IN THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/FR Application No: 168/ 2021,
176/ 2021,
184/ 2021,
& 277 / 2021

SC/FR Application No. 168/2021

1. Centre for Environmental Justice (Guarantee) Limited
   No. 20/A, Kuruppu Road,
   Colombo 08.

2. Withanage Don Hemantha Ranjith Sisira Kumara
   Executive Director
   Center for Environmental Justice, No. 20/ A, Kuruppu Road, Colombo 08.

3. Wijethunge Appuhamyge Herman Kumara
   No. 10, Malwatta Road,
   Negombo.

4. Aruna Roshantha Fernando
No. 87/D, Pitipana Veediya,
Negombo.

PETITIONERS

v.

1. Marine Environment Protection Authority
No. 177, Nawala Road,
Colombo 05.

2. Sri Lanka Ports Authority
No. 19, Chaithya Road,
Colombo 01.

2A. Capt. Nihal Keppetipola
Chairman
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2AA. Dr. Prashantha Jayamanna
Chairman
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2B. Mr. Keith D. Bandara
Chairman
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2BB. Chairman
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

3. A.W. Seneviratne
Director General, Merchant Shipping,
Merchant Shipping Secretariat,
No. 27 Bristol St.,
Colombo 01.

3A. Mr. P.R. Ajith Wijesinghe
Director General,
Merchant Shipping,
Merchant Shipping Secretariat,
No. 27 Bristol St.,
Colombo 01.

3AA. Director General of Merchant Shipping
Merchant Shipping Secretariat,
27 Bristol St.,
Colombo 01.

4. Capt. K.M. Nirmal Silva
Harbour Master, Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

4A. Harbour Master
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

5. Central Environmental Authority
No. 104, Denzil Kobbekaduwa
Mawatha,
Battaramulla.

5A. Hemantha Jayasinghe
Director General,
Central Environmental Authority,
No. 104, Denzil Kobbekaduwa
Mawatha,
Battaramulla.

5AA. Director General
Central Environmental Authority,
No. 104, Denzil Kobbekaduwa
Mawatha,
Battaramulla.

6. R.A.S. Ranawake
Director General,
Coastal Conservation and Coastal
Resource Management Department,
4th Floor, Ministry of Fisheries
Building, New Secretariat,
Maligawatta,
Maradana,
Colombo 10.

6A. Director General
Coastal Conservation and Coastal
Resource Management Department,

4th Floor, Ministry of Fisheries
Building, New Secretariat,
Maligawatta,
Maradana,
Colombo 10.

7. S.J. Kahawatta
Director General,
Department of Fisheries and Aquatic Resources,
3rd Floor, New Secretariat,
Maligawatta,
Colombo 10.

7A. Director General
Department of Fisheries and Aquatic Resources,
3rd Floor, New Secretariat,
Maligawatta,
Colombo 10.

8. Rohitha Abeygunawardena
Minister of Ports and Shipping,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

8A. Nimal Siripala De Silva
Minister of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

8AA. Minister of Ports and Shipping
Ministry of Ports and Shipping,

No. 19, Chaithya Road,
Colombo 01.

9. Mahinda Amaraweera
Minister of Environment,
Ministry of Environment,
"Sobadam Piyasa",
416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

9A. Minister of Environment
Ministry of Environment,
"Sobadam Piyasa",
416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

10. Mohan Priyadarshana De Silva
State Minister,
Urban Development, Coast
Conservation, Waste Disposal and
Community Cleanliness,
Ministry of Urban Development, Coast
Conservation, Waste Disposal and
Community Cleanliness,
17th and 18th Floors,
"SUHURUPAYA",
Subhuthipura Road,
Battaramulla.

10A. State Minister Urban Development,
Coast Conservation, Waste Disposal
and Community Cleanliness

Ministry of Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness,
17th and 18th Floors,
"SUHURUPAYA",
Subhuthipura Road,
Battaramulla.

11. ESO RO PTE. LTD.
18, Robinson Road, #20-02,
18 Robinson,
Singapore 048547.

11A. ESO RO PTE. LTD.
18, Robinson Road, #20-02,
18 Robinson,
Singapore 048547.

Represented by
Sea Consortium Lanka (Pvt) Ltd
4th Floor, Setmil Maritime Centre,
256, Srimath Ramanathan Mawatha,
Colombo 15.

12. X-Press Freeders
11, Duxton Hill,
Singapore, 089595.

12A. X-Press Feeders
11, Duxton Hill,
Singapore, 089595.

Represented by its local Agent:
Sea Consortium Lanka (Pvt.) Ltd.

4th Floor, Setmil Maritime Centre,
256, Srimath Ramanathan Mawatha,
Colombo 15.

13. Sea Consortium Lanka (Pvt.) Ltd.
4th Floor, Setmil Maritime Centre,
256, Srimath Ramanathan Mawatha,
Colombo 15.

14. Chandana Sooriyabandara
Director General of Wildlife
Conservation,
Department of Wildlife Conservation,
No. 811A, Jayanthipura,
Battaramulla.

14A. Director General of Wildlife
Conservation
Department of Wildlife Conservation,
No. 811A, Jayanthipura,
Battaramulla.

15. His Excellency the President Gotabaya
Rajapaksha

Appearing by:
Hon. Attorney General,
Attorney General's Department,
Colombo 12.

15A. His Excellency the President Ranil Wickramasinghe

Appearing by:
Hon. Attorney General
Attorney General's Department,
Colombo 12.

15AA. His Excellency the President

Appearing by:
Hon. Attorney General
Attorney General's Department,
Colombo 12.

16. C.D. Wickramaratne
Inspector of General Police,
Police Headquarters,
Colombo 01.

16A. Inspector General of Police
Police Headquarters,
Colombo 01.

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

RESPONDENTS

18. Kaushalya Nawaratne
President,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

18A. The President
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

19. Isuru Balapatabendi
Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

19A. Chathura A. Galhena
Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

19AA. The Secretary
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

20. Transparency International Sri Lanka

21. Ashala Nadishani Perera

Both of
No. 366, Nawala Road, Nawala,
Rajagiriya.

ADDED RESPONDENTS

SC/FR Application No: 176/2021

1. Fr. Benedict Tennison Sarath
   Iddamalgoda
   'Thulana',
   Kohalwila Road,
   Gonawala,
   Kelaniya.

2. Weeramundage Gamini Fernando
   No. 278/39, Siriwardhana Pedesa,
   Munnakkaraya,
   Negombo.

3. Warnakulasuriya Kristopher Sarath Fernando
   No. 639, Peragas Junction,
   Pahala Ulhitiyawa,
   Wennappuwa.

PETITIONERS

v.

1. Hon. Mahinda Amaraweera
   Minister of Environment,
   Ministry of Environment,
   416/C/1,
   Robert Gunawardhana Mawatha,
   Battaramulla.

2. Hon. Douglas Devananda
   Minister of Fisheries,
   Ministry of Fisheries,
   Maligawatte Road, Colombo 10.

3. Hon. Rohitha Abeygunawardhana
   Minister of Ports and Shipping,
   Ministry of Ports and Shipping,
   No. 19,
   Chaithya Road,
   Colombo 01.

4. Capt. Nihal Keppetipola
   Chairman,
   Sri Lanka Ports Authority,
   No. 19, Chaithya Road,
   Colombo 01.

5. R.M.I. Rathnayake
   Secretary to the Ministry of Fisheries,
   Ministry of Fisheries,
   Maligawatte Road,
   Colombo 10.

6. Dr. Anil Jasinghe
   Secretary to the Ministry of Environment,
   Ministry of Environment,
   416/C/1, Robert Gunawardhana Mawatha,
   Battaramulla.

7. Dr. Palitha Kithsiri
   Director General,
   National Aquatic Resources Research and Development Agency,
   Crow Island,
   Colombo 15.

8. R.A.S. Ranawaka
   Director General,
   Coastal Conservation and Coastal
   Resource Management Department,
   4th Floor, Maligawatte,
   Colombo 10.

9. Hemantha Jayasinghe
   Director General,
   Central Environmental Authority,
   No. 104,
   Denzil Kobbekaduwa Mawatha,
   Battaramulla.

10. Dharshani Lahandapura
    Chairperson
    Marine Environment Protection
    Authority,
    No. 177, Nawala Road,
    Colombo 05.

10A. Asela B. Rekawa
     Chairperson,
     Marine Environment Protection
     Authority,
     No. 177, Nawala Road,
     Colombo 05.

11(A). X-Press Feeders

Represented by its Local Agent;
Sea Consortium Lanka (Pvt) Ltd.
4th Floor, Setmill Maritime Center,

No. 256,
Srimath Ramanathan Mawatha,
Colombo 15.

11(B). Killiney Shipping Pte. Ltd.
11, Duxton Hill,
Singapore 089595.

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

RESPONDENTS

SC/FR Application No: 184/2021

1. Dr. Ajantha Perera
16,
Temple Road,
Rattanapitiya,
Boralesgamuwa.

2. Jeran Jegatheesan
155/8,
4th Lane,
Dolalanda Gardens, Thalawathugoda
(Deceased)

PETITIONERS

v.

1. Marine Environment Protection
Authority (MEPA)

2. Dharshani Lahandapura
Chairperson
Marine Environment Protection
Authority,

1st & 2nd above, both of:
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

2A. Asela B. Rekawa
Chairperson,
Marine Environment Protection
Authority (MEPA),
No. 177, Nawala Road,
Colombo 05.

2B. KVR Samantha Gunasekara
Chairperson
Marine Environment Protection
Authority (MEPA)

3. Sri Lanka Ports Authority
No. 45, Leyden Bastian Road,
Colombo 01.

4. Chandana Suriyabandara
Director General – Department of
Wildlife Conservation,
No. 811/A,
Jayanthipura Main Road,
Battaramulla.

5. Ajith Seneviratne
   Director General – Merchant Shipping
   Secretariat,
   1st Floor, Bristol Building, 43-89,
   York Street,
   Colombo 01.

6. Dr. Nalaka Godahewa, MP
   State Minister of Urban Development,
   Coast Conservation, Waste Disposal,
   and Community Cleanliness,
   17th and 18th Floors,
   "SUHURUPAYA",
   Subhuthipura Road,
   Battaramulla.

6A. Anura Karunathilaka,
   Minister of Urban Development,
   Construction and Housing

7. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.

RESPONDENTS

SC/FR Application No: 277/2021

1. The Archbishop of Colombo,
   Archbishop's House,
   Gnanartha Pradeepa Mawatha,
   Colombo 08.

2. Cardinal Malcolm Ranjith,
Archbishop of Colombo,
Archbishop's House,
Gnanartha Pradeepa Mawatha,
Colombo 08.

PETITIONERS

v.

1. Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2. Nihal Keppetipola,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2A. Dr. Sarath Obesekere,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2B. Keith D. Bernard,
Chairman,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

2C. Admiral Sirimewan Ranasinghe,
Chairman,
Sri Lanka Ports Authority,

No. 19, Chaithya Road,
Colombo 01.

3. Upul Jayatissa,
Managing Director,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

3A. Prabath J. Malavige,
Managing Director,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

3B. Ganaka Hemachandra,
Managing Director,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

4. Capt. K.M. Nirmal P. Silva,
Harbour Master,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 01.

5. Marine Environmental Protection Authority,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

6. Dharshani Lahandapura,
Chairperson,
Marine Environmental Protection Authority,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

6A. Asela B. Rekawa,
Chairperson,
Marine Environmental Protection Authority,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

7. A.W. Seneviratne,
Director-General of Merchant Shipping,
Merchant Shipping Secretariat,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

7A. P.R. Ajith Wijesinghe,
Director-General of Merchant Shipping,
Merchant Shipping Secretariat,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

7B. Capt. S.D. Gamini A.K. Wilson,
Director-General of Merchant Shipping,
Merchant Shipping Secretariat,
Ministry of Ports and Shipping,

No. 19, Chaithya Road,
Colombo 01.

8. Hon. Rohitha Abeygunawardena,
Minister of Ports and Shipping,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

8A. Hon. Nimal Siripala De Silva,
Minister of Ports, Shipping and Aviation,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

8B. Hon. Vijitha Herath,
Minister of Ports, Shipping and Aviation,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

ADDED RESPONDENT

9. U.D.C. Jayalal,
Secretary,
Ministry of Ports and Shipping,
No. 19, Chaithya Road,
Colombo 01.

9A. K.D.S. Ruwanchandra,
Secretary,
Ministry of Ports and Shipping,
No. 19, Chaithya Road, Colombo 01.

10. Hon. Douglas Devananda,
Minister of Fisheries,
Ministry of Fisheries,
New Secretariat,
Maligawatta,
Colombo 10.

11. R.M.I. Rathnayake,
Secretary,
Ministry of Fisheries,
New Secretariat,
Maligawatta,
Colombo 10.

11A. M.P.N.M. Wickramasinghe,
Secretary,
Ministry of Fisheries,
New Secretariat,
Maligawatta,
Colombo 10.

12. Hon. Kanchana Wijesekara,
State Minister of Ornamental Fish,
Inland Fish and Prawn Farming,
Fishery Harbour Development, Multi-day Fishing Activities and Fish Exports,
Ministry of Fisheries, New Secretariat,
Maligawatta,
Colombo 10.

12A. Hon. Piyal Nishantha De Silva,
State Minister of Fisheries,
State Ministry of Fisheries,

New Secretariat,
Maligawatta,
Colombo 10.

13. S.J. Kahawatte,
Director-General of Fisheries & Aquatic Resources,
Department of Fisheries,
New Secretariat,
Maligawatta,
Colombo 10.

14. Hon. Mahinda Amaraweera,
Minister of Environment,
Ministry of Environment,
"Sobadam Piyasa",
416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

14A. Hon. Ahamed Naseer,
Minister of Environment,
Ministry of Environment,
"Sobadam Piyasa",
416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

14B. Hon. Vijitha Herath,
Minister of Environment,
Ministry of Environment,
"Sobadam Piyasa",
416/C/1, Robert Gunawardana Mawatha, Battaramulla.

15. Secretary,
    Ministry of Environment,
    "Sobadam Piyasa",
    416/C/1,
    Robert Gunawardana Mawatha,
    Battaramulla.

