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Human Rights Commission of Sri Lanka

REPORT ON THE MATTER OF THE X-PRESS PEARL SHIP DISASTER AND ITS LEGAL CONSEQUENCES

Complaint No: HRC/HO/1692/23

August 2023

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1. Parties

Complainants

1. CEJ and Others:
 - a. Center for Environmental Justice (Guarantee) Limited (CEJ), 20A Kuruppu Road Colombo 08.
 - b. Withanage Don Hemantha Ranjith Sisira Kumara – Director CEJ
 - c. Withanage Don Samantha Prabath Janaka – Advocacy and Campaign Officer, CEJ
 - d. Wijethunga Appuhamyge Hemantha Kumara
2. Dr. Ajantha Perera, No. 16, Temple Road, Raththanapitiya, Borelasgamuwa

Respondents

1. Marine Environment Protection Authority (MEPA)
2. Sri Lanka Ports Authority (SLPA) and 2(A), Dr. Prashantha Jayamanne, Chairman SLPA
3. A.W. Seneviratne, Director General Merchant Shipping
4. Capt. K.M Nirmal Silva, Harbour Master, SLPA
5. Central Environmental Authority
6. R.A.S. Ranawake, Director General Coast Conservation and Coastal Resource Management Department
7. S.J. Kahawatte, Director General, Department of Fisheries and Aquatic Resources
8. Minister of Ports and Shipping
9. Minister of Environment
10. State Minister Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness
11. EOS RO Pte.LtD, 18, Robinson Road, Singapore
12. X-Press Feeders, 11 Duxton Hill, Singapore
13. Sea Consortium Lanka (Pvt) Ltd, 4th Floor, Setmil Maritime Center, 256, Srimath Ramanathan Mawatha, Colombo 15.
14. Chandana Sooriyabandara, Director General of Wildlife Conservation
15. His Excellency the President, Appearing by Hon. Attorney General
16. C.D. Wickramaratne, Inspector General of Police
17. Hon. Attorney General, Mr. Sanjaya Rajaratnam
18. The London P&I Club, Leadenhall St., London EC3A, United Kingdom

2. Background

1. The Human Rights Commission of Sri Lanka (HRCSL) presents this report in furtherance to the inquiry conducted pursuant to the two applications dated 4 May 2023 by Dr. Ajantha Perera and 9 May 2023 by the Center for Environmental Justice (Guarantee) Limited (CEJ) and Others.
2. Dr. Ajantha Perera's complaint alleges that the failure of the relevant authorities to file civil action for compensation for the X-Press Pearl ship disaster in Sri Lanka and the costly and non-transparent decisions by the government to pursue civil action for compensation in Singapore are violations of Fundamental Rights and Directive Principles of State Policy. The complainant requests the HRCSL to inquire into the matter and direct the government to file action for compensation in Sri Lanka.
3. The complaint by the CEJ and others alleges that the rights of the entire citizenry, and specifically the rights of the communities engaged in fishing and tourism in the affected areas under articles 12(1) and 14(1)(g) of the Constitution of Sri Lanka, have been/continue to be/are in imminent danger of being infringed by the actions/inactions of the Respondents.
4. The Complainants request that the relevant respondents and the Hon. Attorney General take necessary criminal and civil action under the provisions of the Marine Pollution Prevention Act, No. 35 of 2008 (MPPA) and any other laws, as well as through insurance, to obtain compensation and to dispose of the waste materials of the ship disaster, and to direct the appointment of a Presidential Commission of Inquiry to look further into the responsibilities and failures of statutory and regulatory duties related to the ship disaster.
5. As the matter under consideration is of grave concern, accordingly, the HRCSL under its lawful mandate as an oversight body to examine the status of human rights in the country, launched an independent investigation into the matter.
6. The investigation process included information and evidence gathering from 10 May 2023 to 1 June 2023. Building upon the investigations conducted by the HRCSL, detailed findings on the chain of events, human rights violations and recommendations pertaining to the incidents have been prepared.

A. METHOD OF WORK

7. In line with the mandate bestowed upon the HRCSL by the HRCSL Act No. 21 of 1996, the Commission commenced its inquiry process on 10 May 2023 and concluded it on 01 June 2023.
8. Officers enumerated below were summoned and were present before the HRCSL to give evidence before the Chairperson and officers and consultants of the HRCSL.
 - (1) Asela Rekawa, Chairman MEPA
 - (2) Jagath Gunasekera, General Manager (Acting), MEPA from August 2021, prior to that, Deputy-GM. MSc Natural Resources Management/Maritime Affairs

- (3) Upul Peiris, Director Navigation, Merchant Shipping Secretariat
- (4) Capt. K.M Nirmal Silva, Harbour Master, Sri Lanka Ports Authority
- (5) Jivan Goonatilleke AAL, representing Sea Consortium Lanka (Pvt) Ltd
- (6) R.M.S.K Rathnayake, Deputy Director General, Central Environmental Authority (CEA)

- 9. Others who were present to represent relevant authorities included: H.J.N.I Priyadarsha (MEPA), T.G.I.P. Amaranayake (MEPA), S.M.D Athokorala (MEPA) Nadeeka Karunaratne (CEA), P. A. Weerasundera (CEA), Janith Shanika (CEA), Panchali Fernando (CCD). D.T. Rupasinghe (CC/CRMD), B.L.M Inas (SLPA). Representing their clients: P.R. Dabare, Savanthi Ponnampuruma, Shahila Wijewardena, and Sachitra Abeywardena.
- 10. Additionally, correspondence was initiated with the Hon. Attorney General, through letters dated 11 May 2023, 19 May 2023 and 24 May 2023. Written responses from the Hon. Attorney General by letters dated 18 May 2023, 25 May 2023 and 26 May 20223 were received by the HRCSL.
- 11. The Interim Report by the HRCSL dated 17 May 2023 was submitted to H.E. Ranil Wickramasinghe, the President of the Democratic Socialist Republic of Sri Lanka based predominantly on the documentary evidence submitted to the HRCSL by this date. This Interim Report highlighted the urgency of filing a case for civil damages in the Sri Lankan Courts under section 34 of the MPPA and identified potential infringement of the fundamental rights in articles 12(1) and 14(1)(g) of the Constitution and failure to discharge responsibilities under the Directive Principles of State Policy in articles 27(14) and 27(2)c, as a consequence of the government not taking adequate measures to prosecute, initiate civil action and file for indemnity for the damage to the environment, national economy and livelihoods of the communities affected.
- 12. The HRCSL also noted in the abovementioned Interim Report that there is concern that the failure to file civil action in Sri Lanka will be to the detriment of public interest and called upon the President to ensure accountability and to constitute an independent Board of Inquiry to investigate and audit the entire investigation and decision-making process carried out by the Attorney General in the X-Press Pearl ship disaster up to date. It was also stated that upon concluding the inquiry process, the HRCSL will proceed to forward the updated recommendations to the President and relevant authorities for their reference and action.

