

Workshop on Legal Issues surrounding the Colombo Port City Project: A Commercial Law Perspective

Organized by

The Department of Commercial Law
Faculty of Law, University of Colombo

Held on the 29th of June, 2019 at the Senate Hall, University Colombo

Purpose of the Workshop

The Colombo Port City Project is one of the disputed Chinese direct investments in Sri Lanka. It caused increased geo-political concerns at the regional and international levels, as well as much controversy at the domestic level. Much has been written and said about this project largely by academics, journalists and analysts from nations who have interests in the Indian Ocean Region and are concerned about China's rise as a global super power. Such discussions strikingly lack Sri Lanka's perspective on the Colombo Port City project, in particular, and Chinese investments in Sri Lanka, at large. This observation motivated the Department of Commercial Law of the Faculty of Law to organize this workshop in order to look at different legal issues arising from this project, initiating a deeper discussion between academics and professionals in the field and bridging the gap between academia and practice. As the first step of this initiative, the workshop looked at the commercial law perspectives of this project focusing on investment law, company law, contract law and investment-related environmental laws.



Guests, Panelists, Presenters and the Audience

Vice Chancellor of the University of Colombo Professor Chandrika N. Wijeyaratne, Chairman of the Board of Investment Mr. Mangala Yapa and Dean of the Faculty of Law Professor W.I.Nanayakkara were the guests of honour at this event. The panel comprised Emeritus Professor M. Sornarajah and Justice Saleem Marsoof, whilst Professor Sornarajah also moderated the ensuing discussion. Professor Shanthi Segarajasingham, Professor Naazima Kamardeen and Dr. Dilini Pathirana, Senior lecturers of the Department of Commercial Law presented on the relevant subjects. The audience included researchers and policy makers representing various disciplines, together with undergraduate law

students of the Faculty who follow International Investment Law as an elective course.



Summary of the Addresses, Presentations and Discussions

Welcoming the gathering on behalf of the Faculty of Law, Professor W.I. Nanayakkara highlighted the economic and development prospective of this project emphasizing the significance of legal flexibility in reaping maximum benefit out of this mega development project. She further admired the initiative taken by the Department of Commercial Law in organising this event to discuss a topical issue which has national interest not just in terms of economy, but in terms of law as well.

In his informative Keynote address, Mr. Yapa explained Sri Lanka's strategic value in the Indian Ocean Region as an epicenter of global trade and emphasized the need to capitalize on the country's location to boost our economy. Against this background, he pointed out the contribution that would be made by the Colombo Port City Project to enhance the country's profile as a regional commercial hub by creating a world class city for South Asia which will also be performing as an efficient special economic zone. The potential of this project to attract an increased amount of foreign investments into Sri Lanka in the near future was

discussed particularly in the real estate and service sectors. The significance of the country's trade policy and national export strategy in this respect were highlighted together with Sri Lanka's recent legal reforms in the field of taxation and foreign exchange.

Providing the participants with an introduction to the Colombo Port City Project, which was at the crux of this workshop, Dr. Dilini Pathirana raised a few legal issues that should be addressed by Sri Lanka in the process of transforming this newly built city into an international financial center expected to be operated as a separate jurisdiction. First, she looked into the policy decision taken to accommodate unsolicited proposals from foreign investors questioning the suitability of the "Swiss Challenge" procurement method to deal with such proposals. Second, she raised the question of whether Sri Lanka should establish a national security review mechanism in relation to inbound foreign investment due to Sri Lanka's recent bad experience in respect to national security. Her talk moreover highlighted the urgency of Sri Lanka making a policy decision on the applicability of the country's international investment agreements into the investments in the Colombo Port City due to the fact that it will operate as a separate jurisdiction.



During the discussion following Dr. Dilini's presentation, Mr. Yapa elaborated on the issue of entertaining unsolicited project proposals, clarifying the fact that the method of unsolicited proposal applies to public investments rather than to private investments and further highlighted its need for providing Sri Lanka with required capital to boost mega development projects.



Chair of the Panel Emeritus Professor Sornarajah elaborated further on the issue of national security during his discussion; explaining Chinese investors, particularly Chinese State-owned Enterprises, as arms of the state. It was thus Professor Sornarajah's stance that one must be cautious about considering Chinese investments as entirely private investments. Elaborating on Sri Lanka's Bilateral Investment Treaties he explained that they are more extensive than just treaties because they form a part of Sri Lanka's domestic law. Last but not least, Professor Sornarajah discussed the Sino-Sri Lanka historical relations which paved the path for the modern relationship between the two countries.



Professor Shanthi Segarajasingham discussed the contract and company law aspects of the Colombo Port City Project. With respect to the contract law aspect she pointed out that the Sri Lankan government is a party to the contract on the Colombo Port City Project and thus, discussed the legal principles which show that the State can be held liable for breach of commercial contracts which will be in the domain of private law and not the public law. With respect to the company law aspect, she elaborated on the provisions in Sri Lanka's Companies Act relating to offshore companies, lifting of the corporate veil and directors' duties, while highlighting the lack of transparency in the process of concluding contracts by the government.



During the discussion following Professor Segarajasingham's presentation Justice Saleem Marsoof, who participated in this event as a panelist, elaborated on the issue of the lack of transparency mentioning the

fact that public service is subservient to political rulers. Taking *Mihaly International Corporation v. Sri Lanka Arbitration* as an example he pointed out the risk of host States being challenged by foreign investors even where a binding contract between the host state government and investors has not been concluded. Professor Sornarajah pointed out the possibility of choosing a foreign law as the proper law of investment contracts bypassing the domestic, yet explained the circumstances under which Sri Lanka's domestic law would be applicable and important such as *ultra vires* and public trust.



As the last presentation of the workshop, Professor Naazima Kamardeen discussed the environmental law aspect of the Colombo Port City Project. She pointed out shortcomings in the initial process of environmental impact assessment relating to this project which were disputed before Sri Lankan courts and the reasons behind conducting a supplementary environmental impact assessment before the project recommenced after suspension for almost one year.



Highlighting the current environmental issues relating to the project, such as shortage of sand and rocks, Professor Kamardeen drew attention to the fact that this landfill would accommodate half a million people in future, demanding more improved infrastructure facilities and utilities such as water and sewage. Against this backdrop, she highlighted the importance of adopting the concept of Sustainable Development with respect to such mega development projects and emphasised the urgency of mitigating negative environmental impacts of the project in its second phase. During the discussion following Professor Kamardeen's presentation, Justice Saleem Marsoof pointed out that it was the Sri Lankan government that pushed back obtaining the necessary sand mining license because the lavish opening ceremony of the project was given priority.



During the open discussion with the participants, issues such as system failures in the country and the possibility of foreign investors exploiting such systematic failures for their purposes were discussed particularly in the context of Chinese investments in Sri Lanka. The necessity of carefully dealing with foreign investors from around the world was highlighted. This approach would stand in contrast to getting investors from one particular country and taking investors of another particular country out. During this discussion, presenters and the panelists focused on the paradigm shift taking place in the international investment law regime and the backlash against the investor-state dispute settlement mechanism - the issues Sri Lanka should ponder in the context of her foreign investment policy.



This report is prepared by Dr. Dilini Pathirana, convener of the workshop. She duly acknowledges the assistance rendered by Ms. Prasanthi Vignanantha, student volunteer, to take notes during the workshop. Further thanks is due to Ms. Yanithra Kumaraguru for her insightful editorial comments on the report.