16. EOS RO PTE. Limited,
    #20-02, 18, Robinson Road,
    Singapore 048547.

17. Sea Consortium Pte. Limited
    (X-Press Feeders),
    11, Duxton Hill,
    Singapore 089595.

18. Sea Consortium Lanka (Pvt.) Limited,
    No. 256, Srimath Ramanathan
    Mawatha,
    Colombo 13.

19. National Aquatic Resources Research and Development Agency,
    Crow Island,
    Colombo 15.

20. Central Environmental Authority,
    104,
    Denzil Kobbekaduwa Mawatha,
    Battaramulla.

21. Hon. Dr. Nalaka Godahewa,
State Minister of Urban Development,
Coast Conservation, Waste Disposal &
Community Cleanliness,
State Ministry of Urban Development,
Coast Conservation, Waste Disposal &
Community Cleanliness,
17th Floor, 'Suhurupaya',
Battaramulla.

21A. Hon. Arundika Fernando,
State Minister of Urban Development
and Housing,
Ministry of Urban Development and
Housing,
17th Floor, 'Suhurupaya',
Battaramulla.

21B. Hon. Thenuka Vidanagamage,
State Minister of Urban Development
and Housing,
Ministry of Urban Development and
Housing,
17th Floor, 'Suhurupaya',
Battaramulla.

22. Hon. Attorney General,
Attorney-General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

BEFORE : **MURDU N.B. FERNANDO, PC, CJ.**
YASANTHA KODAGODA, PC, J.
A.L. SHIRAN GOONERATNE, J.
ACHALA WENGAPPULI, J.
K. PRIYANTHA FERNANDO, J.

Appearances : Dr. Ravindranath Dabare with Ms. Savanthi Ponnamperuma instructed by Manasha Jayasinghe for the Petitioners in **SC/FR No. 168/21**.

Ms. Himalee Kularathna instructed by Manjula Balasooriya for the Petitioners in **SC/FR No. 176/21**.

Chrishmal Warnasuriya with Chathuranga Hathurusinghe, Ms. Dinali Nishshanka and Ms. Dimuthi Ginigaddara instructed by M.I.M. Iynulla for the Petitioners in **SC/FR No. 184/21**.

Nilshantha Sirimanne with Ms. Deshara Goonetilleke instructed by Paul Ratnayeke Associates for the Petitioners in **SC/FR No. 277/21**.

Manohara De Silva, PC, with Ms. Harithriya Kumarage instructed by Punya Jayatilleke for the 2nd Respondent in **SC/FR No. 184/21**.

Dr. Dan Malika Gunasekera with O.A. Sheran Madhawa Perera and Amila Pathum Fernando instructed by Ms. Punya Jayathilake for the 6th Respondent in **SC/FR No. 277/21.**

Dr. Romesh De Silva, PC, with Harsha Amarasekara, PC, Niran Ankatell, Shahila Wijewardana, Aadhes

Thureraja, Malin Rodrigo and Yasith Jayasundara instructed by D.L & F. de Saram for the 11th, 11A, 12th, 12A & 13th Respondents **SC/FR No. 168/21** and for the 11A & 11B Respondents in **SC/FR No. 176/21** and for the 16th, 17th & 18th Respondents in **SC/FR No. 277/21**.

Ms. Senany Dayaratne with Ms. Nishadi Wickremasinghe and Ms. Maheshika Bandara, Adithya Karalliadee and Ms. Janani Abeywickrema instructed by Ms. Thushari Jayawardena for the 20th and 21st Added Respondents in **SC/FR No. 168/21.**

Saliya Pieris, PC, with Sarinda Jayawardene and Dhimarsha Marso instructed by G.G. Arulpragasam for the 19A Intervenient Petitioner in **SC/FR No. 168/21.**

Nerin Pulle, PC, ASG, with Madhawa Tennakoon, DSG, Ms. Nayomi Kahawita, SSC, Kanishka Rajakaruna, SC, and Ms. Rushmi Wickramagamage, SC, for the 1st - 10th & 14th - 17th Respondents in **SC/FR No. 168/21** and for the 1st - 10th Respondents in **SC/FR No. 176/21** and for the 1st, 3rd - 7th Respondents in **SC/FR No. 184/21** and for the 1st - 5th, 7th - 15th & 19th - 22nd Respondents in **SC/FR No. 277/21**.

Argued on : 29/04/2024, 30/07/2024, 31/07/2024, 09/09/2024, 05/11/2024, 06/11/2024, 08/11/2024, 05/02/2025, 07/02/2025, 13/02/2025, 20/02/2025, 21/02/2025, 24/02/2025, 04/03/2025, 06/03/2025, 24/03/2025,

25/03/2025, 26/03/2025, 01/04/2025, 02/04/2025, 03/04/2025, 04/04/2025, 02/05/2025, 05/05/2025, 07/05/2025, 09/05/2025, 14/05/2025, 19/05/2025, 22/05/2025 and 27/05/2025.

Judgment delivered
On : 24th July 2025

"MV X-Press Pearl Marine Environmental Pollution Case"

Contents

Judgment of Court

Introduction and formalities

The incident

1. Sri Lanka, the island nation home to approximately 22 million people, nestled in the heart of the Indian Ocean with its unique tear drop shape, and blessed with its tapestry of natural wonders, rich and diverse eco systems, unmatched biodiversity, golden sands, turquoise water and its charismatic natural beauty, saw its tranquillity shaken in the months of May and June 2021, when the worst ever maritime disaster in the Indian ocean struck the paradise island nation.

   Even from global standards, the incident is recognised as one of the most severe marine chemical catastrophes that has occurred during the recorded history of planet earth.

2. MV X-Press Pearl, a container ship carrying the Singapore flag with 1,486 containers on board (of which 81 were identified as containing toxic, hazardous and dangerous chemicals), having arrived into the territorial waters of Sri Lanka, caught fire on 20th May 2021 due to obvious causes which arose within the vessel (more-fully described in this Judgment). It was ablaze by the 25th May, and finally sank on 2nd June 2021 within Sri Lanka's territorial waters, 9.5 Nautical miles away from the Port of Colombo, near Pamunugama close to Negombo, in the Western seas of Sri Lanka. It caused unprecedented devastation to the marine environment of Sri Lanka resulting in loss, damage, harm and injury to the marine environment - the unparalleled treasure trove of marine eco-systems, to marine life of flora and fauna and to the coral reefs. The harm caused to the nation's economy, more specifically to the socio-economic lifestyles of the fishing communities of the Western Province was tremendous.

3. This marine environmental disaster constitutes the largest recorded marine plastic spill in the world and carried its debris, especially the micro-plastics including tangible items referred to as 'nurdles', along the Western, Southern and Northern coastlines of the country. The Court takes judicial notice that to-date some amount of the plastic spill remains in the beaches of the Western coast. This most severe marine environmental catastrophe, which occurred four years ago, resulted in the widespread release of toxic and hazardous substances into the marine environment, poisoning ocean waters, killing marine species, and destructing phytoplankton. According to unchallenged scientific expert opinion, this disaster severely disrupted the delicate equilibrium of Sri Lanka's bio diversity, and continues to cause destruction and harm to Sri Lanka's marine environment.

4. This event struck the conscience of most environmentalists and concerned segments of the public at large. It gave rise to widespread condemnation of the event. There was a public outcry for an independent investigation into the causes for the disaster and also for the determination of the propriety, adequacy and legality of the response of the State to the incident and its aftermath. It became evident to this Court that these Fundamental rights Applications were the outcome of that public outcry, and had been initiated by the several Petitioners in good faith and in the larger public interest, with the objectives of securing judicial findings on what had exactly happened and its causes, identification of those responsible, holding persons who had infringed Fundamental rights within the Executive responsible and accountable, securing financial relief to those affected, and obtaining from Court relief for the restoration, preservation and future protection of the marine environment from those responsible for the pollution.

Filing of several Fundamental rights Applications

5. The four Fundamental rights Applications this Court was called upon to determine during a consolidated public hearing, constituted Public Interest Litigation (PIL), and according to the respective Petitioners were

instituted in the best interests of the Petitioners themselves, those whom they represent, the public at large and on behalf of the environment. They also had the objectives of ensuring the delivery of justice and securing meaningful and due relief and redress in respect of the severe and disastrous ecological and economic consequences suffered by the people of this nation. On an examination of the evidence placed before this Court and the submissions made by learned counsel, this Court entertains no doubt regarding the *bona fides* of the several Petitioners and the several parties who sought and obtained permission of Court to intervene. These Applications were indeed in national and public interest.

The parties

6. Whilst the Petitioners in SC/FR 168/2021 were the Centre for Environmental Justice (CEJ) (Guarantee) Limited and three others (a key official of CEJ and two others), in SC/FR 176/2021 the Petitioners were Rev. Fr. Iddamalgoda, a founder member of the Movement for Protection of Human Rights and National Resources and two others representing the fishing communities. In SC/FR 184/2021, Dr. Ajantha Perera, a specialist in Environmental Science and another (now deceased) were the Petitioners, whereas in SC/FR 277/2021, the Archbishop of Colombo and His Eminence Cardinal Malcom Ranjith, representing the severely affected fishing communities of the Western Province and the country as a whole were the Petitioners. They invoked the jurisdiction conferred on this Court by Article 126 read with Article 17 of the Constitution. These Petitioners came before Court cumulatively in view of the serious environmental degradation and pollution suffered by the nation, with the purpose of safeguarding the best interests of the general public. The afore-stated Petitioners are hereinafter collectively referred to as "the Petitioners" in this judgment.

7. In the four Fundamental rights Applications, the principal Respondents cited were the Marine Environment Protection Authority (MEPA) and its Chairperson, the Sri Lanka Ports Authority (SLPA), and the Harbour Master, an officer coming within the purview of the SLPA and the

Director General of Merchant Shipping (DGMS). These Respondents together with certain other State entities, namely, the National Aquatic Resources and Development Agency (NARA), Central Environmental Authority (CEA), Coast Conservation and Coastal Resources Management Department, Director General of the Department of Fisheries and Aquatic Resources, Director General of Wild Life, Inspector General of Police (IGP), the Secretaries to the relevant Ministries under whose purview these entities fell, and the Ministers in charge of such Ministries, were also named Respondents. These Respondents are hereinafter sometimes collectively referred to as the "State Parties" or as "State Party Respondents" in this judgment.

8. The registered Owner of the vessel 'MV X-Press Pearl' namely EOS Ro Pte. Limited, the bareboat charterer of the vessel Killiney Shipping Pte. Ltd and the charterer of the vessel under a time charter namely Sea Consortium Pte. Limited, all being parties in Singapore, and the Owner and Operator's Agent in Sri Lanka - Sea Consortium Lanka (Pvt.) Ltd. were also cited in the Applications filed before Court as Respondents. They are hereinafter sometimes referred to as "the Non-State Parties" and also as "the X-Press Pearl group".

9. The Honourable Attorney General was named as a Respondent in all Applications and the officers of the Attorney General's Department represented the 'State Parties' before Court. The Petitioners, Intervenient Petitioners (added as Respondents) and the 'Non-State Parties' were represented by learned President's Counsel and other learned Counsel respectively, referred to above at the commencement of this Judgment.

Pre-hearing proceedings and the grant of Leave to Proceed

10. The three Fundamental rights Applications, bearing numbers SC/FR 168/2021, 176/2021, 184/2021 and 277/2021 were initially heard before a bench of three judges. On 1st December 2021, Court granted *Leave to Proceed* in respect of the alleged infringement of the Petitioners' Fundamental rights guaranteed by Article 12(1) and 14(1)(g) of the

Constitution in SC/FR 176, 184 and 277/2021. In respect of SC/FR 168/2021, *Leave to Proceed* was granted on 1st March 2022.

11. Consequent to Leave to Proceed being granted and the afore-stated Respondents filing objections and Affidavits to the respective Petitions and the Petitioners filing counter Affidavits, the four Fundamental rights applications were set down for hearing and the parties filed pre-hearing written submissions.

Constitution of a Divisional Bench

12. As per the Record, thereafter, the Petitioners by way of Motions tendered to Court moved for the constitution of a fuller bench of this Court to hear and determine these Applications. That was in view of the national, public and general importance of the matters in issue. The then Honourable Chief Justice acting in terms of Article 132(3) of the Constitution, constituted this Divisional Bench on 10th July 2023 to hear and determine these four Fundamental rights Applications.

Interventions in public interest

13. The Bar Association of Sri Lanka (BASL) and the Transparency International Sri Lanka (TISL) moved to intervene in these Applications. On 6th October 2023, such intervention was permitted in SC/FR 168/2021 being the initial Application filed before Court, and the said two parties BASL and TISL and its named officers were added as Respondents to the said Application.

14. The Record also provides that meanwhile, the Honourable Attorney General representing the 'State Parties' have filed; a) several supplementary Affidavits of the Chairperson of the Marine Environment Protection Authority (MEPA) and the Director General of Merchant Shipping (DGMS), with copies to all parties before Court, and b) supporting documents relating to the outcome of the consultative process conducted by the Ministry of Fisheries and the MEPA, pertaining

to an initial payment of compensation to the coastal fishing communities. This is seen in the proceedings of the Court from March 2022 to October 2023. It is also observed that the Petitioners too, with notice to the Respondents have filed numerous Motions and provided updates pertaining to the continuing effects of the environmental catastrophe during the relevant period.

Private representation for the Chairperson of MEPA

15. Meanwhile, Dharshani Lahandapura, the Chairperson of MEPA during the relevant period, moved this Court to represent herself independently and not by the Honourable Attorney General, and such Application was permitted by Court. In order to substantiate her stand, in October 2024, Ms. Lahandapura in her capacity as the former Chairperson of MEPA, filed a further Affidavit together with numerous documents including the 1st Interim Report on the "*Environment Damage Assessment of the MV X-Press Pearl Maritime Disaster*". At the hearing she was represented by two learned Counsel.

Hearing and calling for and receiving additional material

16. On 29th July 2024, the instant Applications were taken up before the Divisional Bench. At that pre-hearing, all parties consented to the consolidation of all pleadings before Court. Learned counsel moved the Court to adjudicate the four Applications based on such consolidated material and the submissions of counsel at the consolidated hearing, and submitted that they will be bound by a single composite Judgement to be pronounced by the Divisional Bench, in respect of the four Fundamental rights Applications.

17. The hearing of these Applications commenced with the submissions of the learned counsel for the Petitioners in SC/FR 277/2021, Mr. Nilshantha Sirimanne addressing Court first as the lead counsel. Mr. Sirimanne in his submissions regarding the impact of the MV X-Press Pearl disaster to Sri Lanka as a whole, relied on the comprehensive study

and report published in August 2021 by the United Nations Environment Programme (UNEP), which was annexed to the Petition in SC/FR 277/2021 as "P12".

