The current consortium has not sought the concurrence of these parties and will do so only if it succeeds in the acquisition and after the price per share is determined. <u>The divestment of shares to the above mentioned parties will be done after the shares are purchased by the current consortium from the Government of Sri Lanka on a zero profit basis</u>. However if PERC is not in agreement to this divestiture of minority stake in investment companies, the consortium or the SPV will continue to hold the entire capital until the Initial Public Issue." (emphasis added)

The enhanced technical proposal too repeats the same statement made in the first technical proposal that "the acquisition of SLICL by the Consortium will be funded through internally generated funds and debt." In addition, it contains a specific paragraph on the planned sources of funding. That paragraph is as follows.

" As stated above, a SPV company holding 90% to 100% of SLICL. DCSL will acquire 90% equity interest of the holding company (SPV). This will be held until 40% is divested to accommodate ING Group. Post divestiture, the ING Group would hold upto 49%. DCSL proposes to fund 50% of its investment through internally generated funds and 50% through external funding. Few of the companies affiliated to DCSL may also obtain minority stakes to assist the DCSL consortium

on the purchase. Based on the volume of fund requirements if may be necessary for a bank loan to be syndicated. If syndication is necessary Hatton National Bank Limited (HNB) will act as the lead bank.

The ING's role in the Distilleries Consortium has been set out in the Letter of Intent dated 9th January 2003, sent to the Distilleries Company by the ING. It is an annexure to the enhanced technical proposal. The relevant part states as follows.

> *" ING – Institutional and Government Advisory (IGA) is pleased to join the consortium comprising of Aitken Spence and Company Ltd, Aitken Spence Insurance Ltd and Distilleries Company of Sri Lanka Ltd, in their bid for the acquisition of state owned Sri Lanka Insurance Corporation Limited (SLICL), as the Technical Assistance partner. Subsequently, if this consortium succeeds in acquiring SLICL, IGA would be pleased to provide Technical Assistance to the Management of SLICL. Depending on ING's worldwide strategies at that time an acquisition of an equity stake in SLICL could be considered when the envisaged restructuring program is deemed to have been successful. However for now ING cannot provide firm intentions or commitments to do so."*

The following conclusions emerge from the material I have set out above.

** *When the enhanced technical proposal was submitted, the Distilleries Consortium consisted of the DCSL, the two Aitken Spence Companies and the ING Group*

** *ING Group's role was to provide technical assistance to the consortium and there was no commitment from ING to acquire any equity stake in the acquisition of SLIC.*

** *Funding partners were the DCSL and the two Aitken Spence Companies who arranged to provide internally generated funds and debts.*

** *There was no plan or a proposal to get a foreign investor to fund the acquisition.*

** *The intermediate holding company was needed as the ING Group's investment in equity was to come at a later stage.*

** *In the technical proposals reference to institutional investors have been made in the context of the post-divestiture disposal of minority stakes in SLIC and the institutional investors referred to are local investors. There was no proposal to have institutional investors at the stage of the acquisition of the SLIC.*

Participation of an institutional investor at the stage of acquisition was never contemplated even at the stage of submitting the enhanced technical proposal is conclusively proved by the chart showing the proposed shareholding of the SLIC after sale, attached as Annexure III to the enhanced technical proposal. A copy of that chart is annexed to this judgment marked Appendix II.

After financial bids were opened there were negotiations with the two qualified bidders to get their bid prices enhanced and the Distilleries Consortium has agreed to increase their bid price from Rs.6,030000000 (6 billion and 30 million) to Rs.6050,000,000 (6 billion and 50 million). The enhanced purchase price was formally communicated to the Tender Board by letter dated 19.3.2003 signed by Damian Fernando, the Finance Manager of the DCSL as the authorized officer of the Consortium. This letter also refers to the DCSL and the two Aitken Spence Companies as the constituent members of the consortium. Paragraph (g) of the letter states as follows.

> *" We further confirm that in the event that there is a delay in obtaining the funds (Rs.1 billion) for the shares earmarked for the overseas investor(s), this amount will be paid by the consortium pending the fund transfer. The letter from the bank confirms that they will issue a banker's draft or transfer the funds to an account designated by the Secretary to the Treasury for the full value this consortium is required to pay including that of the overseas investor."*

In the bid documents this is the first reference to a foreign investor as a party seeking to invest in the shares of the SLIC at the time of its acquisition. The statement referred to above did not identify the foreign investor or the number of shares earmarked for him. There is no material in the documents which provide any assistance to ascertain the above details. As revealed by the material available, the reference to the foreign investor in the Financial Bid dated 19.3.2003, was certainly not a reference to the ING Group as there was no commitment at that time by the ING to provide any funds to the consortium at the stage of the proposed acquisition and this fact is confirmed by subsequent events.

