

BY COURIER

24th June 2010

Mohan Peiris Esqr., P.C.
Hon. Attorney General
Attorney General's Department
Colombo 12.

Dear Attorney General,

Purported Oil Hedging Deals by Ceylon Petroleum Corporation (CPC)
SC (FR) Applications Nos. 404/2009 & 481/2009

You were personally present in the Supreme Court on 11.5.2010 and made submissions, as the Attorney General, as *amicus* in terms of Article 134 of the Constitution, as well as appearing for the 2 Respondents, CPC and Secretary to the Treasury.

Their Lordships of the Supreme Court, having been incorrectly apprised by Counsel appearing for the Respondents Banks, namely, Standard Chartered Bank of United Kingdom, Citibank of United States of America, Deutsche Bank of Germany, Commercial Bank of Sri Lanka and People's Bank of Sri Lanka, upheld as fatal the common Objection of 'time-bar' taken by the said Counsel, in the desperate endeavour to thwart my Applications being adjudicated upon by the Supreme Court of our country, and also particularly in the context of your submissions referred to herein below; whilst on the other hand, Counsel appearing for the Controller of Exchange and Director Bank Supervision, Central Bank of Sri Lanka, did not take such 'time-bar' Objection, thereby requiring the said Applications to be proceeded with and adjudicated upon by the Supreme Court of our country, exercising the judicial power of the people.

In the public interest, SC (FR) Application No. 404/2009 was filed by me on **25.5.2009**, and SC (FR) Application No. 481/2009 was filed by me one month thereafter on **25.6.2009**. These Applications had come up previously before the Supreme Court on several days, whereat the Respondents were permitted to file limited Objections to the interim reliefs prayed for in both Applications; and on 14.7.2009 His Lordship the Chief Justice directed, as had been prayed for in SC (FR) No. 404/2009, that Statements of 8 persons, who had been involved in these dubious deals be tendered to the Supreme Court. These I verily believe were quite revealing and useful to you in defending the foreign legal proceedings referred to herein. At least to such extent, my said Applications made a contribution in the public interest.

You would recollect that upon your request on the previous day in Court on 22.3.2010, on the eve of you having to file Sri Lanka's Memorial on the Merits by 29.3.2010 in the Deutsche Bank Arbitration before ICSID, I forwarded you 3 sets of analytical Notes on the data, facts and the law, which were to be used in my submissions to the Supreme Court, and which you subsequently acknowledged, were extremely good and very useful. I, as intimated, did so in the public interest, and also heeding His Lordship the Chief Justice's observation on 14.7.2009, that I should be assisting you.

Also on 14.7.2009, your Submissions to the Supreme Court had been recorded in the Supreme Court Minutes thus - "***Mr. Mohan Peiris, P.C., A.G., too informs Court that he vehemently objects to the leave to proceed being granted as he is defending the actions filed abroad vigorously and the arbitration.***" (*Emphasis added*). You would recollect that you made specific submissions to Court, that I should 'lay my head at rest', impliedly leaving you to deal with this matter in foreign jurisdictions.

You would also recollect that on the last day 11.5.2010, you repeated the same submissions, that I should 'lay my head at rest', **ironically whilst at the same time concurring with my submissions.**

This only reveals that you, as the Attorney General, curiously **vehemently opposed** this matter of such vital public importance, being proceeded with and adjudicated upon, with public hearings before the Supreme Court of our country, exercising the judicial power of the people, **which indeed is quite mysterious and baffling !**

On 11.5.2010, you submitted to the Supreme Court, **that you fully concurred with my submissions, particularly the stances taken and the arguments adduced by me**, and assured that you had taken all such stances and arguments, and even more, in the foreign legal proceedings commenced by Deutsche Bank against the Government of Sri Lanka before ICSID, and by Citibank before the London Court of International Arbitration, and by Standard Chartered Bank in the High Court of U.K., both against CPC. Significantly, none of the Counsel appearing for the Respondents Banks were able to demonstratably refute and/or controvert the facts and the applicable law, which were adduced.