18. After commencement of the sittings of the Divisional Bench, another Report of an expert committee appointed by MEPA to assess the damage of the MV X-Press Pearl disaster was filed of record, as the 2nd Interim Report captioned the "*Environmental Damage Assessment of the MV X-Press Pearl Maritime Disaster*". It had nine annexures as well. These were first filed in November 2023 by way of soft copies and in September 2024, the Honourable Attorney General representing the 'State Parties' tendered hard copies.

19. During the hearing, which spanned a period of thirty plus dates culminating on 27th June 2025, the Court encountered many gaps in the disclosures made to Court, and therefore directed the State Parties to file and produce additional material, which included the following:
    (a) the statements made by the Harbour Master and the Master of MV X-Press Pearl to the Criminal Investigation Department (CID),
    (b) the proceedings before the Magistrate Court together with the Brief,
    (c) the Indictment filed in the High Court and the documents and productions relied upon by the Honourable Attorney General to prosecute the eight accused referred to in the Indictment, and
    (d) the pleadings and relevant information and material filed before foreign jurisdictions, London and Singapore to be specific, pertaining to the X-Press Pearl disaster and its aftermath.

    Those orders were duly complied with. However, the progress made in the complaint made to the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) as way back in the year 2021 pertaining to the matter in issue, was not tendered. Upon the Court directly requesting the said information, further time was moved by

CIABOC to tender the same. Following the conclusion of the hearing, the Court issued a further order on that Commission, which was complied with by the submission of an Interim Report. Reference will be made in this Judgment to that report as well.

20. Filing of additional documentation referred to above entailed the Petitioners and the Non-State Parties (i.e., the Owner/ Operator(s)/ Agent) to file further counter Affidavits and documents, and such filing being late as April 2025 was also permitted by Court. This was in order to arrive at a conscious and accurate determination of these Fundamental rights Applications and in order to protect the Fundamental rights of the Petitioners, to mete out justice not only to the Petitioners but also to the citizenry of this nation, and also to safeguard the Public Trust and the Rule of Law in our country. The ultimate task and goal of the Apex court as laid down clearly and precisely in our Constitution, is not only to protect the declared and recognised Fundamental rights of the citizenry, but also to respect, secure and advance such rights of the People on whom the sovereignty lies, by all the organs of government and by this Court. Thus, the Court strives to accomplish that objective. A subsequent part of this Judgment contains a further elaboration of that duty of Court.

21. In order to achieve such ideals, the Court heard all counsel exhaustively and upon conclusion of the hearing, the parties were permitted to file post-hearing written submissions based on the evidence presented and the oral submissions made. Learned counsel made use of that opportunity and tendered to Court such written submissions which this Court found (without exception) to be extremely useful.

22. Following that introductory overview, we now proceed to refer to the evidence and submissions, and judicially adjudicate the four Fundamental rights Applications.

Narratives

Common narrative

23. As regards the sequence of events, all parties to the several Applications fundamentally agree with the following description of the series of incidents that occurred in relation to MV X-Press Pearl.

24. The vessel MV X-Press Pearl was carrying dangerous cargo, and upon detection of a Nitric acid leak from one of the containers stowed in the deck during her voyage which commenced from Port Jebel Ali, the vessel made requests to Ports of Hamad and Hazira, seeking permission to discharge the leaking container. These requests were turned down by the respective ports and the vessel continued its voyage through a cyclone to reach Colombo, where she made another request to discharge the said container. On 20.05.2021, a fire reported onboard the vessel, which was initially brought under control, but re-ignited and continued for several days, until she sank off the coast of Pamunugama on 02.06.2021, after her crew was evacuated, causing the worst disaster ever to the marine environment of this country.

25. The extent of the marine pollution caused by the release of massive quantities of toxic/hazardous/dangerous chemicals, included 46,960 bags of Low-Density and High-Density Poly Ethylene in 20 containers, which spilled at least 70-75 billion plastic nurdles to the Western coastal belt. The marine pollution resulted in the death of 417 turtles, 48 dolphins, 08 whales and a large number of fish species that washed ashore after the incident and the analysis of the carcasses established the nexus of the causes of death to marine pollution.

26. Due to the heavy marine pollution, a fishing ban was imposed by the Government for a period of well over a year in the Western coastal area. This ban deprived the fisherfolk of their income, livelihood and their right to engage in lawful employment.

Narrative of the Petitioners, their claims and reliefs

27. Digressing at times from the afore-mentioned common narrative, the Petitioners provided the following narratives, which to a great extent over-lap. For this purpose, they have used Affidavit evidence, documentary evidence, and evidence which take the form of reports (interim and final) which includes expert opinion. The following narratives also contain a brief description of the relief sought.

28. All Petitioners alleged that the inadequacy of the level of preparedness and response mechanisms to meet up the challenges presented by the unprecedented environmental damage, exposed a lacuna in the existing legislation, which is attributable to the failure of the State to ratify and accede to International Maritime Conventions. This, the Petitioners alleged as a serious breach of the Constitutional duty of the State to protect and preserve the environment and its riches for the benefit of the community.

29. The Petitioners also alleged that what contributed to the disaster is the failure of the State party Respondents to perform their respective statutory duties, which they term as "gross inaction / failures/ negligence" of the State Party Respondents. The Petitioners claimed that the Owner /Operator(s)/Agent are liable to pay compensation for the environmental disaster - a direct result of their gross negligence that caused massive economic loss to the fishing community. The Petitioners also alleged that there is gross failure/negligence/inaction on the part of the Owner / Operator(s) / Agent, who failed to remedy and compensate for the marine pollution and the economic loss to the fishing community, that were caused due to the fire onboard and sinking of the vessel MV X-Press Pearl.

30. All Petitioners, in unison, prayed for declarations of infringement of Fundamental rights by the State Party Respondents. While the Petitioners in SC FR 184/2021 sought declarations of infringement of

Fundamental rights under Articles 12(1) and 14A, the Petitioners of the other Applications sought from this Court declarations of infringement of Fundamental rights guaranteed to them under Articles 12(1) and 14(1)(g).

31. Most of the Petitioners insisted on the conduct of an impartial investigation into the incident, appointment of an expert committee and make them assess the damages and impacts to the health and marine environment, loss to fisheries trade, and adverse effects on the tourism industry. They also called upon the Honourable Attorney General to prosecute the negligent State officials, under the Marine Environment Protection Authority Act, National Environmental Act and Fisheries and Aquatic Resources Act. Further, they sought from the Court an order for the disposal of debris in an environmentally friendly manner, and also an order for the establishment of several mechanisms.

32. The Petitioners in SC FR 176/2021, in addition to the already mentioned reliefs, sought from the Court to apply the Principle of Intergenerational Equity and direct the State to strengthen environmental assessment and monitoring plans. In SC FR 184/2021, the Petitioners sought to set up a committee of experts, in order to mitigate and manage the long-term effects of the disaster.

33. All Petitioners expected compensation to be paid to the victims, from amounts which are to be recovered from the Owner/Operator(s)/Agents, on the basis of Polluter Pays Principle.

34. Particularly, the Petitioners in SC FR 277/2021 sought the promulgation of Regulations under the Sri Lanka Ports Authority Act relating to; comprehensive schedules for describing hazardous/dangerous cargo, standard operating procedures for taking precautions to mitigate risks when transporting such cargo, preparedness and implementation of towing vessels, deployment of firefighting personnel for vessels in distress, reporting procedure on Agents to report/notify/disclose all

actions and measures taken by a vessel in distress to Harbour Master, Director General of Merchant Shipping to upgrade the existing operating procedures.

35. Since the Petitioners in SC FR 277/2021 represent the coastal fishing community who engage in fishing within the Western Province, they sought from this Court to award a sum of Rs. 7.77 billion for the members of that community who engage in fishing activities in Gampaha, Colombo and Kalutara Districts. They also sought a direction to have such monies under the name of the 1st Petitioner, and for compensation to be given to the fishermen who suffered losses due to the fishing ban.

36. The Petitioners of SC FR 184/2021 moved this Court to set up a Restoration and Conservation fund and to allocate no less than 70% of compensation to that fund, in addition to the setting up of a Contingency Plan.

Common position of the MV X-Press Pearl group

37. The Owner, Operators and the local Agent of the vessel MV X-Press Pearl, who were named as the non-State party Respondents (11th and 12th Respondents in SC FR 168/2021) were represented before this Court by one counsel throughout its proceedings. These Respondents have filed Statement of Objections in SC FR 168/2021 and 277/2021 and in addition to the Affidavit dated 18.11.2024 (tendered to Court by way of a Motion dated 19.11.2024) of Ravi Muttusamy, being the authorised Agent of Killiney Shipping Pte. Ltd, have also tendered to Court the Affidavits dated 07.06.2024 and 04.11.2024 (although tendered to Court by way of Motions dated 10.06.2024, 04.11.2024 and 07.11.2024), of Lim Kin Seng, being the authorised Agent of Killiney Shipping Pte. Ltd.

38. The Owner and Operators of the vessel have described their version of events that led to the fire onboard the vessel and her eventual sinking off the coast of Pamunugama, and the salient features that are relevant to the

factual narrative of the Petitioners. The descriptions so provided are referred to below in summary form.

39. The container with a cargo of Nitric acid was loaded onboard the vessel in the normal course of business, and the crew was not aware of the contents or of the manner of its packaging as the container was sealed.

40. After requests made to Hamad and Hazira were turned down to discharge the leaking container, the vessel had no other option but to sail to the Port of Colombo.

41. In the midnight of 19.05.2021, after the vessel dropped anchor in the outer harbour of the Colombo Port, the Master reported increased orange smoke suspected to be from chemicals. However, there was no fire onboard the vessel. On the same day, at about 4.47 p.m., the Operators were informed by the local Agent of the carrier that the Harbour Master's office and safety office were closed at that time and would check with them on the following day.

42. On 20.05.2021, at about 10.19 a.m., the local Agent requested the Port Control to discharge the leaking container at Colombo. At about 12.00 noon on the same day, the Chief Engineer reported a fire in Cargo Hold No. 2, which was communicated to the Colombo Port Control, and steps were taken to control the fire with the release of Carbon Monoxide (CO2). As the temperature of Cargo Hold No. 2 was increasing, the Colombo Port Control was asked for urgent assistance from shore.

43. Around 4.30 p.m., Officials boarded the vessel and inspected the exterior of the Cargo Hold, who found no necessity to discharge cargo immediately. They returned at about 6.30 p.m., in order to discuss matters with the Harbour Master.

44. By 11.00 p.m., there was a visible fire in the deck stow above Hold No. 2 and Port Control was informed and requested immediate assistance. Tugs Hercules and Megha assisted firefighting and the request made by the Master to bring the vessel into the harbour was refused. Sri Lanka Air Force dropped chemicals from air. The Sri Lankan Authorities assumed command over the situation.

45. When the vessel was on fire, on several occasions the Owners inquired from the authorities whether the vessel could be towed to sheltered waters towards the East of Sri Lanka to conduct salvage out of the monsoon conditions. Nonetheless, this request was denied. On 21.05.2021, the Owners engaged the assistance of SMIT Salvage under Lloyds Open Form of Salvage Agreement.

46. The vessel was abandoned on 25.05.2021.

47. Sri Lankan authorities were assisted by Indian Firefighting Teams with firefighting boats and equipment. However, they were unsuccessful in dousing off the fire.

48. There was no determination of the cause of fire by any authority. It is the position of the Owner and Operators that the crew had made all reasonable efforts to detect and extinguish the fire using proper means and all methods at their disposal onboard, but unfortunately could not control the fire. They denied being negligent and stated that they have acted at all times duly and properly and neither sinking of the vessel nor the attendant consequences arising thereof are attributable to the Owner/Charterers or the crew of the vessel.

49. The Owner and Operators have pleaded that this Court has no jurisdiction to make any order against them in the circumstances of this case, and asserted that they are not the 'polluter', as understood in the loosely applied phrase "polluter pays".

Key positions taken up by the State

50. The Harbour Master and the Director General of Merchant Shipping have denied the allegation of the Petitioners that they have infringed any Fundamental rights and asserted that they have diligently discharged their statutory duties and taken decisions, which are reasonable, under the circumstances.

51. The Marine Environment Protection Authority (MEPA), and in particular its Chairperson has taken up the following positions:
    (a) As the Chairperson of MEPA, she has directed the staff of MEPA to fully exercise their statutory obligations in safeguarding the marine and coastal environments from the adverse consequences arising from the MV X-Press Pearl incident.
    (b) On 19.05.2021, Sri Lanka experienced the highest number of deaths due to Covid-19 pandemic.
    (c) Despite the extraordinary challenges due to the pandemic and the nationwide lockdown, the national interest dictated immediate action, thereby, staff members were summoned to

duty without delay, created a bio-bubble for the staff and provided accommodation and logistical support to them, and converted the boardroom of MEPA to an operation centre.

(d) MEPA had no viable means to anticipate the risks due to the vessel's failure to declare the leakage of Nitric acid, as mandated by the United Nations Convention on the Law of the Sea, the International Convention for the Prevention of Pollution from Ships and other maritime laws.

(e) After the arrival of MV X-Press Pearl vessel, the following took place:

(i) On 20.05.2021, MEPA conducted a site visit with Officials, activated the National Oil Spill Contingency Plan at 4.30 p.m., convened the first virtual meeting of the Incident Management Team at 6.00 p.m., utilized modelling techniques with assistance from the International Tanker Owners Association to assess potential oil spill, and installed oil prevention booms as the vessel contained 300 MT of bunker oil.

(ii) MEPA issued Directives on the vessel from time to time. On 25.05.2021, issued a Directive to take urgent and immediate action to tow the vessel away from our waters and if that is not feasible, to relocate the vessel in the designated place of refuge, 50 Nautical miles westerly from the incident site, in order to mitigate maritime and fisheries hazards.

(iii) On 01.06.2021, upon the fire being extinguished, at a meeting convened by the President of the Republic and with the participation of other related State agencies, received instructions to tow the vessel to the previously identified location and expressed reservations of that course of action considering the fragile state of the vessel.

(iv) On 02.06.2021, received information that the vessel had grounded after towing 800 meters and issued a Directive to the Senior Salvage Master to take measures to avert further environmental degradation, and on 08.06.2021, directed Killiney Shipping Pte. Ltd, to take urgent steps to take precautions to prevent oil spill.

(v) Beach clean-up operations of over a 750 kilometers coastal belt were commenced immediately, and the specialised "Blue Machine" was utilised during this process to clean-up plastic nurdles.