3. Factual Analysis

A. The Chemical Leak on Board MV X-Press Pearl, and the Subsequent Fire and the Sinking of the Ship

13. The HRCSL gathered the following key information relating to the X-Press Pearl ship disaster, the relevant actors and the chain of events, particularly the events that took place from 19 May 2021 and subsequently. The information is based on the statements made by the victims and witnesses before the Commission.
14. The X-Press Pearl is owned (since 2020) by *EOS RO Pvt Ltd*, of 18 Robinson Road, Singapore 048547. *Eastaway ISM* are the managers of the ship. The ship operator is *Sea Consortium, Singapore* operating as *X-Press Feeders*, 11, Duxton Hill, Singapore 089595. The ship agents in Sri Lanka are *Sea Consortium Lanka Pvt Ltd*, part of *Setmil Group*, 256, Srimath Ramnathan Mawatha, Colombo 15.
15. The X-Press Pearl set sail from Malaysia on 29 April 2021, docked in Jebel Ali, UAE on 9 May 2021, in Port Hamad, Qatar on 11 May 2021 and Port Hazira in India on 15 May 2021 before arriving in Sri Lankan territorial waters on 19 May 2021.
16. The chemical leak had already been identified prior to 9 May 2021 while approaching Qatar. Both at Port Hamad and Port Hazira, the authorities had declined to assist in offloading the container in question and the ship had headed towards Colombo Port.
17. According to what was stated by *Sea Consortium Lanka* (local agent) to the HRCSL, they were first informed of the chemical leak via the ship captain's email to them on the 19 May 2021 at 18.42 hours. The email stated: "Smoke in container – no risk of fire". The vessel was then in international waters.
18. According to the statements of the Harbour Master and Legal Officer of the Ports Authority to the HRCSL, the ship anchored according to normal notifications and there was no notification of anything abnormal. There was VHF communication when the ship was 25 miles out of port. It is noted that, with regard to the type of cargo that was on board, the agent provides prior information about the cargo. The normal notifications were done, and the dangerous cargo declaration was made. It was noted that the Colombo Ports Authority would be informed of problems by previous ports inspection only if there was a Port State inspection performed, and a serious matter found relating to sea worthiness. This issue regarding the X-Press Pearl was not reported to Colombo Port by Port Hamad or Port Hazira.
19. On the night of 19 May 2021, the ship X-Press Pearl was at an anchorage 9.5 nm (nautical miles) off Colombo Harbour, awaiting an opportunity to berth. A chemical leak (existence of fumes but not a fire) was reported to the Sri Lanka Ports Authority (SLPA) by the local agent. The Port/Harbour Master requested more information concerning the nature of the problem, and in light of the risks, cancelled the berthing.

20. The ship was inspected by the Sri Lanka Navy and Sri Lanka Ports Authority (SLPA) on the morning of the 20 May 2021. The Agent was directed to send a P&I (i.e., protection and indemnity) Surveyor to confirm the situation (N.B. P&I cover has to be submitted by the Agent/DC (dangerous cargo) Declaration, and that is what the authorities go by if there is any damage). Before the boarding, however, a fire was observed, apparently caused by a chemical reaction due to a leak from a container. By 13.00 that day, the ship reported fire on board.
21. The Marine Environment Protection Authority (MEPA) was informed of the disaster on 20 May 2021 at approximately 4.00pm (SL time) by the Sri Lanka Navy. MEPA conducted an emergency meeting with the Incident Management Team (IMT) and activated the National Oil Spill Contingency Plan (NOSCOP).
22. After further observation on 21 May 2021 and 22 May 2021, the MEPA had instructed the vessel to move out of SL waters, if possible.
23. On the morning of the 25 May 2021 an explosion was reported. Crew members of the ship were then evacuated, and the ship was abandoned.

B. Pollution, Salvage and Clean Up Operations

24. The major pollution from the ship itself in terms of the contents of the containers commenced due to the explosion on the night of 25 May 2021 when the containers fell into the sea. According to the information provided to the HRCSL, four containers from the ship reached shore. An unknown number were destroyed or sank.
25. It was later confirmed that 347 objects were collected by Resolve Marine Company, which was chosen by the owner of the ship to remove containers and debris. Initially, there were MEPA observers on the Resolve Marine ship, but the clean-up was not completed. The MEPA officials noted that they thought the MEPA should continue to monitor the clean-up at sea around the X-Press Pearl wreck. However, the Resolve Marine contract appeared to have been concluded, and the MEPA did not know the details and nature of the MoU with the Owner.
26. Another salvor for the wreck – a Chinese company Shanghai Salvage – was also responsible for the ship and up-to 1 km surrounding the ship, and there were no MEPA observers on this salvage vessel. The interruptions of the monsoon rain and safety concerns meant that this salvage operation was also not completed, as far as MEPA is aware. MEPA officials noted that customs/territorial waters duties needed to be paid. Moreover, the lawyers for the ship owners had informed MEPA that they were not prepared to cooperate with the Sri Lankan authorities.
27. MEPA officials also noted that a Letter of Understanding between the ship owner, the salvor and the Attorney Generals Department of Sri Lanka exists and commented that they were of the view that the requests and conditions suggested by the MEPA were being ignored in such Letters of Understanding.