In the PWC report, considered by the TEC and the Tender Board on 25.3.2003 (Attachment 1 marked 7R5), the Distilleries Consortium has been described as DCSL, the two Aitken Spence Companies, ING <u>and institutional investors who proposed to invest in upto Rs.1 billion in funds</u>. It is clear that this reference to institutional investors who propose *to invest one billion in funds was the result of paragraph (g) of the Financial Bid of 19.3.2003. In the TEC and Tender Board recommendations dated 25.3.2003, the Distilleries Consortium has been described as DCSL, the two Aitken Spence Companies, ING, together with institutional investors. The PWC, the TEC and the Tender Board have not referred to a foreign institutional investor. In the Cabinet Memorandum dated 27.3.2003, the Distilleries Consortium has been described as the DCSL, the two Aitken Spence Companies, ING and other foreign institutional investors. The Cabinet Memorandum further stated that the purchase consideration of Rs.6050 million includes about US Dollars 10 million to be mobilized from foreign equity partners.*

At this stage it is necessary to refer back to the details invited from those who wished to submit an EOI. Such parties were instructed to provide the following details.

*** Full name of the company, postal address and contact details.*

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

*** Audited financial statements for the last three years.*

The TEC and the Tender Board were well aware of the necessity to have those details about the parties who submit EOIs and bids. The Distilleries Consortium has provided those details regarding the DCSL, the two Aitken Spence Companies and ING. Those companies have forwarded individual letters confirming their participation in the consortium. No one can say that the members of the TEC and the Tender Board who were senior public servants, were not aware of the necessity to have the precise identity of all parties who seek to enter into contracts with the Government. Governments do not enter into contracts with unknown and/or undisclosed parties whose credentials are not known.

When the members of the TEC considered the PWC report (Attachment 1) on 25.3.2003, they should have noted that the PWC's description of the Distilleries Consortium included a reference to unnamed institutional investors. The TEC members should have at once realized (if they have properly studied the two Technical proposals of the Distilleries Consortium and its Financial Bid) that the Distilleries Consortium in their bid documents has not proposed to bring in an institutional investor at the stage of the acquisition of the shares of SLIC and that the declared source of funds for the acquisition was internally generated funds and debt. The TEC has not made any endeavour to ascertain the identity of the institutional investor referred to in the PwC report and the foreign investor referred to in *the Financial Bid dated 19.3.2003. The TEC meeting was held at 9.30 a.m. on 25.3.2003 followed by the meeting of the Tender Board at 10.00 a.m. When the Tender Board met at 10.00 a.m. the minutes of the TEC meeting which contained the recommendation of the TEC was before the Tender Board. It appears that the TEC has hastily concluded its meeting to send the minutes to the Tender Board without addressing its mind to the manner in which the reference to an institutional investor came to be included in the PwC report. As already indicated the Tender Board has approved the recommendation of the TEC to accept the bid of the Distilleries Consortium. As it has been established that the Tender Board has approved the recommendation of TEC without applying its mind, resulting in the failure to form its own independent opinion, Tender Board approval too has to be necessarily struck down.*

Clause 2B(iv) of the SSPA requires the purchasers of the SLIC to disclose, prior to the signing of the SSPA, the legal and beneficial ownership of each of the purchasers. It appears from the letter dated 8.4.2003 sent by the Distilleries - Spence Consortium (7R10) to the Director General, PERC, that as per the information provided by Greenfield Pacific EM Holdings Ltd, its beneficial shareholder was Hambros Bank (Gibraltar Nominees) Ltd, a company incorporated in Gibraltar. This letter shows that even the Distilleries Consortium did not know, apart from the information supplied to it by Greenfield Pacific Co, the beneficial owners of that company.

The 38th respondent, as attorney of the 29th respondent Greenfield Pacific EM Holdings has filed an affidavit on behalf of the 29th respondent. The affidavit states that during the bidding stage CT Smith Stockbrokers and Asia Box Consultancy Services have invited SG Hambros Bank to invest in the purchase of SLIC and that after the acceptance of the Distilleries bid, the bank has formed a SPV to invest money in the SLIC transaction as a passive investor. There was no need to form a SPV before the bid was accepted. The affidavit further states that as Greenfield Pacific EM Holdings wished to remain as a passive investor, it did not intend to become a party to the SSPA and this position was made known to the PERC by the Distilleries Consortium but upon the insistence of PERC it agreed to become a party to the SSPA, and authorized the 38th respondent to sign the SSPA on its behalf. According to the affidavit, the 29th respondent remitted 9309922/- US dollars to the Hatton National Bank to the credit of its account and the Bank transferred Rs.969100000/- to

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Milford Holdings Ltd to be paid for the purchase of 7438000 shares of the SLIC by the 29th respondent.