(vi) Implemented environmentally responsible waste management, and stored the 1,700 MT of waste in 40 containers and stored them at a designated warehouse.

(vii) Conducted inspections of the underwater debris removal process.

(viii) Conducted an Environmental Damage Assessment and valuation with the assistance of 42 experts under 11 Sub committees, which was partially estimated to be USD 6.4 billion.

(ix) Initiated legal action by lodging a complaint to the Harbour Police on 23.05.2021.

Analysis of the evidence and findings

52. The factual basis on which the alleged infringement of Fundamental rights of the Petitioners was founded is what could be described broadly as the failure on the part of the State party Respondents to take necessary urgent steps and measures to duly and properly ascertain or assess the seriousness of the situation and the potential threat caused by the said vessel to the marine environment of Sri Lanka. It became clear that the said vessel was in a severe distress situation, especially after the first incident of fire that was reported aboard the vessel when it was anchored within the territorial waters of Sri Lanka on 20.05.2021 at 12.35 a.m., and

thereafter during the passage of 13 days of time until she sank, causing severe loss and damage to the economy and the marine environment of the country. They also alleged that in this instance, the Owner / Operators / Agent had jointly acted with foremost consideration on commercial interests.

53. It was the common position of the 1st to 10th, 14th to 17th Respondents in SC FR 168/2021, the 1st, 3rd to 7th Respondents in SC FR 184/2011 and the 1st to 5th, 7th to 15th and 19th to 22nd Respondents in SC FR 277/2021, that the actions/ omissions of the Owners / Operators / Master / Agents of the vessel caused the incident, rather than due to any action or omission on their part, due to them having acted reasonably in the circumstances and in line with their Statutory and Constitutional obligations. It was also the position of these Respondents that the Owner / Operators / Master / Agent were fully aware that failing to deal properly and timeously with a leak of Nitric acid consignment of several Metric Tonnes onboard the vessel, being a highly corrosive substance, would very likely result in a fire that would be difficult to extinguish or contain, in view of other dangerous cargo carried on board the same vessel. These Respondents further alleged that the contamination of the marine environment to an unimaginable proportion had occurred as a direct result of this failure which is clearly attributable to the Owners / Operators / Master / Agent.

54. It was further contended on behalf of these Respondents that the Port of Colombo was adequately equipped to handle situations where containers with dangerous cargo had leaked out its contents onboard and sought to draw parallels to a situation in which they successfully dealt with such a situation when the merchant vessel "Seaspan Lahore" started leaking Nitric acid onboard. The only difference between the incidents of X-Press Pearl and Seaspan Lahore was the sufficient prior notice given by the latter to the Port of Colombo regarding the leak of Nitric acid that occurred onboard the vessel.

55. The Owner, Operators and local Agent of the vessel, who are named as 16th, 17th and 18th Respondents to SC FR 277/2021 respectively, referred to as 'Non-State parties' and as 'Note-State party Respondents' by counsel while making their submissions, claimed that at all relevant times they have acted in good faith. They also advanced a counter allegation that the environmental disaster relied on by the Petitioners to claim damages from them, is a direct result of the actions or inactions of the State actors due to their failure to;
    a. provide emergency berthing,
    b. provide adequate facilities to control the fire onboard, and
    c. permit the removal of the ship, when it could be moved.

56. The conflicting positions presented by the parties for the consideration of Court compels it to undertake a detailed analysis of a considerable volume of factual matters disclosed from their pleadings and also from the material tendered by the learned Additional Solicitor General, upon being directed to do so by this Court by issuing orders of Court from time to time, and thereupon to arrive at reasonable conclusions on the contentious issues presented for determination by the parties, based on that material.

57. This Court in identifying the relevant factual matters considered the contents of the Petitions, Affidavits, documents and transcripts that were tendered by the parties in support of their respective positions (which are far too numerous to be named and identified individually at all instances and therefore a reference is made only where it is necessary to do so.

58. It is helpful if a brief description of the merchant vessel MV X-Press Pearl is made at this stage of the Judgment, before venturing to describe the narrative of her long voyage that commenced on 10.05.2021 from Port of Jebel Ali in Dubai, United Arab Emirates, with the intention of reaching Port of Tanjung Pelepas in Malaysia, before sailing back to Port of Jebel Ali.

59. The merchant vessel MV X-Press Pearl was built in 2021 and classified as a Steel Container ship. She was registered in the Republic of Singapore on 08.02.2021, under the ownership of EOS RO Pte. Ltd. The vessel had a gross tonnage of 31,629.00. She had engines fitted with propulsion power of 16,080 kW and was insured with the London P&I Club.

60. The Certificate of Entry issued by that Club indicates Killiney Shipping Pte. Ltd. (the Bareboat Charterer) as the Principal Assured while listing out as Co-assureds; EOS Ro Pvt. Ltd., Eastway Ship Management Pte. Ltd. (Managers), Marine Solutionz Ship Management Pvt. Ltd. (Crew Managers), C/O Eastway Ship Management Pte. Ltd. (Managers, Operators, and Ship Managers), Sea Consortium Pte. Ltd. (Operator) and X-Press Pearl Container Line (Singapore) Ltd. (Operator). Sea Consortium Lanka (Pvt.) Ltd., a Company registered in Sri Lanka, functioned as the local Agent of the Operators of the vessel MV X-Press Pearl, namely Sea Consortium Pte. Ltd.

61. On 20.05.2021 at 12.30 a.m. when the vessel MV X-Press Pearl dropped anchor at Colombo, with the Master and 24 crew members onboard, she was carrying a total of 1,486 containers out of which, 81 containers contained dangerous cargo. She was scheduled to discharge at the Port of Colombo, a total of 512 containers, including 22 that contained dangerous cargo.

62. For the purpose of convenience in the consideration of available material, this Court refers to the 16th to 18th Respondents in SC FR 277/2021, and 11th to 13th Respondents in SC FR 168/2021, as the Owner, Operators, Master, and Agent of the vessel. Whenever the need arises to make a collective reference to them in this Judgment, they are referred to as the "X-Press Pearl group", treating them as one composite entity. However, where it is found to be more appropriate to do so depending on the context, each of these Respondents shall be referred to individually.

63. Before proceeding to make any reference to the factual matters in relation to the voyage of the vessel that commenced from Jebel Ali and the involvement of any of the parties, namely the Operators, Master or the local Agents, it is of interest to inquire into the command structure of the operations of the vessel and the inter-relationships and the authority that the Operators had over the vessel.

Chain of Command

64. Management of the commercial, operational and navigational aspects of a container carrier vessel of this tonnage should naturally be taken as a complex affair, in which not one single decision maker is tasked with making all the key decisions, but several decision makers, who possess the required expertise in the related areas of knowledge, and who thereby ensures a well-co-ordinated operational mechanism in the management of the affairs of the vessel, its voyages and the crew, are also tasked with making key decisions.

65. It is of relevance at this stage to undertake an investigation into this important aspect, before we proceed to consider the submissions of counsel for the Petitioners on the question whether to impose any responsibility on any one or more of such key decision makers, who acted as Agents of a principal, for the pollution of the marine environment that occurred upon the fire onboard and sinking of the vessel MV X-Press Pearl.

66. The report of the Transport Safety Investigation Bureau (TSIB) of the Ministry of Transport, Singapore, in fulfilling its mission to promote transport safety through the conduct of independent investigations into air, maritime and rail accidents and incidents, released its report on 16.10.2023, titled "*Fire onboard X-Press Pearl at Colombo anchorage on 20th May 2021*", after conducting an investigation into the incident referred to in that title, which shall be referred to in this Judgment as the "Singapore Report". The involvement of the TSIB with the MV X-Press Pearl incident commenced with the email sent by the Director General of Merchant

Shipping on 21.05.2021 at 1.39 p.m., containing the instructions issued to the Operators and the Master of the vessel to appoint qualified Salvors to immediately deal with the fire incident and to initiate emergency response service.

67. In that report, the TSIB, notes "*According to the International Code for the Safe Management of Ships (ISM Code) as defined in SOLAS IX, as amended, to ensure the safe operation of each ship and to provide a link between the Company and those onboard, every Company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.*" (vide page 5, footnote 2).

68. During the hearing of these consolidated Applications that had taken over 30 days to complete, all counsel from time to time drew attention of this Court, to the contents of the Singapore Report which they thought as relevant to their respective positions, the findings of fact arrived by the investigators and even beyond, with a view to support their endeavour to impose liability on certain Respondents, who are State and Non-State Parties, as being responsible to the unprecedented level of pollution caused to the marine environment.

69. The State Parties as well as the Non-State Parties repeatedly made references to certain findings contained therein, which in their opinion tends to support their respective positions, to ward off making any findings against them of that liability. It appeared to this Court that all the parties have therefore relied upon the contents of the Singapore Report, in order to find support to a particular proposition that they intended to place before this Court and for that purpose relied on its contents.

70. Strangely, in the post-hearing written submissions of the X-Press Pearl Group, a different position was advanced by the learned President's

Counsel who represented them, citing Section 21(1) of the Transport Safety Investigations Act of 2018, a law applicable in Singapore, which states that "*A report under section 20 is not admissible in evidence in any civil or criminal proceedings or other proceedings*", it was submitted that the "*purpose of these investigations are to promote safety and to learn lessons from incidents. It is understood that there is belief that the freedom and leeway afforded to 'safety investigators' will be undermined if their reports are used in litigation, which is why they are not permitted to be used in evidence*".

71. This submission placed the status of the investigators attached to the TSIB, in the correct perspective. Section 21(1) of the Transport Safety Investigations Act applies to the TSIB as it is also based in Singapore. If the investigators are called upon to give evidence in a Court of Law and made to tender the documentary material they have acquired during their investigations, certainly the possibility of undermining the '*freedom and leeway'* afforded to them as their findings would be scrutinised by the litigant parties for validity, and their testimonies would be tested by cross-examination along with making legal and factual challenges to their findings. Certainly, such a scenario would prove counter-productive to the very purpose on which the TSIB is established to achieve. Section 9 of the said Act, in addition to setting out the multiple functions conferred by the Statue on TSIB, also includes the functions that are not conferred on that Bureau. Section 9(2) of that Act identifies three such areas, as follows:

    (a) to apportion blame for any transport occurrence,
    (b) to provide means to determine the liability of any person in respect of any transport occurrence, and
    (c) to assist Court proceedings or other proceedings between parties (except as provided by this Act, whether expressly or impliedly).

72. The intention of the Singaporean Legislature is clear that it was never meant to create the TSIB as an investigative body in the traditional sense but rather a body that independently investigates transport occurrences with a view to "*improve transport safety*".

73. In this context, it is relevant to note here that the Director General of Merchant Shipping had taken prompt action to report the situation onboard the vessel MV X-Press Pearl to TSIB on 21.05.2021 through an email sent at 1.39 p.m. This is indicative of the importance placed by him to have an independent investigation conducted into the incident in the vessel carrying the Singapore flag.

74. It became apparent that some of the factual references made by counsel and certain findings that were relied on contained in the Singapore Report, are at variance with the findings made by this Court by relying on direct evidence presented before it, by way of material tendered annexed to Affidavits, vouching for accuracy. It is in these circumstances, that the necessity arose to make references to the factual findings made by the TSIB, particularly to the ones that do not align with the findings made by this Court.

75. Hence, whenever this Court found that the factual findings run parallel to TSIB findings, such is mentioned along with the evidence that was relied on to arrive at such findings. Similarly, where the findings differ, that too is taken note of and tested against the available evidence. This exercise is limited only to making references to factual findings that disclose what had taken place onboard the vessel during its most crucial times.

76. This Court is very much conscious of its Constitutional mandate in seeking out for truth, in arriving at its own findings on the issues presented before it for determination by the parties. This Court would not shirk away from effectively discharging the primary responsibility conferred on it, and in that regard, certainly would not be guided by the views expressed by other entities, and would not use them as substitutes.

77. In fact, it was this Court that pointed out to counsel who made references to the Singapore Report, that "*The sole objective of TSIB's marine safety investigations is the prevention of marine accidents and incidents. The safety investigations do not seek to apportion blame or liability. Accordingly, TSIB*

reports should not be used to assign blame or determine liability." (vide p. 2 of the Report).

78. Lim King Seng, in his Affidavit dated 04.11.2024, makes an introduction to the several entities (some of whom are named as Respondents to these proceedings) that are involved with the vessel's operations. The registered owner of the vessel, EOS Ro Pte. Ltd, is a finance leasing company and is said to have had no involvement either in its operations or management. Killiney Shipping Pte. Ltd. is the bareboat charterer of the vessel and had exclusive possession and control over the navigation and management. Sea Consortium Pte. Limited (Singapore), trading under the name X-Press Feeders had its authority limited to give orders as to employment of the vessel. Eastaway Ship Management Pte. Limited was appointed by Killiney Shipping Pte. Ltd. to manage the technical operations, services and maintenance of the vessel and its crew.

79. Importantly, in relation to the command structure over the vessel, it was the Master of the vessel who offered some clarification. In his statement to CID on 31.05.2021, Master of the vessel, Tyutkalo Vitaly, stated that the Company had its Cargo Planners, and Technical and Marine Superintendents based in Singapore to manage the affairs of the vessel, in addition to several other officers, who functioned whilst being onboard, under his command. The Company is assisted by its local Agents in the management of affairs relating to cargo operations and other allied services, at relevant ports of call.

80. In this connection, it would be helpful if the names and the designation of several officials and their relationship with the vessel MV X-Press Pearl are identified and named, as the three segments in this part of the Judgment makes repeated references to them, in describing what they did and at what point in time.

81. It appears that Captain Yong Sheng Wu (who according to material presented to this Court, acted as the Marine superintendent of the vessel

MV X-Press Pearl with email domain "eastaway.com" of Eastaway, 11-01, 78, Shenton Way, AIG Tower, Singapore) as well as the "Owner's Agent Only". Terence Goh with email domain "x-pressfeeders" functioned as Vessel Operations and Planning. Dennis Yeong (Operations/Singapore Agency) and Royce Joseph, Vessel Planner, both of X-Press Feeders while Arunkumar Sekaran, also of X-Press Feeders, acted as the Technical Superintendent for the vessel.

82. Jing Liu, with email domain "@londonpandi.com", functioned as the Senior Claims Manager while Jeffrey Lim functioned as the Senior Manager, Legal and Claims for X-Press Feeders, whereas Martina Parab too functioned with email domain "x-pressfeeders.com". Rohan Milind Padnis and Manish Makan with email domain "eastaway.com" too were involved in certain instances and participated in the decision-making process regarding the vessel. Almost all of them appear to have discharged their respective functions and responsibilities while being based in Singapore.