By your submissions, you held out an **unqualified assurance and guarantee**, that you will most certainly succeed in the above foreign legal proceedings against the Government of Sri Lanka and the CPC, and that **therefore no payments, whatsoever, would thereby have to be made from public funds to the Respondents Banks**, under these illegal deals as admitted by you, and accordingly that **you would also recover the costs, reckoned to be in the region of Rs. 150 Mn.** incurred utilizing public funds, to defend these foreign legal proceedings, in retaining foreign Counsel and Experts, including costs incurred in overseas travel by you and other Counsel.

In addition, on 11.5.2010 you **reiterated** to the Supreme Court the averments in the Statement of Objections of the CPC, settled by you, in SC (FR) Application No. 404/2009, concurring with my stances taken in the said Application, that - *'the said transactions are illegal, ultra-vires and/or unauthorized and that the Respondent Banks had misrepresented the true nature of the these transactions and that they are inter-alia null and void and/or unenforceable'*.

In the very context of **you having concurred with my submissions**, warranted that this matter of illegality perpetrated on the State / a State Corporation, be proceeded with and adjudicated upon by the Supreme Court of our country.

Does not such stance on your part demonstrate the reality that you did not want the truth and facts being disclosed to the public, whereas this involves colossal funds of the public ?

In the context of the foregoing endorsement by you, as the Attorney General, to the Supreme Court, **serious questions arise, as to why you, have hitherto failed and neglected in terms of the law to have dealt all those persons, who had been involved in the perpetration of such illegality as aforesaid, on the State / a State Corporation, with disclosures to the Supreme Court, of public officers having been compromised with gratifications ?** How could such persons be shielded, whereas all being equal before the law, the rule of law warrants that such persons ought be dealt with in terms of the law ?

Whilst my 2 Applications were to prosecute in the offensive on such illegality, your stance was merely a 'back to the wall' defence against the 3 foreign Banks, *vis-à-vis* such aforesaid illegality, **whilst apparently turning a 'Nelsonian Eye' on the 2 local Banks and those persons, who had perpetrated such illegality / aided and abetted therewith.** Whereas, I cited to Court, instances where the State is arraigning before Courts ordinary villagers for identical, but very minor offences in terms of the law. **In addition, was this not a scheming endeavour to defraud the State / a State Corporation, through such misrepresentation, as admitted by you ?**

I attach certified copies of the two Judgments delivered by Supreme Court on 11.5.2010, after Their Lordships having heard submissions and adjourned for about ½ an hour to deliberate thereon, and thereafter refusing Leave in both Applications Nos. SC (FR) 404/2009 & 481/2009, which certified copies I was able to obtain on 10.6.2010. In both Judgments identical, **it has been held that my not filing these Applications within one month from 27.1.2009, (i.e. by 26.2.2009) was fatal, and on such basis Leave was refused in both Applications.**

In SC (FR) Application No. 404/2009, I had stated I filed the Application on 25.5.2009 upon coming to know, that notwithstanding the Central Bank directions not to remit any monies on these deals, that Standard Chartered Bank between December 2008 and May 2009 had remitted over US \$ 100 Mn., and was seeking to remit a further US \$ 20 Mn. I cite the following paragraph 12 (k) in Application No. 404/2009, and paragraph 9 in Application No. 481/2009, **which disclosed that the said US \$ 20 Mn. had not been remitted, after I filed SC (FR) No. 404/2009 on 25.5.2009.**

"12.(k) he verily believes that, *notwithstanding and regardless of, specific directions in regard to the aforesaid, given in or about December 2008 by the Monetary Board, Central Bank of Sri Lanka*, the 3rd Respondent Standard Chartered Bank has remitted in valuable foreign exchange a sum exceeding US \$ 100 Mn. between December 2008 and April 2009, and is endeavouring to remit a further sum exceeding US \$ 20 Mn. immediately, on such 'Back to Back Agreements' entered into with foreign party / ies."