According to the documents filed in this Court, the sole shareholder of Greenfield Pacific EM Holdings is Hambros Bank (Gibraltar Nominees) Ltd. The shareholder of Hambros Bank (Gibraltar Nominees) Ltd is Hambros Bank (Gibraltar) Ltd. The shareholder of that Bank is SG Hambros Bank, London and the shareholder of SG Hambros Bank is Societe Generale SA, France. SG Hambros Bank is engaged in the business of providing an integrated wealth management service including the provision of banking products and trust structures and investment management advice.

When a new foreign company brings foreign funds into the country for a transaction with the Government relating to Government property, it is necessary to ascertain the details of the beneficial ownership of such foreign money. This is necessary to ensure that the bringing of such money does not contravene any domestic law or foreign law and that the acceptance of such money by the Government is not a contravention of any international obligation of the State. The beneficial owner of the money brought into the country by Greenfield Pacific Ltd is concealed behind a series of corporate veils, thereby making it difficult to ascertain the real beneficial owner of such money.

The Cabinet authorized the Secretary to the Treasury to divest 90 % of the shares of SLIC to the Distilleries consortium. The Cabinet decision did not contain the names of the parties which constitute the consortium, but those names are in the Cabinet Memorandum referred to in the Cabinet decision. The Secretary to the Treasury derived his authority to execute the SSPA from the Cabinet decision and as such his authority is confined to the four corners of the Cabinet decision. The execution of the SSPA with parties not known and not approved by the Cabinet was a wrongful executive act done without jurisdiction and as such was illegal and null and void ab initio.

The 24th to 27th respondents have submitted that Milford Holdings is a company formed by and owned by three parties which figured in the Distilleries Consortium. Greenfield Pacific EM Holdings Ltd is a total stranger. There is only one contract and when it is void due to illegality the whole contract is null and void. I accordingly hold and declare that the Share Sale and Purchase Agreement executed by the 5th respondent Acting

Secretary to the Treasury on behalf of the Government of Sri Lanka and by Milford Holdings (Pvt) Ltd and Greenfield Pacific EM Holdings on 11.4.2003 was and is illegal and null and void ab initio.

This now brings me to the topic, adjustment of purchase price consideration which is a necessary step, in terms of the SSPA to conclude the sale of 90% shares of the SLIC. Since I have already held that the SSPA is null and void it is not strictly necessary to consider this aspect but as it sheds light on the manner in which the whole transaction was handled it is opportune to briefly refer to it.

The firm Ernst and Young (hereinafter referred to as EY) was the auditor of SLIC. EY audited the Financial Statements of the SLIC in accordance with Sri Lanka Auditing Standards to determine whether the Financial Statements have been prepared in accordance with the Sri Lanka Accounting Standards.

The audited Financial Statement of the SLIC for the period ending on 31.12.2001 (certified on 11.6.2002 by EY) has been marked P14, and the audited Financial Statement for the year ending on 31.12.2002 (certified on 28.11.2003 after the new buyers took over SLIC) has been produced marked P17.

At the 1st meeting of the Steering Committee held on 25.1.2002, it was noted that EY, the auditors of SLIC has sent a proposal to SLIC for restating Financial Statements according to International Accounting Standards. At the 2nd meeting of the Steering Committee held on 13.2.2002, it was decided that SLIC will undertake to fund the IAS audit which amounted to around US Dollars 81,000. EY's IAS audit has commenced in March 2002. The Consolidated Financial Statements of SLIC are said to have been prepared by EY in accordance with International Accounting Standards as at 31.3.2002. This has been produced marked P15. In the report of EY in P15 it is stated as follows.

> " *We have reviewed the accompanying Consolidated balance sheet of Sri Lanka Insurance Corporation Limited ....for the period ended March 31, 2002. The consolidated financial statements are the responsibility of company management. Our responsibility is to issue a report on these financial statements based on our review. <u>We have not performed an audit and accordingly do not express an opinion.</u>" (emphasis added)*

However in the last paragraph of the report of EY was as follows.

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

The above statement shows that EY has not certified that the financial statements have been prepared in accordance with International Accounting Standards.

The sale of SLIC on 11.4.2003 was based on the unaudited accounts P15. In view of this, SSPA made provision for the purchase price to be adjusted based on either an increase or decrease of the Net Working Capital (NWC) of SLIC between 31.3.2002 and 11.4.2003, on a later date. Clause 4A(A) of SSPA provided as follows.

> *" The consideration shall be adjusted following the 1st completion as follows:*
>
> *(i) If the Net Working Capital is higher than the amount shown in the Management Accounts, by adding the amount by which Net Working Capital exceeds that amount; and*
>
> *(ii) If Net Working Capital is less than the amount shown in the Management Accounts, by deducting the amount by which Net Working Capital is less than that amount."*

Management Accounts referred to in the above clause means the consolidated financial statements of the company prepared in accordance with International Accounting Standards as at 31.3.2002 as reviewed by Ernst and Young.