83. The X-Press Feeders operated from their office located at 11, Duxton Hill, Singapore, which is also the address of the bareboat charterer of MV X-Press Pearl, Killiney Shipping Pte. Ltd. Interestingly, Killiney Shipping Pte. Ltd. has also become the "*owners of the X-Press Pearl Vessel as at the time of her loss …*" (vide paragraph 2 of the Affidavit of Lim Kin Seng dated 07.06.2024 – tendered to Court with the Motion dated 10.06.2024, by the 12th Respondent (in SC/FR 168/2021) X-Press Feeders, 11, Duxton Hill, Singapore, in SC FR 168/2021).

84. In relation to activities in and around the Port of Hamad on behalf of the vessel, Transvision Sea Shipping Line Agents Ltd. acted as her Agent through Juned Saleem, Afrin and Vishal.

85. During the relevant time, Agents for the Operator Sea Consortium Pte. Ltd. and the Master of MV X-Press Pearl in Sri Lanka were Sea Consortium Lanka (Pvt.) Ltd. (18th Respondent in SC/FR 277/2021) with

the domain "x-pressfeeders.com.lk". Arjuna Hettiarachchi was the Chairman of the Company, Sanjeewa Samaranayake functioned as the Assistant General Manager (Operations) and Susantha Sampathawaduge functioned as the Deputy Manager (Operations) of Sea Consortium Lanka (Pvt.) Ltd. It was Amila Sandun Lunugama also of Sea Consortium Lanka (Pvt.) Ltd., who submitted the Declaration for Dangerous Cargo to the Harbour Master in terms of the statutory obligation to do so.

86. Suzanne Lewis of GAC Shipping Ltd., acted as the correspondent (only) during the relevant time for the London P&I Club which provided insurance for the vessel.

87. With this backdrop of information relating to the manner of managing the affairs of the vessel and the relevant individuals involved with the management, and along with the familiarity acquired over the command structure, this Court now proceeds to set out the details of the voyage undertaken by the vessel from its commencement.

88. The merchant vessel MV X-Press Pearl began her final voyage from the Port of Jebel Ali and then called on Port Hamad of Qatar, before berthing at Port Hazira of India. The next port of call was Colombo in Sri Lanka and the vessel was thereafter scheduled to call on Port Klang in Malaysia, before reaching her last scheduled Port of call in Singapore.

89. The different sequences of events that occurred during the final voyage of the merchant vessel MV X-Press Pearl, are considered in this part of the Judgment after separating them, and are referred to in detail under the following three main segments:

    (i) From the Port of Jebel Ali to the Port of Hazira (10.05.2021 to 15.05.2021).

    (ii) From the Port of Hazira till arrival in Sri Lanka's waters (15.05.2021 to 20.05.2021).

(iii) From dropping anchor in the outer harbour of Colombo to the sinking of the vessel (21.05.2021 to 02.06.2021).

MV X-Press Pearl journey to Colombo

From the Port of Jebel Ali to the Port of Hazira

90. The vessel MV X-Press Pearl reached the Port of Jebel Ali on 10.05.2021, around noon (in U.A.E. time). After completion of the loading of cargo as scheduled, the ship set sail from Jebel Ali at about 3.00 p.m. She was carrying, among many other containers of dangerous cargo, a container which contained 29 metric tons of Nitric acid of 70% concentration, bound for Port Klang of Malaysia. The next Port of Call of the vessel was Port Hamad.

91. The ship arrived at Port of Hamad on 11.05.2021 around 3.30 a.m. (Qatar time). Cargo operations were to commence at 6.00 a.m. While the cargo operations were underway, a crew member noted a leak of some greenish liquid with a strong chemical smell on the deck, which was then traced to be a leak from the container No. FSCU 7712264, containing Nitric acid, stored on the deck of Bay 11, Row 5, above Cargo Hold No. 2, at a position described in the shipping industry as, "110582".

92. The Master of the ship, after verifying the contents of the container and the details of the shipper from available documentation, immediately contacted the vessel's Planner Terence Goh, over his mobile phone and conveyed the situation onboard. It appears that the Master had taken this particular course of action to communicate the situation immediately and to request advice, without using electronic mail as a means of communication, due to certain technical issues that had arisen in the past causing communication delays. The crew, on the instructions of the Master, used sea water to wash away the corrosive liquid from the deck, but was forced to abandon that exercise due to objections raised by the Hamad Port Control, in view of certain environmental concerns. Saw

dust was used instead of sea water, to soak up the corrosive liquid, during the period the vessel was within the protected area.

93. In addition to the said telephone conversation, the Master of the vessel kept the vessel Planner informed of this unexpected development also by way of email, upon which a chain of emails, carrying instructions as well as information, followed. In that first email, the Master informed the Planner that the leaking container already had "*heavily corroded*" the hatch cover and sought his directions to off-load the leaking container. He then followed up that email with a WhatsApp message sent to Terence Goh, who is responsible for the vessel's Operations and Planning. The WhatsApp message conveyed that "*1 DG leakage. Pl check email sent 20 mins ago*". That message was sent at 9.47 a.m. (ship's time).

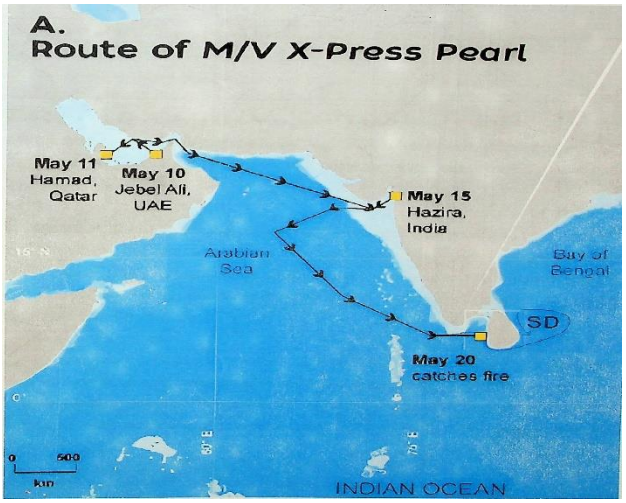
94. At 6.12 a.m. Juned Saleem of Transvision Sea Shipping Line Agents Ltd. (Agents for Transvision at Port Hamad) wrote to Martina Parab informing her of a "*leakage*" with an attachment. Royce Joseph, another vessel Planner, sent an email at 9.12 a.m., to Terence Goh informing that the Master reported a leak from a container. The Master once again sent an email to Juned Saleem at 10.41 a.m., requesting his advice stating "*What to do with leaking container which already heavily corroded hatch cover*" and warned that"*… if not discharged, it will continue until POD MYPKG*".

95. Martina Parab, from her email account of x-pressfeeders.com, sent an email to Royce Joseph at 10.47 p.m., whom she requested assistance as soon as possible on this issue, following up her earlier telephone conversation. Juned Saleem informed Martina Parab by email at 1.40 p.m., informing her to "*discharge the container at Hamad, we have instructed the agent to take direct delivery of the unit from the port and re-work*" who then replied at 1.53 p.m. stating that "*Will advise the same to agent. Advise us the process and formalities for discharge at Hamad*". She then once more reminded Juned Saleem, with copy to the ship by an email sent at 2.15 p.m., stating that "*Urgently advise your Hamad agent to take direct delivery*

of the unit from the port and rework the unit to make it seaworthy for loading on this or subsequent sailing".

96. This particular chain of emails gives away two important factors to take note of, in relation to the matter presented before this Court. There was no question that the container with its continuous leakage of Nitric acid, was unseaworthy and owing to that very reason, was not in a position to be retained aboard. It is also indicative that the unseaworthiness of the leaking container was such that it should not be loaded back unless and until it is re-worked and made seaworthy. This was the situation of the leaking container as at 2.15 p.m. on 11.05.2021, and that too was after remaining it on the deck of the vessel for a period of time of only about 15 hours, after it was loaded onto the vessel. As noted and reported by the Master, during this relatively short period of time, the continuous leaking of Nitric acid caused substantial damage to the deck of the vessel, and rendered the container unseaworthy.

97. As felt by the Planners, the urgency to act swiftly to offload the leaking container is evident from the email sent by Terence Goh to Juned Saleem directing him "*to complete it in 30 minutes as the vessel will leave in 1 hr".* Then, the bad news was conveyed by Afrin of Transvision Sea Shipping Line Agents Ltd., in his email to Terence Goh at 2.23 p.m., which conveyed that "*Due to Ramadan holidays and timing, our agent facing issues to take the direct delivery at Hamad, request to discharge at Hazira".*



98. When Martina Parab wrote to Juned Saleem at 3.18 p.m., it was obvious that she was not informed of the futility of pursuing the option of off-loading the container at Port Hamad any longer, and requested him to "*… expedite the process"* as the "*… vessel will complete by evening hours prior [to] which we need to finish all formalities."*

99. They did not waste any time after Hamad declined the request. At 3.55 p.m., Afrin wrote to Juned Saleem, requesting from the latter the details of the Agent at Port Hazira. Martina Prarab replied to Juned Saleem at 4.24 p.m. that "*Hazira agents are copy holder of this email, added Hazira office"*. Thereupon, Juned wrote to Vishal of Transvision Sea Shipping Line Agents Ltd. requesting him to "*coordinate with XP feeders and take delivery of cargo in Hazira and rework unit to make it seaworthy for loading on this or subsequent sailing"*.

100. With this development, Vishal sent an email at 5.08 p.m., to vessel Planner Royce Joseph with a copy to Deepak Bhadra of Merchant Shipping Services Pvt. Ltd., under the heading "*TOP URGENT*", stating "*Pl advise the procedure to discharge the subject container at Hazira to be reworked to make it seaworthy for loading on this or subsequent voyage"*. The last of the emails for the day was sent by Royce Joseph at 7.42 p.m., directing Juned to "*liaise with your local agent for the formalities*".

101. On 12.05.2021, Vishal followed up with an email sent to Royce Joseph and Deepak Bhadra at 12.12 p.m. "*whether you received any revert from Hazira*" to which the reply came at 4.37 p.m. from Vishal "*awaiting reply*".

102. The situation onboard the ship did not improve at all with the passage of time, but deteriorated to the extent, as indicative from the fact that a high-level bilge alarm was sounded from Cargo Hold No. 2 in the morning hours of 13.05.2021, making the Master of the ship to go down to the hold to personally inspect it. He saw that the bilge wells were full of water, which he ordered to be pumped out of the vessel. During this inspection, although no chemical smell emanated from Cargo Hold No.

2, the Master suspected that the Nitric acid, that had leaked out from the container, would have seeped into the Cargo Hold No. 2 mixed with water, through the gaps of the hatch covers, covering that cargo hold.

103. The reply that was anxiously awaited by the Master on his request for off-loading, was sent by Deepak Bhadra to Vishal on 14.05.2021 at 4.45 p.m., by email. That email read "*Terminal advise, they are unable to handle the leakage container and will not discharge here at Hazira, try next possible port*" and the reason being "… *the extent of heavy leakage discharging may affect terminal property, difficult to permit.*"

104. The vessel called at the Port of Hazira on 15.05.2021 around noon. In the same afternoon, "*orange/light yellow*" coloured smoke was observed by the crew, emitting from the leaking container. It was also noted that the hatch cover was heavily corroded by the constant leaking of Nitric acid. The leak rate was estimated as 0.5 to 1 litre/hour. The Master informed this development on 15.05.2021 to Terence Goh, via a WhatsApp message sent at 5.22 p.m., to which the reply was a direction to "*investigate*". After investigation, the Master was of the view that the emission of smoke was due to chemical reaction that commenced when the leaking Nitric acid came into contact with the red coloured paint of the Hatch Cover. This finding was conveyed by the Master, via a WhatsApp message sent at 5.24 p.m., by adding "*lucky, that no fire*".

105. After Hazira, the next scheduled port of call was Colombo. The advice issued by Hazira to make the request to the "*next possible port*" is suggestive of the position that they were cautious not to mention Colombo, instead allowed the Operators to determine the port at which they wished to discharge the leaking container. It is important to note the significant duration of advance notice given to Port Hazira, in relation to the ship's request to off-load and re-work the leaking container. It was at 2.33 p.m. on 11.05.2021 that the decision not to allow the offloading request was conveyed to the vessel. The Operators have thereupon directed the Agents to make a request to Hazira.

106. The details of the leaking container were dispatched to Hazira on that day itself by 3.55 p.m. Given the enthusiasm with which the parties have acted on this issue, it is highly unlikely that there was a delay in submitting all the necessary information to Hazira Port Control for a ruling. The ruling of the Port Control that the leaking container could not be permitted to off-load was made known to the vessel around 4.45 p.m. on 14.05.2021. It was around 4.24 p.m. on 11.05.2021, when Martina Prarab replied to Juned Saleem that "*Hazira agents are copy holder of this email, added Hazira office*". The decision of the Port Control, denying the request to discharge, came after a period of almost four days. That is the duration time the Port Control at Hazira was afforded by the Operators, which allowed the former to evaluate and assess relevant factors and to arrive at an informed decision. The fact that the decision to deny off-loading was due to "… *extent of heavy leakage may affect terminal property* …" as noted by the Port Control, in itself is a strong indication that they were given a full disclosure of the situation that prevailed onboard the vessel, regarding the leaking container, although the documentation that had actually been tendered for their consideration is not clear from the available material.

From the Port of Hazira till arrival in Sri Lanka's waters

107. On 15.05.2021, the vessel left Port of Hazira at about 7.00 p.m., commencing her Colombo bound voyage. The weather report sounded ominous and the cyclone "Taukatae", classified as a Category 4 cyclone, was moving northwards from the sea area located to the South of Port Hazira. It was expected to reach the Western coast of India on 17.05.2021, cutting across the already plotted down sea route for the vessel. Accordingly, the vessel altered its course, and opted to sail around the projected path of the cyclone, for the purpose of minimising its adverse impact on her, thereby covering more distance in rough seas, and more importantly, with more hours of continuous leaking of Nitric acid.

108. The rough seas, following the disturbed weather, brought about more 'pitching' and 'rolling' of the vessel than usual, causing more stress on the protective metal caging meant to protect the plastic tubs (referred to as Intermediate Bulk Containers, and referred to with the acronym 'IBCs', in the relevant documentation), in which Nitric acid were stored. These external metal caging, covering the plastic tubs were meant to provide structural support to withstand the effects of accumulated weight made to bear upon them, when the IBCs are stacked inside a container.