28. MEPA officials commented that the Attorney General's Department officials also informed them that there was no need for MEPA to monitor wreck removal. However, the MEPA has been involved in communication with salvors appointed by the ship owners (i.e., Shanghai Salvage and Resolve Marine) with regard to the removal of the containers, and the MEPA had maintained the position that it is the responsible authority for monitoring the ship.
29. There are no current or updated images of the seabed to ascertain the condition of the wreck and surrounding area. The Sri Lanka Navy has carried out a survey previously and should do so again with the support of the National Aquatic Resource, Research and Development Agency (NARA), after Shanghai Salvage has recovered all parts of the dangerous wreck.
30. For the onshore clean-up operations, the NOSCOP plan was implemented with the cooperation of the Tri-Forces and the Coast Guard.
31. Other than the state authorities, there was an ITOPI recommended technical assistance through MEPA from the P&I Club for the onshore clean-up of the Red Zone (Sarakku area) where plastic nurdles were found.
32. The CEA is responsible for waste management and hazardous waste regulation and licensing on land. The CEA issued a guideline to the MEPA on waste management, and initially (for the first few weeks after the ship disaster) a private company N&Y Marine Services Pvt Limited of 581, Negombo Road Wattala, was involved in the onshore waste storage. Thereafter a license was issued from the CEA to the MEPA, which was renewed in 2023.
33. Several tons of waste have been temporarily stored on land in 45 hired containers at a selected warehouse. Officials noted that the collecting of onshore waste is still ongoing with the participation of fisheries families. This storage in containers is clearly temporary and it is necessary that a plan for the final disposal be made by relevant authorities and for the final disposal plans to be made public.

C. Estimating the Environmental and Economic Damage

34. According to MEPA submissions to the HRCSL, Oceans Affairs section of the Ministry of Foreign Affairs had contacted UNEP (including two experts from France and one from Italy) for expert assistance and to help MEPA. This included how to do a damage assessment recommendations and preparation for a post-fire bunker oil spill.
35. By July 2021, the Ministry of Justice had appointed an advisory Committee to investigate the legal issues concerning the X-Press Pearl ship disaster.
36. By 5 September 2021, the MEPA submitted a report estimating the damages at USD 1.9 B to the Australian legal expert appointed by the Attorney Generals Department (Michelle

Taylor)¹ who said via Zoom and email that the report was insufficient and to update to a comprehensive damage assessment.

37. A second updated report was therefore submitted to the Attorney General on 13 January 2023, which estimated the damages at 6.48B. On an online meeting with Ms. Michelle Taylor, the review was that the Report was good (recordings available with MEPA). It was also emailed that MEPA keep the report confidential since the purpose of the Report was for the Court case.
38. However, in April, it was stated that Mr. Vikum De Abrew of the Attorney General's Department had informed MEPA that there are still faults in the report and they are waiting for Australian lawyers report to confirm that further measures for compensation can be based on this report.
39. No information has been provided to MEPA on the Singapore case, which is presumably using the MEPA Report for the calculation of compensation.
40. Notably, X-Press Pearl is the first incident that was taken out of Sri Lankan jurisdiction. It was stated to HRCSL that previous marine pollution cases such as MV Grandba and MV New Diamond as well as three ongoing cases in Commercial High Court were dealt with under Sri Lankan law.

¹ It is presumed that this is Michelle Taylor at Sparke Helmore, a leading Australian law firm. Her profile identifies her as specializing in maritime and transport law, with 25 years' experience as a litigator (<https://www.sparke.com.au/people/michelle-taylor/>). She is also President of the Maritime Law Association of Australia and New Zealand (MLAANZ) a member of the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Australian Maritime Safety Authority.

4. Legal Analysis

A. The Rule of Law

41. According to the internationally accepted definition:

...the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards...It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”

The rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people’s rights and fundamental freedoms. It is foundational to people’s access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state. Rule of law and development is strongly interlinked, and strengthened rule of law-based society should be considered as an outcome of the 2030 Agenda and Sustainable Development Goals (SDGs).²

42. The Rule of Law as ‘the foundation of the Constitution’ was recognized by the Supreme Court of Sri Lanka in a number of cases, including *Visuvalingam and others v Liyanage and others* 1983 (1) Sri.L.R 203, *Premachandra v. Jayewickrema* 1994 (2) Sri.L.R 90, *Senarath and others v Chandrika Bandaranaike* 2007 (1) SLR 59 and *Karunathilaka and another v Dayananda Dissanayake, Commissioner of Elections and Others* 1999 (1) Sri.L.R. 157.
43. At a time where various mismanagements and corruption has led the country into a financial crisis and severe setbacks on the path to economic growth and sustainable development, it is also relevant to note that the Supreme Court has reiterated the importance of rule of law in light of the fact that ‘publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved’.³
44. In accordance with this principle, the government of Sri Lanka has an obligation under the Constitution as well as basic principles of law consistent with international obligations, to be transparent and fair with regard to all the decision-making processes related to the criminal and civil liability and indemnity matters relating to the X-Press Pearl ship disaster.

² United Nations Organization, ‘What is the Rule of Law’, available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

³ Jayawardene J. in *Kariyawasm v CEA* (SC FR Application No. 141/2015 at p48) citing Amerasinghe J in *Gunaratne vs. The Homagama Pradeshiya Sabhawa* (1998 2 SLR 11 at p.16).