According to SSPA, Net Wording Capital means the current assets less current liabilities of the company as at the first completion date shown in the Completion Balance Sheet.

According to clause 4A(B), if as a result of the adjustment of consideration,

(i) the amount of consideration is increased, the purchasers shall pay to the seller in cash a sum equal to that increase; or

(ii) if the amount of consideration is reduced the seller shall pay to the purchasers in cash a sum equal to that reduction.

According to the SSPA, net working capital has been interpreted to be the current assets minus current liabilities. However there is no interpretation or a definion of current assets and current liabilities. According to the SSPA purchase price consideration *has to be adjusted within 60 days of the first completion date or such other date agreed by the parties and the purchasers have to procure the company (SLIC) to prepare and deliver to the seller the balance sheet of the company as at first completion, i.e. 11.4.2003.*

The SLIC has obtained 16 extensions of time from PERC to prepare the balance sheet as at 11.4.2003. Subsequently EY who continued as auditors of SLIC under the purchasers has submitted on 26.3.2004, unaudited accounts as at 11.4.2003, called Special Purpose IAS Financial Statements. Those accounts have been produced marked 13R8. Even in 13R8, EY has stated (like in their earlier statement of accounts of 31.03.2002 (P15) that they have not performed an audit and accordingly do not express an opinion. Similarly like in P15, they have stated that "nothing has come to our attention that causes us to believe that the accompanying financial statements do not give a true and fair view in accordance with International Accounting Standards". However there is no certificate that the financial statements have been prepared in accordance with International Accounting Standards.

The 13th respondent invited the Court's attention to the two audited balance sheets (P14 and P17) and the two unaudited balance sheets (P15 and 13R8). He pointed out that in both audited balance sheets current assets and current liabilities and non current assets and non current liabilities have been separately classified and shown. He pointed out that in the unaudited balance sheets (P15 and 13R8) assets and liabilities are shown without classifying them into current assets and non current assets and current liabilities and non current liabilities.

Since the unaudited balance sheet (13R8) does not separately reflect current assets and current liabilities it has become impossible for the Government and the PERC to compute the Net Working Capital as per clause 4A of the SSPA. In view of the failure of the SLIC and EY to compute the NWC in terms of SSPA, the PERC having computed the adjustment of consideration has demanded the SLIC to pay to the Secretary to the Treasury a sum of Rs.1,500,000,000/- as an interim payment of the total sum due Rs.1,670,807000/-. SLIC has disagreed with the computation on the basis that it has not been prepared in accordance with International Accounting Standards. On SLIC's computation of NWC between 31.3.2002 and 11.4.2003, it has demanded the Government to pay to SLIC a sum of Rs.2059,436,000/-. The sale transaction has come to rest on those competing claims and *demands and has not reached the conclusion intended by the parties. It still remains to be concluded.*

I now proceed to consider the preliminary objections raised by the respondents with regard to the maintainability of this application. The first objection is that the application is time barred in terms of Article 126(2) of the Constitution. The petitioners in both applications, SCFR 117/2007 and SCFR 158/2007 have filed their applications to seek, among other reliefs prayed for, a declaration that the sale of 90% of the shares of SLIC to Milford Holdings (Private) Ltd and Greenfield Pacific EM Holdings Ltd on 11.4.2003 is null and void as the said sale had been effected by wrongful and illegal executive and administrative actions in violation of the petitioners' and citizens fundamental right to equality before the law and equal protection under the law. In both applications the petitioners have stated that they became aware of the details regarding the manner in which the sale of 90% shares of SLIC had been carried out only after the publication of the Report of the Committee on Public Enterprises. They have stated that thereafter they had to collect material from various sources to file their applications. Application 117/2007 has been filed on 10.4.2007 and Application 158/2007 has been filed on 28.5.2007. The Hansard containing the COPE Report is dated 12.1.2007.

The SSPA has been signed on 11.4.2003. The adjustment of the purchase price consideration set out in the SSPA is an integral part of the sale. The account given above shows that so far the adjustment has not been done in a way acceptable to both parties and as such the sale process in terms of the SSPA has not reached its conclusion in accordance with the agreement and the intention of parties. It remains as an incomplete transaction yet to be completed. The conduct of the parties and the competing claims made by them show the continuity of the transaction upto the present day. In the light of this the petitioner's applications to have this on going transaction invalidated cannot be held to be time barred.

Without resting my decision on the plea of time bar on the sole ground stated above I propose to approach the subject on a broader basis. Fundamental rights jurisdiction forms a part of the equitable jurisdiction of the Supreme Court which exercises, at the highest level, the judicial power of the people according to the Rule of Law and the fundamental rights provisions enshrined in the Constitution.