109. On 16.05.2021, Master of the vessel, discussed the situation with a crew member. The transcript of the Voyage Data Recorder indicates that at 2.45-2.48 a.m., the Master, who is a Russian national, had said that "… *everyday send rate of leakage … corrosion may be, it is very corroded. Next day we found smoke orange, like fire and whole crew started firefighting. Finally found no this is very corroded chemical and due to your paint red … orange smoke coming from Bay 10.*" He has also added that after the container started leaking "… *we checked everything, MSDS sheets, manifests also … we know everything inside … some small many packages … one package was broken and leaking these two, three days now empty*".

110. The Singaporean Investigation Team, in its report indicates (at p. 88) that they found there was another container that was expected to be shipped in a different vessel (*GESU 28377027*) by the same shipper who shipped the leaking container on board the vessel MV X-Press Pearl, that had also started leaking Nitric acid at Jebel Ali Port itself. During re-working of that container at the Port, it was found that the Nitric acid was stored in IBCs, which had badly corroded protective metal caging. The investigators opined that the corroded metal caging had compromised the integrity of the IBCs stored within the container, particularly of the ones that were stored at the bottom of the stack.

111. It is very likely that the condition of the IBCs that were stored in the container *GESU 28377027* are almost identical, if not similar, to the

condition of the IBCs that were stored in the leaking container and for the same reason, would have suffered even more distortions to its protective metal caging, as the vessel navigated through the cyclonic weather, which obviously caused the vessel to 'pitch and roll' stronger than usual. In all probability, due to the constant exposure of the metal caging of the IBCs to Nitric acid, its structural integrity would have been heavily compromised. The leaking container had 18 IBCs stored within, containing Nitric acid of more than 70% concentration.

112. This is a factor which clearly had an impact on the plastic tubs containing Nitric acid, causing more IBCs to leak its contents. The validity of this factual assumption, was proved correct by the subsequent developments, particularly when the crew heard sounds like "*falling down drums*" inside the leaking container on 20.05.2021 and observed the large volume of smoke in Cargo Hold No. 2 (vide VDR recordings at 0921 hrs).

113. During the extended period of the voyage, routine inspections of the leaking container that were carried out by the crew since leaving Hazira, had to be suspended along with inspections made on the deterioration caused to the deck from leaking Nitric acid, on account of cyclonic weather.

114. Late into the night of 16.05.2021, the Master, upon being directed "*to control the situation*" by the Company, replied the same in an unusual manner by using harsh language (at 2350 hrs/ ship's time) and said "*what f… control. We need to discharge … already three ports tell cannot discharge [but] you order me to control*". He also stressed the point about the cause of the orange smoke, by stating that "*I think it may be fire, because smoke is too much*". This is the first reference made by the Master of a possible "*fire*" for he was convinced there is no other explanation other than that to the emission of orange smoke in such high volume.

115. The Master of the vessel MV X-Press Pearl kept on updating the Operators regularly with current rate of leakage by sending emails on 17.05.2021 and 18.05.2021, which, if accurately reflects the position, apparently remained constant at the earlier estimated value at the rate of 0.5 to 1 litre/hour. However, when Terence Goh, by a WhatsApp message sent at 1131 hrs checked on that information, Master noted that "*anyway DG will on o/b till MYPKG"*, to which Terence Goh replied "*Yes, Capt … unfortunate[ly]".*

116. On 18.05.2021, there is yet another series of emails, that were exchanged among Terence Goh of Vessel Operations and Planning, Dennis Yeong of Operations/Singapore Agency (using email domain "x-pressfeeders.com") and an entity called SinOps (email address being "SinOps@x-pressfeeders.com").

117. They all are based in Singapore. Therefore, the time of originating emails ought to be adjusted according to the time gap between Singapore and Sri Lanka, by deducting 2 ½ hours from Singapore time to determine the relevant time in Sri Lanka, since the time of generating these emails are very relevant to the issues under consideration.

118. On 18.05.2021, at 3.00 p.m. (corresponding Sri Lankan time - 12.30 p.m.) Terence Goh checked with Izhan Redwan of SinOps@x-pressfeeders.com, whether there would be any issues in handling the leaking DG container in "*Sin/TPP discharge*". Dennis Yeong emailed back to Terence Goh at 3.26 p.m., (corresponding Sri Lankan time - 12.56 p.m.) conveying his position on the matter. His decision was "*Since the said container is bound for port of discharge port klang, pl handle this at POD"*. Terrence Goh then writes back to Dennis Yeong at 3.35 p.m., (corresponding Sri Lankan time - 1.05 p.m.) "*Just confirmed vessel will omit PKG and unit will discharge in Sin*".

119. Dennis Yeong was apparently not impressed with that development but accepted the decision by sending a cynical reply at 4.24 p.m.

(corresponding Sri Lankan time - 1.56 p.m.), noting that "*Another dg leaking container to discharge at Sin"*. Terrence Goh, with his email sent at 4.52 p.m. (corresponding Sri Lankan time - 2.22 p.m.), requested Dennis Yeong to inform the vessel to provide him with the daily report of the Master containing leakage rate and the quantity of waste collected so far etc. After a little over an hour, Dennis Yeong attached "*SDS. Packaging certificate and cargo manifest*" to his email sent at 6.09 p.m., (corresponding Sri Lankan time - 3.39 p.m.).

120. On 19.05.2021, by an email sent at 9.03 a.m., (corresponding Sri Lankan time - 6.33 a.m.) Dennis Yeong requested Terence Goh to provide a "*copy of bay plan and current location of DG container*". The required bay plan was sent by Terence Goh at 11.42 a.m. (corresponding Sri Lankan time - 9.12 a.m.).

121. It is important to note that, to this particular chain of emails that was exchanged between Dennis Yeong and Terence Goh, the Marine Superintendent of the vessel, Captain Yong Sheng Wu, too was included and was accordingly made privy to all the updates, namely the decision to discharge the leaking container at the Port of Singapore, in spite of the decision made earlier on in this regard, to discharge same at Port Klang. It is reasonable to assume that information regarding the bay plan, "*SDS*", Packaging certificate and cargo manifest were called by the Operators for the purpose of submitting them along with the request to Singapore Port Control in seeking its permission to discharge the leaking container.

122. Captain Yong Sheng Wu, in his email sent to the Master of the vessel following a telephone conversation at 10.55 a.m., (corresponding Sri Lankan time - 8.25 a.m.) reconfirmed his understanding to the cause of the orange smoke being "*due to corrosion*" and assured the Master that there is *"no risk of fire"* onboard, "*but"* with a qualification by adding to that assurance "*at this moment*". However, in the same email, he issued instructions to Dennis Yeong of Operations/ Singapore Agency to "*check*

the possibility to discharge this DG container in port of Colombo", because the estimated time of arrival at Colombo was around midnight on that same day.

123. Interestingly, Captain Yong Sheng Wu sent an email at 1.37 p.m., (Sri Lanka time 11.07 a.m.) the same day to Terence Goh, which was also copied to the vessel. In that email, Captain Yong Sheng Wu has directed the Planner Terence Goh, to "*… ensure this DG container to be discharged in port of Colombo*" and cited the reason for his decision by adding that it is "*very risky to keep it onboard*." This email was also copied to Sanjeewa Samaranayake of Sea Consortium Lanka (Pvt) Ltd, the local Agent for the Company. The time gap between the two decisions, namely the decision that there was no risk of fire and the orange smoke emission was simply due to corrosion and the decision to "*ensure this DG container to be discharged in port of Colombo*", is just two hours and forty minutes. It will be interesting to inquire into finding an acceptable reason for this significant shift of approach by Captain Yong Sheng Wu.

124. Master of the Vessel, thereupon sent an email at 9.02 a.m. (in the vessel's computer, time is kept at GMT and, by adding 5 ½ hours, corresponding Sri Lankan time could be arrived at as 2.32 p.m.) to Yong Shen Wu, stating "*We don't know why orange smoke coming from the container already 10 days. Photos attached, no risk of fire, strong chemical smell.*" This email too was copied to Samaranayake and he was fully aware of the situation onboard and had in possession all relevant details.

125. Amila Lunugama of Sea Consortium Lanka (Pvt) Ltd, sent an email on behalf of the Operators, Master of the vessel, to the Navigation Safety Section of the Port of Colombo at 4.44 p.m., on 19.05.2021, along with images of several documents as attachments ("doc.173.pdf; LOCAL. Pdf: INTRANSI. Pdf). No introductory remarks were made to the recipient of that email, indicating the purpose of that email or what it contains. This email was also copied to Samaranayake. Lunugama, sends another email to Navigation Safety Section, at 4.45 p.m., on the same day, but this time

his email had the text "*pl find attached DC Declaration" and* an attachment introduced as "*DC Declaration*".

126. It appears that these two emails were sent by the local Agent for the Operators and Master, in fulfilling a Statutory requirement and therefore by following a mere routine automatically. Even the documentation so sent seemed to contain inaccuracies as Lunugama sent another email to Navigation Safety Section at 4.14 p.m. on 20.05.2021 sending "*DC Declaration – ADDITIONAL INTRANSIT UNITS*". This was after the fire was reported on board the vessel by the Master to Port Control and required the Port Control to dispatch a fire crew. He once more sends "*correct attachment*" to the Navigation Safety Section at 5.35 p.m. on the same day.

127. The requirement of a submission of a declaration of dangerous cargo imposed on an Owner, Agent or Master of every vessel arriving in any specified port, is a Statutory duty, imposed in terms of Regulation 7(1)(a) of the Sri Lanka Port Authority (Dangerous Goods) Regulations No. 1 of 1987, published in the Government *Gazette Extraordinary* No. 462/16 on 16.07.1987. This Regulation required the Owner, Agent or Master of every vessel carrying dangerous goods "*… where they are packaged, shall, at least forty-eight hours prior to such arrival or departure, give written notice thereof to the Harbour Master indicating the estimated time of arrival or departure and submit a declaration substantially in Form "C" in Schedule I hereto; …".*

From dropping anchor in the outer harbour of Colombo to the sinking of the vessel

128. The vessel dropped anchor at 12.30 a.m. on 20.05.2021 in the anchorage of Colombo Port (within the outer harbour area) and the Agent of the vessel submitted its Declaration of Dangerous goods only at 4.44 p.m., on 19.05.2021, a mere 7 hours and 45 minutes prior to the arrival of the vessel, whereas the Regulation requires it to be submitted 48 hours before the arrival. However, it was revealed from the Harbour Master (Captain

Nirmal Silva - 4th Respondent in SC/ FR 168/ 162021) that the said requirement of making the declaration 48 hours prior to arrival was not strictly imposed by the Port Control. Irrespective of the said conciliatory approach taken by the Port Control, the fact remains that the Agent had not fulfilled that requirement even after a fire erupted on-board the vessel which then had reached a level of intensity that required deployment of fire tugs to have the situation under control by the Colombo Port Control.

129. In reply to the email sent by Captain Yong Sheng Wu directing Terence Goh to " *… ensure this DG container to be discharged in port of Colombo, very risky to keep it in board*" and copied to Samaranayake (at 11.07 in local time), Susantha Sampathawaduge, also of Sea Consortium Lanka (Pvt.) Ltd., stated at 4.57 p.m. (local time) "*Will check with HM, safety office and HM office closed, tell tomorrow morning of the possibility of discharging the container*".

130. In response to the declaration of dangerous cargo, sent by Lunugama via email, the Navigation Safety Section of the Port of Colombo, sent its acknowledgement of the same at 8.05 p.m., on the same evening.

131. Terence Goh sent a WhatsApp message to the Master of the vessel at 5.28 p.m. on 19.05.2021 (Sri Lanka time 10.58 p.m.) informing him "*tomorrow we will know what if we can solve the issue at CMB*" obviously because the local Agent claimed that "*the ministry in CMB is closed*".

132. The Master then informed Terence Goh at 5.51 p.m. (Sri Lanka time 11.21 p.m.) that "this *agent now in charge for our vessel he will arrange everything if any , already arranged with suhantha*", to which Goh had replied; "*cannot see any confirmation. This is as usual blab bla*".

133. Martina Parab was notified by the Master of the vessel at 5.33 p.m. (Sri Lanka time 11.33 p.m. of 19.05.2021), conveying that "*leaking DG containers are too much smoke from inside since 11/5/21 nonstop. We can hear*

noise from inside falling down drums, leakage still .5-1 litre" and requested her advice. Samaranayake too is a recipient of this email.

Situation of MV X-Press Pearl in Sri Lanka

Events of 20th May 2021

134. The email dated 19.05.2021 and sent at 10.35 p.m., (local time 4.05 a.m. on 20.05.2021) by the Master to Captain Yong Sheng Wu from the vessel and copied to Samaranayake, reads as follows;

> "*Dear Sirs,*
> *G'day*
> *Vessel at anchor in port Colombo since 20/0030.*
> *and*
> *Today 20/0200 [Local Time- India] we have same in Cargo Hold #2.*
> *Smoke Detection System start alarm fm CH#2*
> *Fire Drill activated, all crew mustered as per Muster List.*
> *Actions done: Emergency Team.*
> *All Air Vents of All Cargo Holds were in closed psn, due to vessel have pass Heavy weather soon ago.*
> *All Fans of Cargo Hold also stopped.*
> *When we open any of Air Vents of CH#2, found so much chemical (NOT FIRE) same orange [looks like due to night]*
> *Color smoke start come out fm this Air Vents*
> *As per Cargo Plan we have – pls see attached.*
> *We can't come inside Cargo Hold & identify [its cause] due to so dangerous for crew.*
> *Also found that chemical reaction start may be due to raining.*
> *Rain continues but we will remain keep Air Vents of Cargo Hold #2 open, otherwise too much smoke will inside.*
> *Fans remain in Off Psn.*
> *Smoke is too much that we don't know how crew will come on Deck for berthing.*
> *And how stevedores can work.*
> *Waiting [for] your advices."*

135. The Port Control Log Book maintained by the Sri Lanka Ports Authority contains a contemporaneous entry made by an Official of Port Control at 2250 hrs on 19.05.2021 as "*X-Press Pearl – ETA 23.50 Hrs*". The Master of the vessel, has made a call to the Port of Colombo at 11.42 p.m., and reported that the vessel is "*approaching to anchorage, give me anchor position*". On 20.05.2021, the said Log Book carries an entry at "*00.30 – vsl dropped anchor*". The Deck Log Book of X-Press Pearl also carried an entry dated 20.05.2021, that reads "*0024 Hrs vsl dropped anchor @ Colombo anchorage*".