"9. The Petitioner verily believes that

- (a) *Notwithstanding and regardless of, specific directions in regard to the aforesaid, given in or about December 2008 by the Monetary Board, Central Bank of Sri Lanka*, the 3rd Respondent Standard Chartered Bank has remitted in valuable foreign exchange a sum exceeding US \$ 100 Mn. between December 2008 and April 2009, and was endeavouring to remit a further sum exceeding US \$ 20 Mn., on 'Back to Back Agreements' entered into with foreign party / ies,
- (b) The said sum exceeding US \$ 20 Mn. had not been remitted after the Petitioner filed on 25.5.2009 his aforesaid SC (FR) Application No. 404/2009. (Emphasis Added)
- (c) The aforesaid sum exceeding US \$ 100 Mn. had been remitted by 3rd Respondent Standard Chartered Bank by utilizing Foreign Currency Deposits of the Public held by the said Bank, inasmuch as the said Bank did not have Reserves in Sri Lanka to have remitted such sum exceeding US \$ 100 Mn., *thereby jeopardizing public deposits; and which said remittance in exceeding US \$ 100 Mn. ought be directed to be brought back in to the country.*"

The veracity of the foregoing was proven by the Exchange Controller's Letter dated 13.5.2009 ('8R7(a)' in 404/2009) faulting Standard Chartered Bank for having so remitted US \$ 107.7 Mn. between 12.12.2008 and 14.4.2009, and further by similar Letter dated 5.6.2009 ('8R7(b)' in 404/2009) to Commercial Bank for having so remitted US \$ 7.7 Mn. upto April 2009.

I came to be aware, and could have only come to be aware of such fact, only in May 2009, inasmuch as the Controller of Exchange had come to know of the same only in May 2009, and therefore, in the given facts and circumstances, it was an impossibility for me to have filed Application No. 404/2009 within one month from 27.1.2009 (i.e. by 26.2.2009).

In the Judgment in SC (FR) 481/2009, **which had been filed specifically in relation to the foreign legal proceedings**, the Supreme Court has held *per-incurium* that I had filed the Application on **25.5.2009**, whereas I filed this Application on **25.6.2009**, upon having coming to know only on **2.6.2009** of the institution of foreign legal proceedings, as stated in the following paragraph 10 in the Petition :

- “10. (a) The Petitioner on 2.6.2009 in Your Lordships’ Court came to be aware that the 5th Respondent, Deutsche Bank has filed for Arbitration at the International Center for Settlement of Investment Disputes in the US (ICSID), coming under the purview of the World Bank. **The said Claim would be against the Government of Sri Lanka and not against the 1st Respondent (CPC).**
- (b) Similarly, the Petitioner came to be aware that the 4th Respondent, Citibank has instituted Arbitration Proceedings in the U.K, in the London Court of International Arbitration, under the ISDA Master Agreement, and is being defended by the 9th Respondent, Attorney General, with the assistance of Foreign Lawyers, costing the 1st Respondent (CPC) and/or the Government of Sri Lanka, considerable costs by way of Foreign Lawyers and Experts Fees, etc., *which to date the Petitioner understands on this Arbitration alone has amounted to around Rs. 25.0 Mn., **which is public money.***
- (c) The Petitioner also understands that the 3rd Respondent, Standard Chartered Bank, the lead Bank that initiated the dubious transactions put in issue has instituted Legal Action in the UK High Court, making a Claim against the 1st Respondent (CPC).”

Deutsche Bank’s Application to ICSID had been registered only on **24.3.2009** (*paragraph 18 of Objections in 481/2009*). Arbitration proceedings by Citibank in London Court of International Arbitration had been on early termination, with interest upto **26.3.2009** (*paragraph 9 of Objections in 481/2009*). The acknowledgement of Notice of service by the CPC of the U.K. High Court legal action by Standard Chartered Bank had been only on **24.6.2009** (*‘1R4’ in 404/2009*), which had to be filed within 28 days of receipt thereof, whereby such Notice of *service* would have been received on or after **27.5.2009**.