The petitioners have filed this application in public interest alleging that the executive power of the people, delegated to the Executive by the Constitution, to be exercised in good faith and according to law have been wrongfully and illegally exercised to the prejudice of the people. The trust reposed on the executive to which the peoples' executive power has been delegated is, in the words of Amarasinghe J in Bulankulama case, "the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interest of the people." (2000 3 SLR 243 at 258.) The ruler's trusteeship of the resources of the State which belong to the people is a part of the legal heritage of Sri Lanka dating back at least to the third century BC as pointed out by Justice Weeramantry in his separate opinion in the International Court of Justice in the Danube Case, by quoting the sermon of Arahath Mahinda to King Devanampiya Tissa as recorded in the Great Chronicle – Mahawansa.(See Bulankulama case – 2000 (3) SLR 243 at 254-255.)

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

In this case the petitioner in SCFR 158/2007 who has locus standi as a matter of right, to come before this Court for the alleged violation of his and the citizens' right to equality before the law, has emphatically asserted that he invoked the jurisdiction of this Court also in pursuance of a duty cast on every citizen of Sri Lanka. He has relied on Article 28(d) of the Constitution which appears in Chapter VI which set out Directive Principles of

State Policy and Fundamental Duties. According to Article 28(d) relied on by the petitioner, it is the duty of every citizen in Sri Lanka "to preserve and protect public property and to combat misuse and waste of public property." The petitioner's position is that he came before Court in obedience to a constitutional duty to protect public property - that is the SLIC,[which ultimately belongs to the people who possess the powers of the Government (Article 3 of the Constitution)] sold in contravention of the law.

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

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

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

The above is the basis on which I approach the objection based on the time bar. The petitioners have stated that they learnt about the alleged irregularities relating to the sale of SLIC after they read the COPE report tabled in Parliament. Thereafter they had to *obtain the relevant documents, which as revealed by this judgment itself, were in various government bodies not readily accessible to the public. Even after they manage to get the necessary documents, they have to study those documents to have a proper insight into the transaction to prepare their affidavits to be presented to this Court along with their applications. When all those matters are taken into account and considered in combination with the fact that the sale transaction is yet to be completed in accordance with the SSPA, accepted and agreed to by both parties, the only reasonable conclusion I can come to is that the objection relating to time bar is devoid of merit. I accordingly overrule that objection. What I have set out above is also relevant to the question of locus standi of the petitioners and I overrule all objections relating to the standing of the petitioners. In view of my detailed examination of the facts of this case I overrule the objections relating to lack of good faith of the petitioners and the allegation that they have misrepresented facts and suppressed material facts. Infact it was the respondents who suppressed the material facts. The failure of P.B.Jayasundara and N.Pathmanathan (6th respondent) to produce a copy of the letter dated 29.7.2002 sent to the Secretary to the Treasury regarding the appointment of a Tender Board is an example. That letter, if produced, would have shed light into the manner in which the Tender Board came to be nominated/appointed. Another objection was that necessary parties, especially the PERC and the members of the Cabinet have not been cited as respondents. The Attorney General appeared for the State. The failure to bring in the individual members of the then Cabinet is not material to this application as the petitioners have not sought any relief against the Cabinet collectively or against any of its members. The petitioner in 158/2007 who has made allegations against the then Minister of Finance Mr.K.N.Choksy and Minister Moragoda are among the named respondents and they have filed their objections in Court.*

I have set out my findings on the allegations of the petitioners with regard to executive and administrative actions which resulted in violation of the petitioners' fundamental right to equality before the law. It is not necessary to itemize or repeat those findings again. Although there were several allegations made by the petitioners against several parties who have figured in the process leading to the sale of SLIC, I have confined my examination and findings to executive and administrative actions which come within the purview of the fundamental rights jurisdiction of this Court. It is sufficient to say that the conscience of this Court is shocked by the manner in which the senior public officers had handled the sale of a pivotal asset of the state which belongs to the people of this country.

I now come to the order making stage of the two applications heard by this Court. In terms of Article 126(4) of the Constitution, this Court has the power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition filed in terms of Article 126(2) of the Constitution.

This Court notes that one of the objects sought to be achieved by the programme to divest the State ownership of the SLIC was the need to attract an international insurance company to invest in Sri Lanka. The end result of the privatization shows that the Government has failed to achieve this desired objective. When the Cabinet granted its approval to the proposed divestiture programme, the 2nd respondent Minister was requested to report on the feasibility of divesting the State ownership of SLIC, whilst retaining a minority share by the Government. The Minister in his Cabinet Memorandum of 27.3.2003 set out his observations on this aspect and recommended, for the reasons set out by him that "retaining minority stake in SLIC by the Government is not in the best interest of the transaction". One of the reasons adduced for his recommendation was that "retaining a minority shareholding in SLIC is also not conducive to ensure a level playing field in the insurance industry which has the presence of 10 players."