136. Jing Liu informs GAC Shipping by email sent on 20.05.2021 at 10.32 a.m. (8.02 a.m. local time) with a copy to Samaranayake, stating that "*fumes observed from cargo hold. Appoint a surveyor, vessel insured with P&I Club*".

137. Samaranayake, sends an email to the Harbour Master at 10.19 a.m. on 20.05.2021, requesting the following:

> "*Harbour Master - Capt. Nirmal Silva*
> *CC: Senior Deputy Harbour Master – Capt. Lakshi Siwrathne*
>
> *Dear Sir,*
> *DG CONTAINER LEAKING ON BOARD MV X-PRESS PEARL ERB 20TH MID NIGHT AT CICT*
> *We have been advised by master of MV X-PRESS PEARL ETB tonight at CICT, that one of the containers FSCU 7712264 containing DG has been leaking on board and*
> *Request your kind permission to dis same at Colombo for re-working*
> *As per the master there is a smoke for last few days but no fire. Container stowage – 110582*
>
Cntr nbr	*FSCU7712264 - (location110582)*
Commodity	*Nitric Acid*
IMO	*8*
Un	*2031*
Stuffed on	*36 IBC tank*
Loaded port	*Jabel Ali*
FDN	*PORT KELANG*

Container weight 28.7 mts
Attaching herewith COPY OF B/L and mails rcvd from vessel master/owners for your ready ref
Request your kind approval to dis the container at Colombo due to the reason that vessel is dangerous to carry the Cntr on board. Further vsl is not calling PKL due to down line delay encountered on her way as a result of Cyclone 'Tauktae'".

138. The material placed before this Court, regarding the exact time of the start of the first "fire" is different to the time mentioned in the Report of the Transport Safety Investigation Bureau (TSIB). In that report it is stated (at p. 9) that "*On 20 May at about 1030H (Local Time), the Singapore registered container ship X-Press Pearl, which was carrying 1486 containers, encountered a fire that started in the cargo area while at anchor about nine nautical miles from the Port of Colombo, Sri Lanka*". The report also made a reference to a subsequent fire situation (at p. 32, para 1.2.21) that "*… at about 14.06H, black smoke was observed coming out of cargo hold 2, the Master immediately reported to Colombo Port Control that XP had discharged all the fixed CO2 into cargo hold 2, black smoke was coming out from the cargo hold 2, and requested for shore assistance*". The Singapore Report, in making the said references, cited local times as 10.30 a.m. and 2.06 p.m.

139. It is evident that the entries in the Deck Log Book of the vessel are entered according to Ship's Mean Time, which is adjusted to local time scale by adding 5 ½ hours (as its top most entry confirms) and not according to ship's time as reflected in its computer system, which is set in GMT. The entry that appears immediately below the entry regarding the dropping of the anchor states that "*at 0200 hrs got a cargo hold fire alarm. On checking it was found some smoke coming. Called Master, C/E & C/o @ same timekeeping watch on the bridge. C/o went with C/E to investigate. Found no fire in the cargo hold but found corrosive leakage of chemicals*".

140. The entry at 12.00 hrs reads as "*alarm was sounded (general emergency alarm) 2/E reported fire in cargo hold No 2 … Port Control was informed and*

asked for immediate attention". Thus, it could be inferred from these entries that, in terms of the available official records, that a "fire" on-board the vessel was first reported at around 12.00 noon on 20.05.2021. However, it must also be observed that despite the constant emission of smoke from the leaking container and also from Cargo Hold 2, observed at 2.30 p.m., which was initially in "*orange/brown"* colour, that changed at a subsequent point of time to "*light gray*" and then to "*black*", as per the Report (at pgs.27 and 30,), the Operators, did not think it qualifies to be termed as a "fire" situation.

141. However, the Report also contains a more descriptive account of the events that had taken place than the situation revealed from the material tendered by the Petitioners and the Respondents who are State actors, before this Court. This is probably due to the fact that the team of investigators have had the advantage of interviewing the Operators, and the Master of the vessel along with his crew, during their investigations.

142. Describing the events that followed, the log entry reads "*at 0200 hrs got a cargo hold fire alarm. On checking found some smoke coming. Called Master, C/E & C/o @ same timekeeping watch on the bridge. C/o went with C/E to investigate. Found no fire in cargo hold but found corrosive leakage of chemicals"*, the Report in paragraph 1.1.8.13 (at p.27) states that "*The A-CO and ASD-1 while keeping clear of the smoke of the deck, approached cargo hold 2 from the windward side (port side). A A-CO immediately reported to the Master when sighting smoke and heavy cargo leak from container FSCU77112264."*. After undertaking boundary cooling for about two hours, the Report further notes at paragraph 1.1.8.16 that "… *the smell emanating from container FSCU77112264 worsened (toxic fumes) and the Master was informed. … The Master added, considering the extent of leak and smoke, he requested Colombo Port Control for an urgent and immediate berthing. Port Control in response, advised the Master to monitor the temperatures in cargo holds 1 to 3."* If this was noted after about "*two hours*" since the fire alarm at 2.00 a.m., the time would be around 4.00 a.m. on 20.05.2021.

143. The Report further describes the sequence of events in a more detailed manner. Paragraphs 1.1.8.21 and 1.1.8.22 provide valuable insight into the incident of reported emission of smoke without "fire". These two paragraphs are reproduced below in verbatim:

> "*At about 1030H, during the CE's routine inspection rounds of the E/R, he noticed an unusual smell of burning rubber. Not seeing any abnormalities inside the E/R, the C/E returned to the ECR and called the A-2E to accompany him to find out the source of smell.*
>
> *The CE and the A-2E entered the starboard side passageway and traced the smell to cargo hold 2. As both CE and the A-2E entered cargo hold 2, they saw space filled with smoke and several small fires at the top tiers between rows 05/07 and 06/08. One of these small fires was around the upper section door (along the rubber gasket) of one of the containers. In addition, the A-2E also recalled leak marks on some containers, as well as signs of melted metal."*

144. The Report seeks to substantiate its factual narrative by the inclusion of photographs that depict the places where "*leak marks*" and "*burnt rubber*" were noted by the crew and most importantly the observance of "*incandescent glow*" found on the containers that were stacked in the top most tiers of Cargo Hold 2. These photographs depicting the "*leak marks*" and "*burnt rubber*" were provided by the Operators themselves and interviewing the crew confirmed the observation of "*incandescent glow*".

145. It appears that the Harbour Master, upon being alerted of the fire situation on-board the vessel, has sent an email at 11.12. a.m. (local time), to Port Fire Brigade, after issuing verbal instructions via telephone. The manner in which the Harbour Master received the photographs of the vessel could not be ascertained. If that was provided by the Master of the vessel or by the Sea Consortium Lanka (Pvt.) Ltd., that fact would have been readily disclosed and strongly relied upon to stress that they acted diligently. Nevertheless, there was total silence from them over this

information. Therefore, the source of that information cannot be considered as originating from the Master or from the local Agent.

146. Despite this information, the Port Control Log Book, carries an entry made only at 12.05 p.m., which reads "*vsl reported fire in C/H No. 2 & requested assistance*". This is confirmed by VDR recordings as the Master informed the Port Control that "*we have a emergency situation, fire in cargo hold number 2 and we would like to ask you for your assistance. We will used CO2 for firefighting in cargo hold number 2*" (vide VDR communication at 0632 hrs). The entry made in the Port Control Log Book at 1.00 p.m., states that it was "*confirmed that fire under control*" and at 1.30 p.m., another confirmation was made by stating that "*confirmed fire under control*". The entry of that log book at 2.10 p.m., reveals that "*all extinguishers used, request assistance from navy ops room …*".

147. It is clear that the Deck Log Book indicates that assistance from Port Control was sought only after the fire erupted around 12.00 noon and that too with the release of Carbon Dioxide gas into Cargo Hold No. 2. This step was taken after more than 1 ½ hours since the crew first detected "*small fires"* inside Cargo Hold No. 2 around 10.30 a.m., to which no reference could be found in the Deck Log Book at all.

148. It is at this late-stage, Samaranayake had thought that it is fit to alert Terence Goh of the fact that "*port control just reported a small fire on hatch, navy assistance is proceeding, pl check and confirm 12.05. hrs*" by an email. This email was sent at 3.04 p.m. (local time), and even after the Master reported back to Port Control at 1.00 and 1.30 p.m., that the fire was under control with the release of CO2. By then, a fire team was dispatched by the Port Control to report the situation on-board the vessel, since the fire was brought under control, as reported by the Master. Even at the time of the team boarding the vessel, there was no fire but the constant emission of smoke from the cargo hold was noted. The fire crew returned back to shore.

149. During the time period between 6.30 p.m. to 7.00 p.m. on 20.05.2021, the Harbour Master decided to cancel the permission already granted for berthing of the vessel X-Press Pearl at the Port of Colombo.

150. There is yet another chain of emails, within which the Company corresponded with a fire expert, Dr. Darren Holling, over the precarious situation that had arisen, subsequent to the continuous leaking of Nitric acid from the container on the deck surface, and thereafter flowing down to Cargo Hold No. 2. The first mail of that email chain, namely the one requesting assistance of the fire expert, was not tendered before this Court. The officials of the Sea Consortium Lanka, Samaranayake and Lakmal Dissanayake, too were included in the chain of email as recipients. But none of them, in their parts, have thought it fit to annex the same to their Statement of Objections.

151. Dr. Darren Holling, in replying to an email sent by Jing Liu, Senior Claims Manager, by sending an email at 3.44 p.m. (Sri Lanka time 1.14 p.m.), alerted her of the possible dangers such a position would necessarily pose. He alerted Jing Liu, upon consideration of the material made available to him at that point of time, by the Company. As already noted, Samaranayake too was a recipient of this email.

152. Dr. Holling in the said email has stated as follows;

> "*Dear Jing Liu, All,*
>
> *Following my perusal of the information shared within last 30 minutes or so I understand that following rough weather it was discovered that a container on deck (FSCU 7712264) containing Nitric Acid >70% (in IBCs), 50 MT, was found to be leaking. I further understand that some of that nitric acid has leaked into cargo hold 2 where there are numerous DG containers, including 46 containers of caustic soda (sodium hydroxide). Fumes (reportedly orange coloured) have been seen coming from the cargo hold.*
>
> *Nitric Acid is both corrosive and an oxidiser. Reactions with steel will generate hydrogen gas, which is extremely flammable with a wide*

explosive range, and contact with combustible materials such as cardboard and wood may result in a fire. Nitric Acid can also generate nitrous oxides which are orange/brown in colour.

If nitric acid came into direct contact with the caustic soda it will undergo an exothermic neutralisation reaction that will generate water (perhaps as steam) and sodium nitrate. Some of the other cargoes such as sodium methoxide and methanol would also undergo exothermic reactions with nitric acid, possibly causing fire and or issuance of brown fumes.

As I understand matters, carbon dioxide has been released (or is it being released into the cargo hold?) and this ought to assist with fire suppression and extinguishment.

Question: Is boundary cooling being undertaken on deck? If not that it would be a prudent action to commence so as to prevent fire spread and to wash away the nitric acid.

How much nitric acid is believed to have leaked into the cargo hold?

Please can you provide me with the balpie file and the bay plan showing individual containers as stowed?

Please can you provide me with the general arrangement plan, fire control plan, tank plan.

I trust the forgoing is of assistance for your current needs.

Best Regards,

Darren.

Dr. Darren Hollings

FRSC, MSNIC, Al Fire E"

153. Jing Liu, thereupon sent an email to Samaranayake at 3.07 p.m. (12.37 p.m. local time) informing him that a "*fire expert brought into the loop of emails*" and his contact details were made available to that expert.

154. Dr. Darren Holling also sent an email to Terence Goh at 5.42 p.m. (Sri Lanka time at 3.12 p.m.) which reads as follows:

"*Dear Terrence, All,*

Apologies for my slight delay in responding as I have been perusing the information attached to the flurry of emails that occurred.

Can you provide the vessel's complete bay plan in the format per bay which has the container numbers, slot positions, DG Info, load and destination, and weights (similar in format to the attached. glf picture)? Can I ask for an update from the vessel as to the current situation on board – I understand that all CO2 have been added into both cargo holds 2 and 3 (how many cylinders into each hold and what are the designated numbers of cylinders for each hold as per CO2 system specification?
Is it confirmed that there is a fire (burning odour, grey/black smoke), elevated temperatures measured on coamings or hatch covers? Has the CO2 had any noticeable effect? Is boundary cooling in place on deck/hatch covers?
I note that there is a container of lithium batteries on deck at slot 110482.
I note from the vessel plans that there are no fuel tanks by way of cargo hold 2 which occupies bays 09(10)11 and 13(14)15.
From the documents I note from the Nitric Acid packing list that the consignment comprises SOMT net of Nitric Acid divided into 36 IBCs (each having about 1.4MT). The DG declaration form states that container FSCU7712264 contains 18 IBCs. As I can only see one container of Nitric Acid on the provided DG manifest. Is there another container somewhere else on board that is stuffed with other 18IBCs of nitric acid? If so, where is it? Is it also leaking?

Further, the Nitric Acid is described in the excel spread sheets as UN2031 Pk Grp I Nitric Acid more than 70%. The MSDS supplied for the nitric acid as is a Thermo Fisher document which relates to 65-70% strength Nitric Acid which is UN2031 Pk Grp II. Under the IMDG code for Pk Grp I (more than 70% material) there is no packing instruction for IBCs (Just a dash) meaning there is no authorisation for packing in IBCs; Pk Grp II (65-70%) and Pl Grp II (less than 65%) may be packaged in IBCs. As this may be important later, can I ask for the strength of the Nitric Acid to be confirmed from the documents as 65-70% or more than 70%? The answer may also result in any other container of Pk Grp I Nitric acid in IBCs being discharged for inspection and /or repacking in IMDG code authorised containers or tanks. [I

attach photographs of the IMDG code entries for UN2031 for your reference].
I trust the foregoing assists for current needs.

Best regards.
Sgd.
Darren."