B. Equality and Equal Protection of the Law

45. Equality before the law implies that no one is above the law and, therefore, that the law does not discriminate negatively based on personal characteristics and that the law applies regardless of privilege or social disadvantages. Everyone should be subject to the same laws, no matter who they are, what their status in society is, and everyone should be treated equally by the State authorities and by the courts. Public bodies are required to treat all people equally when applying the law.
46. Equal protection under the law refers to the fact that the law provides equal opportunity to all people who are in similar situations. The laws themselves must provide equality and equal protection for everyone.
47. Article 12(1) of the Sri Lankan Constitution states that: ‘All persons are equal before the law and are entitled to the equal protection of the law’. Article 12(2), (3) and (4) include the notion of nondiscrimination. Article 12 has been extensively discussed and interpreted by the Supreme Court of Sri Lanka and is the basis for the arguments concerning the rights of the public that have been brought forward by the Complainants.
48. Furthermore, it is a provision which can be interpreted by the Superior Courts in a manner to provide a remedy in situations where there has been a perceived injustice but there is no specific provision covering the facts of the case. As stated recently:

The concept of ‘equality’ was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that, the ‘right to equality’ covers a much wider area, aimed at preventing other ‘injustices’ too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a ‘Fundamental Right’, conferred on the people by the Constitution, for the purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law.⁴

49. Thus, article 12(1) can be read together with other fundamental rights provisions (including article 14(1)(g)⁵ with regard to the damage caused to the environment, national economy and livelihoods of the communities affected, which has been raised by the Complainants), as well as with other principles in the Constitution and principles incorporated through judicial interpretation.

⁴ Kodagoda J., in *Wijerathna v. Sri Lanka Ports Authority* (2020 SC (FR) Application No. 256/2017 - SC Minutes 11.12.2020)

⁵ Article 14(1)(g): “the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise”.

The Supreme Court (Sharvananda, C.J. in *Elmore Perera v. Major Montague Jayawickrema* [1985] 1 Sri LR 285) has stated broadly that “Article 14(1)(g) recognises a general right in every citizen to do work of a particular kind and of his choice”.

C. Protection of the Environment and Environmental Rights

50. Neither environmental protection obligations nor the concept Right to a Healthy Environment are explicit provisions in the fundamental rights chapter in the Constitution of Sri Lanka; but the principle of environmental protection can be found in the Chapter on the Directive Principles of State Policy and Fundamental Duties, as shown below:

Article 27 (14): The State shall protect, preserve and improve the environment for the benefit of the community.

Article 28: The exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka:
(f) to protect nature and conserve its riches.

51. While not conferring legal rights or obligations that are directly enforceable in any court or tribunal, article 27(1) states as follows:

Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

52. The Supreme Court has affirmed the above and referred to the Directive Principles and Fundamental Duties in the interpretation of fundamental rights and the scope of state obligations – and reiterated that they should guide the exercise of state power.⁶ Furthermore, the Supreme Court has stated that there is also a link with article 12:

The right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of intergenerational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12 (1) of the Constitution.⁷

53. Therefore, article 12 (equality) can be read with articles 27(14) and 28(f) in the context of this matter of the Xpress Peal ship disaster and the issues of rule of law and equality raised by the complainants.

⁶ See *Wijebanda v Conservator of Forests* (2009 1 SLR 337 at p356), *Environmental Foundation Ltd v Mahaweli Authority of Sri Lanka* (2010 1 SLR1 at p19) and *Kariyawasm v CEA* (SC FR Application No. 141/2015 at p50), which referred to Articles 27(14) and 28.

⁷ Tilakawardane J., in *Wijebanda vs. Conservator General of Forests* *ibid*, at p. 356, and affirmed by Jayawardena J in *Kariyawasm v CEA* (SC FR Application No. 141/2015 at p51).

D. Right to Livelihood and the Polluter Pays Principle

54. Similar to the above discussion of the lack of a direct and enforceable provision with regard to environmental rights and obligations, a similar scenario applies to the lack of an enforceable provision with regard to the Right to Livelihood in the Constitution of Sri Lanka.
55. However, it is stated as set out below, in the Directive Principles of State Policy, article 27(2)(c):

The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include –

(c) the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities...

56. There has been no decision on marine pollution thus far, but in the context of ground water pollution, it has been stated by the Supreme Court that:

...clean water is a necessity of life and is inherent in Article 27(2)(c) of the Constitution”.⁸

The marine pollution that affects the livelihood of citizens can also be clearly linked with Article 12 and 27(2)(c) in a similar manner.

57. Furthermore, it is recognized in the Sri Lankan legal system that the harm caused by a polluter should not be borne by the communities directly affected by the pollution nor by the general public in terms of the cost of the clean-up and the effected economic activity in either short or long term. Previously, the Supreme Court has stated that:

The costs of environmental damage should... be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects...⁹

58. The above has been supported by later decisions, and in *Kariyawasm v CEA*, this principle was applied, and the respondent company was directed to pay compensation in a sum of Rs. 20 million to offset at least a part of the substantial loss, harm and damage caused by the groundwater pollution.
59. If even partial responsibility through constitutional rights can be found on that part of individuals or legal persons who have assets or insurance that could cover these losses, the polluter pays principle should be applied and the relevant parties should bear losses, without the entire cost to fall upon the public.

⁸ *Kariyawasm v CEA* (SC FR Application No. 141/2015 at p53.

⁹ Amerasinghe J in *Bulankulama vs. Ministry of Industrial Development* (2000 3 SLR 243 at p. 305)

60. Furthermore, it is not only the polluter but the State bodies which can also be held liable, according to Tilakawardane J. in *Wijebanda v Conservator of Forests* who stated that:

While the polluter pays principle internalizes the costs of pollution to corporate or individual polluters, the principle of public accountability extends this liability towards corrupt or incompetent regulators for the most egregious instances of mis-regulation.¹⁰

61. A similar result was arrived at in the *Wilpattu Case*¹¹ by the Court of Appeal, applying the Polluter Pays Principle, and finding the government authorities and relevant local political representative personally responsible for remedial actions.
62. In the situation where there is sufficient regulation and yet there is insufficient action, incompetence or failure to take action with regard to applying existing laws for the benefit of the public, this too, it is possible to argue, should theoretically have some degree of personal responsibility, although the extent of the loss to the country if sufficient compensation cannot be claimed may go into many billions of dollars, and not be able to be claimed from individuals.
63. If according to the evidence, the fault (knowledge or negligence) and the polluter can be identified, then seeking civil liability and payment of compensation or indemnity are procedures that can be followed, parallel to a fundamental rights or human rights procedure.
64. If the company or companies and/or authorities involved in the X-Press Pearl ship disaster are held to the principle of ‘polluter pays’, the burden of the cost of the environmental damage should be borne by them, rather than the public.