When the SSPA was signed the 38th respondent D.H.S.Jayawardene was the sole signatory on the side of the buyers, that is the two purchasers and the three guarantors. When one takes a realistic view of the matter, the fact that the 38th respondent had the authority to sign the SSPA on behalf of all five parties indicates that the 38th respondent had the controlling power in the four local companies figured in the transaction and a sufficient standing in relation to the foreign company, Greenfield Pacific E M Holdings. Thus in real terms a monopoly of one individual in the affairs of the market leader in insurance in Sri Lanka is clearly visible. Such a state of affairs is not in the best interest of the insurance industry in which the ultimate beneficiary is the policyholder. The Court has taken this aspect into consideration in deciding the relief to be granted and the directions to be given by it in these applications. The Court has also considered the submissions made on behalf of the respondents with regard to the relief to be granted by this Court. The relief granted and the consequential orders and directions are as follows.

1. *The Court declares that the petitioners have established an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution in respect of the sale of 90% of the shares of SLIC, a company fully owned by the Government of Sri Lanka and that such infringement has occurred due to wrongful and unlawful executive and administrative actions. Accordingly the relief sought in prayer (b) of both applications, namely that there has been an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution, is granted.*

2. *This Court has already held that the SSPA signed by the 5th, 28th and 29th respondents is null and void ab initio. Accordingly the Court holds that the sale of 90% of the shares of SLIC to 28th and 29th respondent companies under and in terms of the SSPA was also illegal and invalid ab initio. Accordingly the Court directs that the legal ownership of the 90% of the shares purported to have been sold to 28th and 29th respondent companies shall forthwith vest in the Secretary to the Treasury to be held on behalf of the Government of Sri Lanka. The Board of Directors of SLIC stands removed forthwith. In order to ensure the continuity of the commercial transactions of the SLICL, effected in the ordinary course of business, the Court declares and directs that the 90% of the shares of SLICL purported to have been sold to the 28th and 29th respondent companies on 11.4.2003 shall be deemed to have been held by the 28th and 29th respondent companies from 11.4.2003 for and on behalf of the Secretary to the Treasury.*

3. *The purchase price of 90% of the shares of SLICL namely Rs.Six Billion and Fifty million shall be returned to the 28th respondent Milford Holdings (Private) Ltd by the Government of Sri Lanka. The Government of Sri Lanka had nothing to do with the 29th respondent foreign company Greenfield Pacific EM Holdings brought into this transaction by the 5th respondent Acting Secretary to the Treasury. The Government had no financial transactions with it. The purchase price for the shares sold to the 29th respondent company had been paid to the Government by the 28th respondent Milford Holdings (Private) Ltd. The Secretary to the Treasury is directed to cause Treasury Bonds redeemable in 5 years from today at current interest rates be issued in favour of Milford Holdings (Private) Ltd for the said sum of Rupees Six Billion and Fifty Million (Rs.6,050,000,000/-).*

4. *The 28th and 29th respondents are entitled to retain the profits of the SLICL derived by them from 11.4.2003 to 4th June 2009 in lieu of the interest for the aforesaid sum of Rs.Six Billion and Fifty Million (Rs.6,050,000,000/-). The Secretary to the Treasury is directed to cause profits of the SLICL computed and audited from the date of the last audited balance sheet of the SLICL to 4th June 2009 to enable the 28th and 29th respondents to obtain the net profits after tax of SLICL from the date of the last audited balance sheet of the SLICL to 4th June 2009. The Secretary to the Treasury shall pay the amount of profits due to 28th and 29th respondent companies according to the audited computation to be made as aforesaid. It is further directed that since the SSPA was void ab initio, the return of the purchase price by Treasury Bonds redeemable in five years with the current rate of interest and the right to the retention of profits from 11.4.2003 to 4.6.2009 has been ordered on the basis of a quasi contract to grant just and equitable relief to the 28th and 29th respondents in respect of the payment they have made for the purported purchase of the shares of SLICL. This direction is made after taking into consideration the public interest which this Court is bound to uphold. The 28th and 29th respondents are not entitled to any other payment, except the payment authorized under relief number 6 set out below.*

5. *Since it is necessary in the interest of the public to ensure proper and efficient management of SLICL, this Court directs the Secretary to the Treasury, in consultation with the Minister of Finance, to submit to this Court for its approval the appropriate number of names of persons who have recognized academic/professional qualifications and more than 10 years experience in any one or more of the fields of business management, accountancy, law, commerce, economics, and insurance to be appointed to the Board of Directors of SLICL. The Secretary to the Treasury is directed to submit the list of names within two weeks from today. The Secretary to the Treasury is hereby authorized to make suitable arrangements to administer the affairs of SLICL until a Board of Directors is appointed.*

6. *Employees of the SLICL were allotted 10% of the shares of SLICL. Under the SSPA the purchasers were entitled to purchase shares allotted to employees from those who agreed to sell their shares to the 28th and 29th respondents at the same price paid to*

the Government per share for 90% of the shares. (Rs.134 per share) In view of the declared invalidity of SSPA, the right given to the 28th and 29th respondents to purchase employees' shares has no legal basis. Accordingly if any share or shares has/have been purchased by 28th and 29th respondents from employees after 11.4.2003, all such shares shall also vest forthwith in the Secretary to the Treasury to be held on behalf of the Government. Payment to the 28th and 29th respondents for such shares shall be made by the Secretary to the Treasury in the manner provided for the repayment of the purchase price paid to the Government.