As stated in the Petition as aforesaid, I came to be aware of the foregoing foreign legal proceedings only on **2.6.2009**, and in the foregoing facts and circumstances, it was **an impossibility** for me to have filed Application No. 481/2009 **within one month from 27.1.2009** (i.e. by **26.2.2009**), **on which date the said foreign legal proceedings did not even exist.**

I have been advised that the foregoing are good, sufficient and valid grounds for me to make Applications to the Supreme Court for a review of the aforesaid Judgments by a fuller bench, inasmuch as this matter is of national and public importance, and also the captions and the reliefs sought in the previous actions by other Petitioners, would reveal that the captions and reliefs sought in my Petitions are distinctly different, with different scopes, than the previous actions referred to, and the two Judgments identical in SC (FR) Applications Nos. 404/ 2009 and 481/2009 disclose that the real nature and scope of such Applications had not been taken cognizance of.

Nevertheless, taking into consideration the foregoing stance you have taken as the Attorney General, I have decided not make such Applications, relying on **your aforesaid assurance and guarantee**, that you would most certainly succeed and **that no monies whatsoever of public funds would be paid to the Respondent Banks**, under these illegal deals as admitted by you, **and that you would recover the total costs incurred in the region of Rs. 150 Mn., which are public funds.**

However, in the national and public interest, **I urge you to take and/or cause to be taken, as warranted, in terms of the applicable laws, including, but not restricted to the Offences Against Public Property Act No. 12 of 1982, stringent action against all those persons, who had been involved in these illegal deals, as admitted by you to the Supreme Court, which illegal deals jeopardising colossal public funds had been perpetrated on the State/ a State Corporation, with known intent to cause colossal losses to the State / a State Corporation, with public officers having been compromised.** I am aware that after SC (FR) Application No. 404/2009 was filed, the Criminal Investigation Department raided the CPC Head Office and had taken into custody relevant documents, recording statements, but what action followed ?


Otherwise, it would clearly demonstrate that **you do not want the truth to be out and the facts known to the public on these illegal deals**, whereas it involved colossal sums of public funds. To me this is a matter of national and public importance and interest, with potential threat of colossal claims of monies in foreign exchange, reckoned to be in the region of US \$ 800 Mn., in the context of the actual claims being mysteriously and intriguingly suppressed from the public, including the real facts pertaining thereto. Do not the public have a right to know, particularly as statutorily mandated by the Fiscal Management (Responsibility) Act No. 3 of 2003 ?

On the other hand, as reported in the media, several prosecutions have been zealously and speedily launched by you, on matters of far less gravity, whilst, to my knowledge, on certain crimes of far greater gravity, upheld by the Supreme Court to be fraudulent / defrauding the State, and on which the CID had commenced investigations, the Attorney General's Department has curiously not caused such warranted criminal investigations and prosecutions to be proceeded with, **I am compelled to believe due to socio-political considerations.**

There are certain grave and serious facts / issues detrimental to the public interest revealed by the documents filed in the Supreme Court by the Respondents in the aforesaid SC (FR) Application Nos. 404/2009 & 481/2009. I reserve my right to take up such issues at a later date, since in the public interest I do not wish to cause any prejudice to your endeavours of defence in the foreign legal proceedings; **whilst it is such very revelations that has compelled me to address this Letter to you.**

Inasmuch as I acted in this matter in the public interest, and this matter being of national and public importance, I am affording copies of this Letter to those concerned persons.

Yours truly,



Nihal Sri Amersekere

cc. Hon. Susil Premajayantha, M.P., Minister of Petroleum Industries

Mr. Lalith Weeratunga, Secretary to H.E. the President – *For H.E. the President, as the Minister of Finance and responsible for the Attorney General's Department, to be apprised*