E. Responsibility of the State to File Action and Seek Compensation and Public Trust

65. In terms of linking the concept of Rule of Law and articles 12, 27(14), 27(2)(c) and 28(f) in terms of the responsibility of the State to file civil action against those who are responsible for the X-Press Pearl ship disaster, it is clear that the failure to apply the law to those responsible and file action can be seen as a violation of fundamental rights of the affected public. It can also be identified as a violation of the public trust.
66. The Supreme Court has previously described a situation where the State authorities, although there were relevant statutory and regulatory duties in place, were found “having failed or refused to enforce the law ... [and] having failed to act in the best interests of the public” as violations of the ‘**Doctrine of Public Trust**’ as well as a violation of fundamental rights in article 12.¹²

¹⁰ *Wijebanda v Conservator of Forests* (2009 1 SLR 337 at p362).

¹¹ *CEJ vs Conservator of Forests* Case No. C.A. (Writ) 291/2015

¹² *Kariyawasm v CEA* (SC FR Application No. 141/2015 at p50), citing Ratnayake J. In *Environmental Foundation Ltd vs. Mahaweli Authority of Sri Lanka* (2010 1 SLR 1 at p.19).

67. Furthermore, it has been stated that:

Although it is expressly declared in the Constitution that the Directive Principles and fundamental duties ‘do not confer or impose legal rights or obligations and are not enforceable in any Court of Tribunal’, Courts have linked the Directive Principles to the public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers.¹³

68. In the X-Press Pearl ship disaster situation, the applicable statute for filing of a civil action is the Marine Pollution Prevention Act, No. 35 of 2008 (MPPA). This statute establishes the Marine Environmental Protection Authority (MEPA), which shall be responsible for the administration of its provisions.
69. The administration, management and control of the affairs of the Authority are vested in a Board of Directors which includes four ex officio Directors representing the Ministries in charge of Environment, Foreign Affairs, Finance and Fisheries, as well as the Director of Merchant Shipping, the Commander of the Sri Lanka Navy and the General Manager of the Authority.
70. MEPA’s authority under the MPPA generally covers the prevention, reduction, control and management of pollution arising out of ship-based activity and shore based maritime related activity in the territorial waters of Sri Lanka or any other maritime zone, its foreshore and the coastal zone of Sri Lanka. MEPA must also support ratification and adherence to international agreements dealing with marine pollution and plays a vital role in the formulation and implementation of the National Oil Pollution Contingency Plan.
71. MEPA has wide powers to make surveys, investigations or examinations and it may also board any ship within its areas of jurisdiction. MEPA is also empowered to institute legal action in relation to any pollution arising out of activities occurring within its jurisdiction, including the release of oil and/or harmful substances. It is stated in the statute that every assistance shall be given to the Authority or a person authorized by it in carrying out its functions.
72. With regard to the institution of civil actions under the MPPA, the following provisions and phrases in section 34 are important:
- (1) Where any act referred to in section 24 or section 26,¹⁴ results in the pollution of the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka, **the owner or the operator of the ship** or the owner or the person in charge of the apparatus or the owner or the occupier of the off-shore installation or the owner or occupier of the pipe line or the owner or the occupier of the place on land for the time being, as the case may be or the person carrying on the operation of exploration of

¹³ Ratnayake J in *Environmental Foundation Ltd vs. Mahaweli Authority of Sri Lanka* 2010 1 SLR 1 at p.19.

¹⁴ Maritime casualties or activities that result in escape of oil or other harmful pollutants from ship, pipeline, facility etc.

natural resources including petroleum or the person in charge of such operation shall be liable for—

- (a) **any damage caused** by the discharge, escape or dumping of any oil, harmful substances or other pollutant into the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka under such Law or to the foreshore or any interests related thereto;
- (b) **the costs of any measures taken for the purposes of preventing, reducing or removing any damage** caused by the discharge, escape or dumping of any oil, harmful substance or pollutant into the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone or any interests related thereto.”

- (2) For the purpose of this section, **interests** related to the territorial waters of Sri Lanka or any other maritime zone, its fore-shore of Sri Lanka include —
 - (a) marine, coastal, port or estuarine activities including **fisheries activities**.
 - (b) the promotion of **tourism** and the preservation and development of tourist attractions in the territorial waters of Sri Lanka or any other maritime zone or on the foreshore including beaches and coral reefs.
 - (c) the **health of the coastal population and their wellbeing**; and
 - (d) **the protection and conservation of living marine resources and wildlife**.

- 73. The Complainants in this X-Press Pearl Ship disaster issue have submitted that the lack of transparency over the decision-making process regarding the civil liability and claims that can be filed in Sri Lankan courts. MEPA officers noted that the relevant provision in the MPPA is the abovementioned section 34.
- 74. MEPA officers before the HRC noted that on 23 May 2021, a complaint was made to the Pamunugama Police under section 26 of the MPPA (Discharge or escape of oil, harmful substance or other pollutant into the territorial waters of Sri Lanka or any other maritime zone). According to MEPA officials, the need for criminal action was also informed to the Attorney General, but it was noted that it took more than six months to file the criminal case.
- 75. With regard to financial indemnity at the first instance (from insurance) MEPA has not requested for this. According to MEPA, they were not advised on this matter by the Attorney General’s Department and has not been given the required advice or how to act on this matter. As far as the MEPA official have been informed the Australian experts would be advising the Attorney General’s Department on the issue. It is a matter of public interest for transparency on the processes and procedures for indemnity, and the responsibility of the government in this serious matter that affects the national economy and livelihood of citizens.
- 76. With regard to civil liability under section 34 of the MPPA, an Environmental Damage Assessment was needed, and therefore an Expert Panel Report was prepared by MEPA and submitted to the Attorney General. The original deadline was September 2022, but it was

submitted finally on 13 January 2023. As mentioned previously in this report, the Australian legal expert consulted by the Attorney General, stated in a virtual meeting, that this report was sufficient to file the case.