7. *It is clear from the material placed before this Court that Ernst and Young who functioned as auditors to SLICL when it belonged to the Government has continued to function as auditors of SLICL under the purchasers thereby serving two masters with conflicting interests (during the period fixed for the adjustment of purchase price consideration). Accordingly we direct that Ernst and Young stand removed forthwith from the position of Auditor of the SLICL. The new Board of Directors shall select and appoint an Auditor for SLICL according to the appropriate procedure.*

8. *The petitioners in both applications, SCFR 117/2007 and SCFR 158/2007, have filed their applications in public interest. The Court notes the expenses they have incurred and the efforts they have made to bring the subject matter of these applications before this Court. The Court does not wish to award costs to them as it is not proper to value their services in terms of money. Instead the Court places on record its appreciation of the valuable services rendered by them to uphold the public interest. We direct the Registrar of this Court to issue a certified copy of this judgment to the petitioners of SCFR 117/2007 and the petitioner in SCFR 158/2007 without payment.*

9. *The Registrar of this Court is directed to send a certified copy of this judgment forthwith to the Secretary to the Treasury.*

10. *The Secretary to the Treasury may seek directions from this Court which he may deem necessary from time to time.*

We record our appreciation for the assistance rendered to this Court by all learned counsel who appeared for the parties to these applications and the assistance rendered by the 13th respondent in SCFR 158/2007 who appeared in person.

Judge of the Supreme Court

Sarath N. Silva CJ.

I agree.

Chief Justice

K. Sripavan J.

I agree.

Judge of the Supreme Court

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W. A. PRIYANI S. PERERA
REGISTRAR III
CHIEF CLERK - COURTS BRANCH
SUPREME COURT.

CF 963968 / 21

08/06/2009

APPENDIX I

"A"

5.2 Financial Forecasts

(in LKR million)	2001 Audited	2001 Adjusted	2002 Forecast	2003 Forecast	2004 Forecast	2005 Forecast	2006 Forecast
UNDERWRITING INCOME							
Gross Written Premium	5,133.2	5,133.2	6,638.8	7,550.4	8,305.5	9,136.0	10,049.6
Reinsurance Premium	(2,370.4)	(2,370.4)	(3,665.3)	(4,293.3)	(4,828.2)	(5,288.0)	(5,791.4)
Reinsurance Commission	223.3	223.3	324.1	388.0	460.5	501.8	546.8
Net Written Premium	2,986.1	2,986.1	3,297.7	3,645.1	3,937.7	4,349.9	4,805.0
Increase / Decrease in UPR	40.0	40.0	(114.7)	(141.8)	(110.1)	(185.4)	(205.0)
Net Earned Premium	3,026.0	3,026.0	3,182.9	3,503.3	3,827.7	4,164.5	4,600.0
Claim Paid	(2,524.6)	(2,524.6)	(2,650.4)	(2,785.3)	(3,063.9)	(3,370.2)	(3,707.3)
Reinsurance Recoveries	477.5	477.5	765.6	951.1	1,111.2	1,214.9	1,328.3
Increase / Decrease in Claim Reserves	(31.1)	(31.1)	(173.5)	(363.1)	(245.3)	(269.8)	(296.8)
Net Claim Incurred	(2,078.2)	(2,078.2)	(2,058.4)	(2,197.3)	(2,198.0)	(2,425.1)	(2,675.8)
Management Expenses	(687.6)	(687.6)	(791.6)	(907.4)	(991.8)	(1,084.5)	(1,183.9)
Commission Paid	(262.9)	(262.9)	(343.8)	(393.2)	(432.5)	(475.7)	(523.3)
NET UNDERWRITING PROFIT	(2.6)	(2.6)	(10.8)	5.4	205.4	179.1	217.1
Investment Income	875.5	875.5	836.2	802.3	844.1	872.3	903.3
Other Income / (Expenses)	694.2	(225.8)	(485.4)	(400.5)	(424.8)	(456.9)	(487.0)
PROFIT BEFORE TAX	1,567.2	647.1	339.9	407.2	624.7	594.5	633.4
Income Tax Expenses	(405.3)	(226.5)	(119.0)	(142.5)	(218.7)	(208.1)	(221.7)
NET PROFIT AFTER TAX	1,161.9	420.6	221.0	264.7	406.1	386.4	411.7

"B"