77. However, the Minister of Justice received Cabinet approval to file the civil case in Singapore. It has come to the knowledge of the public and state officials that a loan of 4.5 Million USD was obtained from a Singapore lending agency for the legal expenses. MEPA was not informed of the decision not to file the civil case in Sri Lanka nor the reasons for doing so, by the Government, but only got to know from the news reports, and the officials of MEPA do not know whether the Government is using the MEPA Report in the case or not. MEPA is not a petitioner in Singapore. Additionally, MEPA has received a letter from the Attorney General that MEPA is not a primary litigant.

5. Special Observations

A. The Relationship between Sea Consortium Lanka (Pvt) Ltd and ‘Xpress Feeders’

78. As confirmed by the lawyers for Sea Consortium Lanka Pvt. Ltd, it is EOS RP Pvt Ltd which is the owner of the ship X-Press Pearl and Eastaways ISM is the manager, with Sea Consortium Pte Ltd (Singapore) being the operator.
79. According to their lawyer, among the roles of Sea Consortium Lanka (Pvt) Ltd is being ‘the local agent for all Xpress vessels’, and it is 100% a locally owned company.
80. The nature of the legal relationship between Xpress Feeders Group (a part of HICO Investment Group), Sea Consortium Pte Ltd (Singapore) which trades as Xpress Feeders, X-Press Container Line (Singapore) Pte. Ltd, EOS RP (Pvt) Ltd and Eastaways ISM and the Sri Lankan company Sea Consortium Lanka (Pvt) Ltd (part of Setmil Group) needs further clarification, as the lawyers were not clear themselves as to the contractual relationships between the companies.
81. While being referred to as a shipping agent, as per the website of Setmil Group, of which Sea Consortium Lanka (Pvt) Ltd is a part, Sea Consortium Lanka (Pvt) Ltd was further described as follows: ‘[i]ncorporated in 1994, this [Board of Investment (BOI)] approved joint venture is the Sri Lankan extension of X-Press Feeders’.¹⁵
82. It is recommended that the State authorities are transparent and clarify the nature of the legal relationship that Setmil Group/Sea Consortium Lanka have with Xpress Feeders Group/Sea Consortium and their Singapore companies, under the Sri Lankan domestic legal framework. Specifically, do the legal entities have a contractual relationship, agent-principal relationship or a joint venture relationship? As liability for actions by an agent and liability in a joint venture relationship differs, the nature of the relationship may be relevant with regard to filing of civil actions for compensation for negligence, as well as the issue of the most suitable forum and jurisdiction for filing action.
83. In the absence of official confirmation, a Right to Information request could be filed by any citizen with the BOI for a clarification of the above relationship in the public interest.

B. Attorney General’s Department’s Responses

84. The HRCSL summoned the Attorney General for a meeting to explain the reasoning behind the decision not to file civil action in the courts of Sri Lanka for the X-Press Pearl ship disaster and to instead file civil action in Singapore.
85. The Attorney general responded to the summons from the HRCSL in writing, stating with regard to the requested explanations that there were ongoing fundamental rights cases and a criminal case.

¹⁵ See https://www.setmil.com.lk/sea_consortium_lanka_ltd.php.

86. It was further clarified that five entities domiciled in Singapore including Sea Consortium Ptd Ltd, trading as Xpress Feeders together with another company domiciled in the United Kingdom were the defendants in the action filed in Singapore, whereas Sea Consortium Lanka (Pvt) Ltd was one of the respondents in the four fundamental rights cases pending in the Sri Lankan Supreme Court.
87. This answer did not provide a sufficient explanation as to why an Australian law firm and a Singaporean Law firm were consulted,¹⁶ and apparently on their advice, the civil case was handed over to a foreign law firm based in Singapore and filed in Singapore courts, at a far greater expense to the public than if filed in local courts.
88. Furthermore, the Attorney General is a respondent in the fundamental rights cases and not the party filing the cases, thus it cannot benefit from reference to these fundamental rights cases, as action taken by the Attorney General's Department concerning the aftermath of the X-Press Pearl disaster.
89. The criminal cases are still pending and conviction of individuals or the possibility of fines under the criminal law would not provide financial compensation for the economic losses faced by the affected citizens and the national economy.
90. Neither the fundamental rights cases nor the criminal cases address the issue of compensation for the environmental damage and loss of livelihood that the civil compensation case that could have been filed in Sri Lanka would have been able to address.
91. According to information provided by MEPA officials, the Attorney General had responded to their own inquiries concerning the non-filing of civil cases in Sri Lanka and had provided two reasons:
- (1) that the Singapore Company concerned will not come to summons; and
 - (2) that a court decision on compensation cannot be enforced against a Singapore Company in Sri Lanka.
94. It was stated during the inquiry by officers from MEPA that they were not consulted or informed about the process of decision-making not to file a civil case in Sri Lanka, and that the communications between themselves and the Attorney General's Department was that they were only one of many stakeholders and had no special status with regard to being involved in the decision concerning any civil litigation.
95. The HRCSL believes that it is important matter in the public interest for there to be transparency on how the decision not to file a civil case in Sri Lanka came to be made and to ascertain the persons who are finally individually or collectively responsible for this decision, as well as the related decision to limit the involvement of MEPA in the process.

¹⁶ Presumed to be Sparke Helmore and Dentons, Rodyk & Davidson.

C. ‘The Singapore Case’, SICC Confidentiality and Lack of Transparency

96. According to information initially given at the inquiry and confirmed by publicly available information, a case was filed in the Singapore High Court: *Attorney General of the Democratic Socialist Republic Sri Lanka V EOS RO PTE Ltd and Five Others* HC/OC 249/2023, with the Attorney General being represented by the law firm of Dentons Rodyk & Davidson LLP – specifically the lawyers Kavitha Ganesan, Loh Jen Wei and Teh Kee Wee Lawrence.
97. As of 1 June 2023, this case was shifted to the *Singapore International Commercial Court (SICC)* – the same case name and number is retained, and the first date (for a case conference hearing) was set for 6 July 2023. Another case conference hearing was set for 24 August 2023.
98. In the SICC, the six defendants in these proceedings are identified as:
 - (1) Eos Ro Pte Ltd
 - (2) Killiney Shipping Pte Ltd
 - (3) Sea Consortium Pte Ltd
 - (4) X-Press Container Line (Singapore) Pte. Ltd.
 - (5) Eastaway Ship Management Pte. Ltd.
 - (6) X-Press Container Line (UK) Ltd.
99. The six Defendants are represented by *Rajah & Tann Singapore LLP* (Daphne Chua Hui Lu; Lim Shao Yang Lionel; Tan Chuan Bing Kendall). Rajah and Tann Singapore LLP is one of the leading firms for shipping law in Asia and the lead lawyer Daphne Chua Hui Lu has more than ten years’ experience and formerly worked for P&I Club Singapore, the leading association composed of ship owners.
100. The claimant, the Attorney General of Sri Lanka, is represented in the SICC by the same abovementioned lawyers from *Dentons, Rodyk & Davidson LLP* in the SICC.
101. It should be noted that while Loh Jen Wei and Teh Kee Wee Lawrence are Senior Partners in *Dentons, Rodyk & Davidson LLP*, Kavitha Ganeson only graduated from the Singapore Management University with a Bachelor of Law Degree in 2020 and was admitted to Singapore Bar in 2021. As the Government of Sri Lanka is using public funds to pay for the services of the firm, it is concerning that the first named lawyer on the legal team is so severely lacking in experience.
102. Crucially, the SICC procedure, normally initiated under a written SICC jurisdiction agreement, may be kept confidential if a party requests or if there is an any agreement between the parties on the making of such an order. In such a situation, the public is denied access to the deliberations, decisions and documentation regarding the case. As clarified in the *SICC Procedural Guide*:
 - 10.13.1 The SICC may, on the application of a party, make all or any of the following orders:
 - (a) an order that the case be heard in camera,

- (b) an order that no person must reveal or publish any information or document relating to the case,
- (c) an order that the court file be sealed.¹⁷

103. In the 28 June 2023 SICC decision of *CZT v CZU*, the SICC declined to grant orders for the production of an arbitral tribunal's records of deliberations because these records were confidential and any exception to the confidentiality of deliberations would be found only in the 'very rarest of cases' as it would 'take a very compelling case' to overcome the policy reasons for protecting the confidentiality of arbitral deliberations.¹⁸ It was reasoned that the interests of justice in this particular case did not warrant lifting the veil of confidentiality.
104. The transparency of the judicial proceedings concerning the compensation for the X-Press Pearl ship disaster is a matter of justice and public interest for Sri Lankan citizens.
105. However, the choice of the SICC in this instance raises the questions of whether the abovementioned confidentiality clauses in the SICC Procedural Guide played a role in the choice of forum. It is undeniable that if the civil case had been filed in Sri Lanka, the court proceedings would have been public, and there would have been access to the documentation and the potential court decision.
106. The HRCSL recommends that in light of the above lack of transparency in the current SICC proceedings and potential lack of an open access future SICC decision, if any, that can be perused by the general public, the public should be officially informed as to the weighing and balancing of benefits and reasoning of the relevant government decision-makers, which led them to decide confidential proceedings was deemed more suitable than transparent proceedings in Sri Lankan courts.

D. Legal and Policy Reforms Identified During the Inquiry

107. During the course of the HRCSL investigation several necessary legal reforms were mentioned by officials, which are summarized below, for the attention of lawmakers and relevant policymakers.
107. Representatives of the Merchant Shipping Secretariat noted the current Merchant Shipping Laws and regulations thereunder does not make it clear what obligations ship agents have. In light of the lack of clarity being highlighted by the X-Press Pearl shipping disaster and the extent to which the local agent Sea Consortium Lanka Private Limited has responsibility to liaise with and inform of dangers to Colombo Port and relevant authorities, and the vision of Sri Lanka being a maritime hub in the future, such an amendment should be drafted as soon as possible with the advice of relevant experts and input from stakeholders.
108. MEPA Officials noted that there are recommendations for ratifying nine relevant international conventions, as well as MPPA Act amendments which have been suggested. Approval has allegedly not yet been given, since multiple authorities concerned.

¹⁷ See https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc_procedural_guide-1.pdf

¹⁸ *CZT v CZU*, [2023] SGHC(I)11, para.53.

109. Relating to amendments of national laws it was pointed out that the amendment process for the MEPA Act already started in 2011 with the process initiated through submission of concept papers. In 2014 relevant memos were submitted and currently the Line-Ministry received drafts submitted by MEPA, and Cabinet papers were submitted in 2022. However, no action has yet been taken.
110. Furthermore, a specific Chemical Spills Contingency Plan is needed, which perhaps also requires an amendment of the MEPA Act. It was noted that the OPRC (HNS) Protocol (regarding chemical spills)¹⁹ - which still needs to be ratified by Sri Lanka – requires amendment of relevant statutes and a contingency plan.²⁰
111. It has also been pointed out in submissions to the HRCSL that at present it is only intentional pollution that is covered by the NEA, so there have been suggestions that there is a need to amend the Act to include negligence/negligent environmental pollution as well.
112. Relating to National Policy on shipping accidents, a Casualty Management plan is being drafted by the Merchant Shipping Secretariat, Navy, Ports Authority and MEPA. The drafting of a Ship Accidents Plan is still needed.