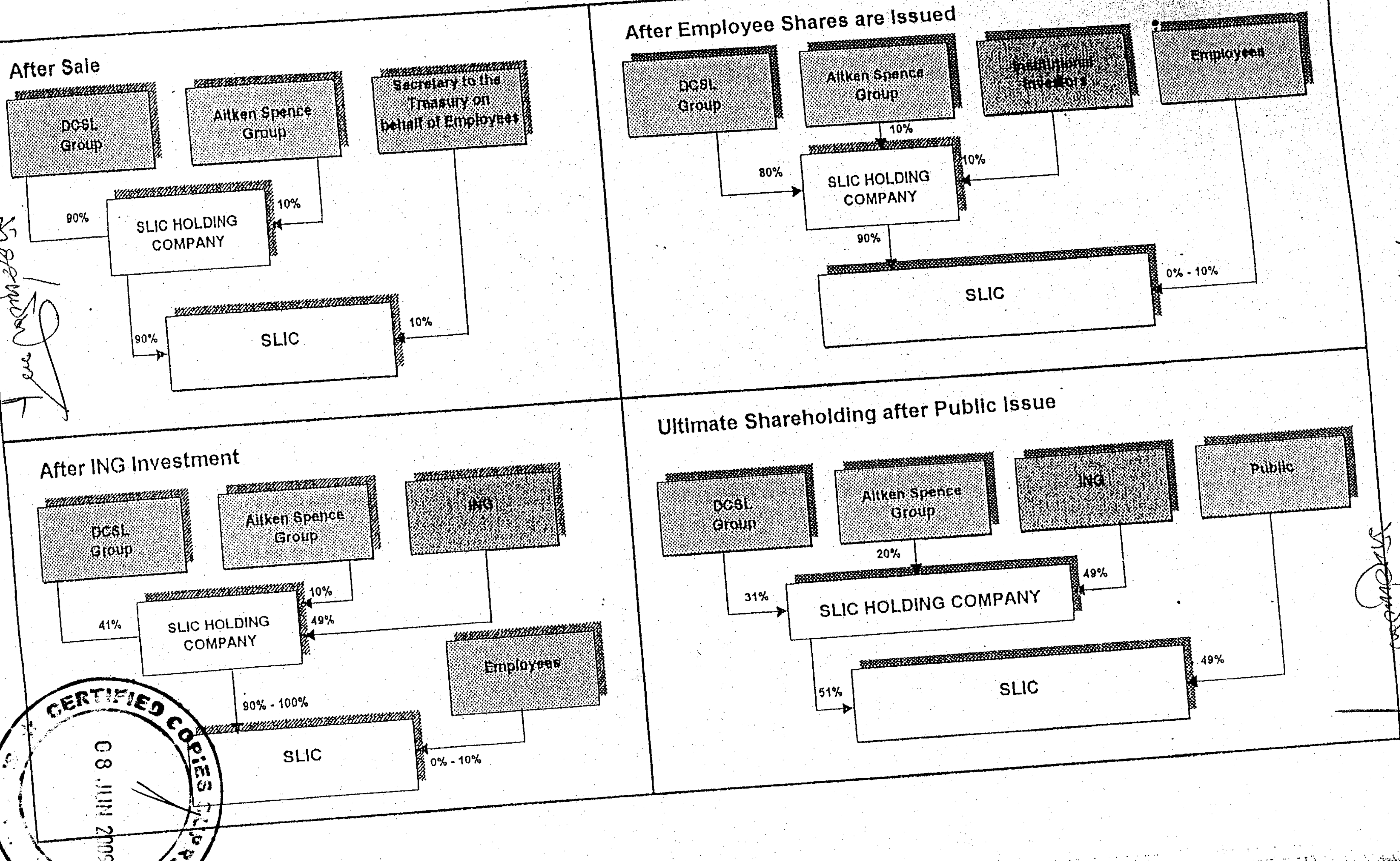
Adding back such erroneously and continuously **deducted amounts** the following corrected projections of 'net profit after tax' are computed on the basis of the PWC projections;

	2001 Rs.Mn.	2002 Rs.Mn.	2003 Rs.Mn.	2004 Rs.Mn.	2005 Rs.Mn.	2006 Rs.Mn.
Adjusted Profits before Tax	647.1	339.9	407.2	624.7	594.5	633.4
Other Income / (Expenses) *deducted*	(225.8)	(485.4)	(400.5)	(424.8)	(456.9)	(48[illegible]
Adjusted Projected Profits before Tax and **before** above erroneous **Deduction**	872.9	825.3	807.7	1049.5	1051.4	1120.4
Tax @ 35%	(305.5)	(288.9)	(282.7)	(367.3)	(368.0)	(392.1)
Corrected Adjusted Net Profit after Tax	567.4	536.4	525.0	682.2	683.4	728.3

APPENDIX II

Sri Lanka Insurance Corporation Limited

Shareholding Structure



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08 JUN 2009