E. Relevant Entities and the Frameworks of Cooperation

113. It is generally observed by the HRCSL, that the sharing of information and cooperation between the relevant authorities need to be improved in case of future emergencies of a similar nature.
114. The cooperation and effective communication before, during and after a marine pollution emergency, between the relevant authorities listed below, should be strengthened.
 - (1) Ministry of Ports and Shipping
 - (2) Ministry of Environment
 - (3) MEPA
 - (4) SLPA
 - (5) Merchant Shipping Secretariat
 - (6) Sri Lanka Ports Authority
 - (7) Sri Lanka Navy
 - (8) NARA
 - (9) Central Environmental Authority (CEA)
115. If necessary, relevant policy, legal or regulatory guidelines or amendments should be made to improve the situation. Such recommendations should consider Sri Lanka's international

¹⁹ International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, and its Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol). The OPRC-HNS Protocol is for ensuring that ships carrying hazardous and noxious substances are covered by preparedness and response regimes similar to those already in existence for oil incidents.

²⁰ A National Contingency Plan was previously prepared by the Marine Pollution Prevention Authority (MPPA) in 1995 and revised several times thereafter.

obligations, constitutional rights and duties, the relationship between the relevant institutions and the statutes establishing them, if any.

116. The role of the Attorney General's Department in implementing legislation as well as the cooperative policy with other State institutions needs to be clarified and strengthened. In particular, regarding marine pollution and maritime accidents, where MEPA is the primary implementing authority of the MPPA.

F. Other Points of Significance

117. With regard to the duties of the Ports Authority, fire services and radio communication between ports and between ships and ports (7Q and 7Z) are included in the Ports Authority Act No.51 of 1979, as amended. The HRCSL was informed that the Minister had inquired into these issues in the context of the X-Press Pearl ship disaster and the Ministry had held an inquiry, thus it was noted that the results of the inquiry can be requested through a Right to Information application.
118. It was noted by the Harbour Master during the HRCSL inquiry that, two months after the X-Press Pearl incident, a ship named the MV Seaspam Lahore also had a Nitric acid leak. However, in this later case, since the ship had updated the Port with information and visual information on the leak, the authorities had managed the incident, reworked and reloaded the ship and sent it on its way without the leak becoming a disaster. This suggests that the officers on board the X-Press Pearl and/or the local agent and/or the ship owners could have provided the required information as the Port was equipped to handle such a situation. The Harbour Master also noted that it was observed that there were no logbook entries of the Ship concerning the nitric acid leak from one of the containers. This is something that must be recorded according to Singapore Law, and it was stated that there is Flag State Rights and Liability of Singapore to initiate an investigation on this matter.
119. The government has sponsored government officers for capacity building training in maritime law over the past several decades and should have by this stage developed the expertise necessary for the litigation in this instance. The government officers who received the *Master of Laws in International Maritime Law* from the IMO International Maritime Law Institute (IMLI) include Vikum De Abrew, Nuwan Peiris, and Nayomi Kahawita, currently of the Attorney General's Department, and former Chief Justice of the Supreme Court, Parinda Ranasinghe (Snr) and former Justice of the Supreme Court P.A. Ratnayake. Uditha Egalahewa PC and Anusha Samaranyake Fernando also had the same maritime law training at IMLI. The additional expenditure on foreign Maritime Law consultants – an issue that arose during the investigation - can only be justified if there is a lack of expertise in Sri Lanka. If there is a lack of expertise in maritime law and maritime transport and maritime accident compensation/indemnity, the government needs to develop this capacity in light of future needs.

6. Recommendations

120. The HRCSL wishes to present the following key recommendations:

- a) It is reiterated that the government has a responsibility to act in the public interest, protect fundamental rights of the citizens, the environment and the national economy, with regard to all matters relating to the aftermath of the X-Press ship disaster.**
- b) In light of the lack of a reasons and justification being provided, the HRCSL has identified that there is an imminent infringement of the fundamental rights in articles 12(1), 14(1)g and the directive principles in articles 27(14) and 27(2)(c), as a consequence of the failure of the government to take adequate and timely measures to prosecute, initiate civil action in Sri Lanka and file for indemnity for the damage to the environment, national economy and livelihoods of the communities affected by the X-Press Pearl ship disaster.**
- c) The inquiry also identified areas for increased cooperation of public bodies and gaps in the policy, legal and regulatory framework which needs to be improved for the protection of the rights of citizens and prevention of future violations of a similar nature. It is recommended that lessons to be learnt from the X-Press Pearl ship disaster should be investigated and a plan of action for increased cooperation and filling of identified gaps be carried out through coordination of the relevant authorities.**
- d) The Interim Report dated 17 May 2023 which was submitted to Mr. Ranil Wickramasinghe, the President of the Democratic Socialist Republic of Sri Lanka highlighted the urgency of filing a case for civil damages in the Sri Lankan Courts under section 34 of the MPPA Act, and requested for full transparency and an inquiry into the decision-making process taken by the government (including the expenses borne) with regard to the decision not to file in Sri Lanka and to file in the Singapore High Court, and then shortly after to shift to the Singapore International Commercial Court. This interim recommendation is reaffirmed.**
- e) The individual and collective responsibility of government officers, particularly the relevant officers of the Attorney General's Department and Cabinet members, with regard to delays in taking required action, failure to file civil action in Sri Lanka, and related decisions which could negatively affect the compensation and restoration of the environment and livelihoods must be explained or investigated fully, and with public transparency.**
- f) It is also required that the full accounting of expenses and outcomes received for the payments to foreign consultants and lawyers be made public through the relevant public accounting/audit and oversight bodies.**

- g) The individuals and communities most directly affected by the X-Press Pearl ship disaster require compensation, and the State must identify and ensure that the relevant monies reach them upon receipt of the indemnity or compensation payments. Reporting on this matter should be received by the HRCSL.**
121. All the above recommendations have been made by the HRCSL as per its lawful mandate under the Human Rights Commission of Sri Lanka Act, No, 21 of 1996 to ensure full protection of human rights as per the national laws and the international human rights obligations undertaken by the State.