155. Terence Goh made available the bayplan with his reply email sent at 7.11 p.m., to Dr. Hollins (local time 4.41 p.m.), which the expert acknowledged by his email sent at 12.08. p.m. on 21.05.2021. No further information was available on any further opinions expressed by the fire expert, Dr Hollins. The independent Fire Forensic Expert, employed by the Operators with the mandate to determine the origin and the probable cause of fire had not been made available to either members of the team of investigators, who prepared the Report for the Ministry of Transport, Singapore or to this Court. The X-Press Pearl group did not think it was relevant to produce that Report along with its pleadings or by way of a Motion for the consideration of this Court.

Conflicting positions of the State party Respondents and Non-State Party Respondents

156. Before moving to the next phase, this Court is of the view that at this stage of the Judgment, it is opportune to consider the conflicting narratives of the Respondents who are State parties as well as of the Respondents who are Non-State parties. This is a necessity that arose in view of a particular submission made by Dr. Romesh De Silva, PC who appeared for the X-Press Pearl group of companies, which he claimed in relation to the '*polluter pays*' principle, that it is the State parties who ought to be considered as polluters in this instance and not the private parties (his clients). In support of that contention, learned President's Counsel contended that the environmental disaster relied on by the Petitioners to claim damages from them, is a direct result of the actions or inactions of the State actors due to their failure to;

a. provide emergency berthing,
b. provide adequate facilities to control the fire on board, and
c. permit removal of the ship, when it could have been moved.

157. Learned Additional Solicitor General on the other hand, accused that the contamination of the marine environment to an unimaginable proportion had occurred as a direct result of the failure on the part of Owner / Operators / Master / Agent to deal properly and timeously with a leak of Nitric acid consignment of several Metric Tons, on board a vessel which would very likely have resulted in a fire, particularly in view of the quantity of other dangerous cargo carried onboard, such a fire would then be difficult to extinguish or contain.

158. In view of these attempts made by the State parties and the Non-State parties to pass on the responsibility of causing the marine disaster in its totality onto each other, whilst denying any form of responsibility on themselves, both the State and non-State actors, claim that they acted reasonably and to the best of their ability under the circumstances.

159. These claims must then be inquired into by this Court, as any liability to pay compensation sought by the Petitioners, claimed by them under the '*polluter pays principle*', hinges upon the identification of who the 'polluter' is. In this regard, the consideration of the first two factors relied on by the learned President's Counsel for the Non-State parties provides this Court with a precise starting point to undertake that task.

160. Learned President's Counsel, on behalf of the Non-State parties, advanced the said contention on those three points, presumably based on the contents of the pleadings filed in Court on behalf of his client. Ravi Muttusamy, being the authorised signatory of Killiney Shipping Pte. Ltd. of Singapore, in his Affidavit dated 18.11.2024, has stated that the Declaration of Dangerous Goods was made following the prescribed format provided by the Sri Lanka Ports Authority and its Agent, the Sea Consortium Lanka (Pvt.) Ltd., forwarded the same to Port Control, as it

is the customary practice. He categorically denies that "*… there was no suppression whatsoever of relevant information by the 18th Respondent in making the said declaration*".

161. The 11th Respondent (X-Press Feeders), represented by its local Agent the 12th Respondent (Sea Consortium Lanka Ltd) in SC FR Application No. 168/2021, pleaded in its Statement of Objections that:
    a. the Captain and his crew of the vessel had at all times acted duly and/or properly and neither the sinking of the vessel nor the attendant consequences arising thereof are attributable to the Owners, Charterers and/or the crew of the said vessel,
    b. the Respondent company, at all times, adhered to all lawful requirements and guidelines in carrying the containers on board the vessel,
    c. they specifically deny that it was negligent and/or at fault, and
    d. the vessel had taken steps at every turn to extinguish the fire and prevent the loss of the vessel.

162. The said Respondent Company, in the absence of a determination to date by an authority within or outside Sri Lanka, regarding the cause of fire onboard the vessel, further stated the following:
    a. At Jebel Ali, a container numbered FSCU7712264 (the "Container") was loaded on board for carriage for Port Klang. The container was stowed in position slot 110582 on board. The cargo was a consignment of about 28 mt UN 2031 Nitric acid in plastic containers.
    b. Container FSCU7712264 was part of a wide consignment of 50 Metric Tons laden in two containers under the same packing list. Both containers were carried to Jebel Ali from Iran on board the vessel MV Ronika. Container FSCU7712264 was laden on board the MV X-Press Pearl at Jebel Ali for carriage to Port Klang while the second container, GESU 2837027, also

containing Nitric acid, was destined to be carried on another vessel and remained at DP World, Jebel Ali.

c. Post casualty, the Respondents caused container GESU 2837027 to be intercepted at DP World, Jebel Ali for inspection. It was discovered that the Cargo of Nitric acid in container GESU 2837027 was improperly stowed in inappropriate and non-standard plastic containers with metal bands which had leaked inside this container, and consequently the cargo contents had been transhipped to a new container WSCU 8592772 at DP World. The Nitric acid cargo was so poorly packaged that it had leaked again in the container WSCU 8592772. By this investigation of a surviving part of the same consignment of Nitric acid shipped from Iran in two containers, these Respondents have concluded that the cause of the Acid spill on the vessel was caused by insufficient and defective packing of Nitric acid within the container.

d. These Respondents have ascertained post casualty, that the seller of the Cargo is an Iranian entity, Esfahan Chemical Industries who sold the Cargo to an Indonesian consignee, PT Interchem Plasagro Jaya via intermediaries Chemi Pakhsh Paykan of Iran and Hope Brighten Ltd. of Hong Kong.

163. The contention that it is the State parties who should be considered as the 'polluters', was founded on the factual basis, as stated by Lim Kin Seng, the authorised signatory of Killiney Shipping Pte. Ltd, Singapore, in an Affidavit dated 04.11.2021, tendered to Court along with the Motion dated 07.11.2021 in SC FR Application No. 176/2021. He stated that "*it was decided on 19th May 2021 to seek to discharge the container in Colombo instead of Singapore as previously intended, and the local agents Sea Consortium Lanka (Pvt) Ltd was informed on the evening of the 19th May 2021 of the decision to discharge the Nitric Acid container at Colombo*" and upon being informed that the Harbour Master's office was closed for the day stated that, " … *as soon as practically possible after receiving such instructions, Sea Consortium Lanka (Pvt) Ltd, following the proper procedures, wrote to the Port of Colombo*

on the 20th of May 2021 at approximately 1019 hrs and requested permission to discharge the Nitric Acid container".

164. In dealing with the sequence of events that followed since the detection of the leak of Nitric acid at Port Hamad, in the first segment of the Judgment, this Court noted that the Master had taken action expeditiously to deal with the unexpected situation. It was noted that he immediately sought advice from the Planner, the manner in which the concerned parties have thereafter conducted themselves to ensure the discharge of the leaking container as soon as it was noted.

165. The detection of the leak was made by the crew even after the vessel had reached the Port Hamad and while the cargo operations were continuing. The request to discharge the leaking container was made to Hamad Port Control without the slightest delay on the part of the local Agent. When the local Agent at Hamad failed to secure the discharge of the leaking container, the question of why the Operators failed to take the decision to return to Jebel Ali to discharge the same, was not answered at all. Instead of offering an acceptable explanation indicating the factors considered by the Operators to continue the voyage up to the Port of Hazira with a continuously leaking container onboard, an attempt was made to 'dilute' the effect of leaking Nitric acid had on the vessel, when the X-Press Pearl group relied on a Report prepared by a "container ship specialist" Jeroen J. de Haas, tendered annexed to the Affidavit of Lim Kin Seng, marked as "Y6". In that Report, the specialist noted that "*the carriage of nitric acid drums in containers is commonplace*" and stated his view that "… *the extent of the leakage was very small and could be managed by the crew*" and "*Nitric acid does not have a track record of causing fires on board container ships*".

166. The said expert in preparation of his Report, considered the Report of the Transport Safety Investigation Bureau, DP World Tariffs and General Conditions of Trade – 2023 for the Ports Jebel Ali and Mina Rashi, Dubai along with email communications between the Master, the Owners of the

Vessel, the Shippers and the respective terminal operations. Unlike the team of investigators for the TSIB, he has had no opportunity for personally interviewing any of the stakeholders and considering the evidence available as to the effects the leaking acid had on the vessel.

167. But the regular situational reporting of the leaking of Nitric acid and its effect on the hatch covers of the vessel, undertaken by the Master reveals a more serious situation on board than a mere situation where there is a "*very small leak*" which the crew on-board could manage as the expert opined.

168. The Master's act of describing the seriousness of the situation in his email reporting the leak of Nitric acid to Juned Saleem of Transvision Sea Shipping Lines Agents LLC, sent on 11.05.2021 at 9.12 a.m., indicating that the Acid had heavily corroded the hatch cover, has been downplayed by the container ship expert when he stated that the Master's concerns about the leak were related to the damage to the hatch covers, paint and deck "*rather than the risk of fire*". This opinion might have its validity confined only to the exact moment of detection of the acid leak, and certainly not to the circumstances in which the vessel was, when she reached Port of Colombo. In his opinion (paragraph 5 – ii), "*the vessel's hatch covers appear of a design which would prevent the spillage of cargo from the Container directly into the cargo hold and any spillage would be expected to be drained onto the main deck of the vessel, from where it could be flushed overboard".* This could well be the general situation in similar vessels. But the Singapore Report contains a finding made by the investigators that reflects another area of concern not adverted to by the container ship expert, despite him having perused the said report. The Singapore Report states (paragraphs 1.4.4.1 and 1.4.4.2 at p. 52) that "*The cargo holds were fitted with non-weather tight hatch cover panels typical for a ship of this design"* and "*These panels had gaps of about 30 +/- 10 mm between the fore-aft gutter plates …".*

169. It was incontrovertible that along with the leaking of Nitric acid, the container was emitting orange smoke, which the Master thought was due to the chemical reaction caused by Nitric acid coming into contact with the paint work of the hatch cover. The Master had expressed his fears over this danger in that email, by stating that if the leaking container was not discharged at that point of time, it had to be taken all the way down to Port Klang. Martina Parab, having realised the danger that the leaking container might pose to the vessel by having it onboard for a longer period, directed the Transvision Sea Shipping Lines Agents to advise its Hamad Agent to take direct delivery of the container and re-work the unit to make it "*seaworthy*". She clearly indicated that unless re-working happens, it might have to await a subsequent sailing. She also warned Transvision by stating "*Do note all the cost, consequences and penalty arising due to this matter XPF will hold Transvision Shipping fully responsible*" (vide email dated 11.05.2021 sent at 2.15 p.m.).

170. This course of action clearly indicates the position that no sooner Nitric acid started leaking from the container and corroded the hatch covers, the officials who were tasked with the responsibility of managing the vessel's voyage at that time, had realised that leakage of Nitric acid made the said container unseaworthy and that it is a serious issue which needed to be addressed immediately. They also decided that the said container needed to be re-worked, rectifying the leak and, unless and until re-worked, it should not be kept on board the vessel, in view of the obvious dangers such a course of action would pose. They even considered, as an alternative option, to take the re-worked container onboard the vessel only at a subsequent sailing. They forewarned that the shipping Agent is to take responsibility for "*all the cost, consequences and penalty arising due to this matter*". The urgency with which they acted on to secure the discharge of the leaking container is clearly demonstrable from the chain of emails exchanged within a period of little over ten hours, commencing from 9.27 a.m. to 7.42 p.m., totalling to 12, inclusive of the one Terence Goh had sent to Juned Saleem at 2.23 p.m.,

directing the latter to complete the process of offloading in 30 minutes, as the vessel was scheduled to leave in an hour.

171. The urgent interest to take meaningful action as displayed by the relevant officials on behalf of the X-Press Pearl group regarding the leak of Nitric acid and its impact on the safety of the vessel, during the time gap between Hamad and Hazira, could not be seen from the officials who are based in Singapore. The general assessment of the situation on board the vessel, entertained by the officers who are responsible for managing the emergency situation onboard, was reflected from the Affidavit of Lim Kin Seng (dated 04.11.2024). Lim Kin Seng stated (in paragraph 20) that "*… the Master's reasonable assessment was that the leakage would cause paintwork damage to limited parts of the vessel, but it did not endanger the safety of the Vessel, her crew and cargo*". He further avers that by 15.05.2021, "*… the crew observed that the leaking has stopped*" and the only impact the leaking acid had on the vessel was "*paint work damage*" and the offloading too was considered as a step to prevent any further damage to paintwork.

172. Perhaps the misappreciation of the factual situation, as reflected in the said averment, would have led to the obvious state of complacency displayed by the officials who are based in Singapore, in relation to determining the degree of seriousness that ought to have been attributed to the Nitric acid leak and to its impact on the vessel. They should have arrived at such a finding only after undertaking a process of critical assessment of the situation after calling for all vital information, with the aid of an expert, which they did only when it was too late. The near fatal mistake made on the part of these officials in treating the leak of Nitric acid as a trivial situation, which they assessed as a situation which the crew could handle without leading to any other complication, is apparently not confined to them.

173. Even after the vessel sank due to the fire originated from the effects of the leaking Nitric acid into Cargo Hold No. 2, which had thereafter engulfed the vessel in its entirety, the container ship expert has opined

(at paragraph 5(d)(iii) of "Y6") that "*Nitric Acid does not have a track record of causing fires on board container ships*". The reason for the Company officials to trivialise the situation onboard the vessel was based on the fact that "*the crew observed that the leaking has stopped*".

174. There is a reference suggesting that the leaking had stopped, found in the Master's VDR communications. On 16.05.2021, the Master conveyed (at 2.45 – 2.48 hrs) that "… *we checked everything, MSDS sheets, manifests also … we know everything inside … some small packages … one package was broken and leaking these two three days, now empty*". Obviously, the Master in this instance was referring to IBCs that were stored within the leaking container. In his assessment, one such IBC may have got damaged and leaked out all of its contents. But he did not and could not physically examine the other IBCs stored in that container and only guessed that only one of them could have got damaged.

175. This Court, in the consideration of the available material, did not come across any email sent by the Master or any message (VHF or WhatsApp) sent by another on board the vessel that the leaking had ceased by 15.05.2021. However, the Singapore Report states that "*On 15 May 2021 prior to arriving Hazira, noting that the leak had stopped, the CO instructed the crew to stop hosing down the area around container*". The report made no reference to any contemporaneous record, upon which that factual statement was made. However, it must be noted that the Master, in his statement made in the presence of his team of lawyers to the Criminal Investigation Department on 31.05.2021, stated that when they arrived at Hazira, the leakage had ceased.

176. The mismanagement of the emergency situation on board the vessel, on the part of the Operators based in Singapore, was primarily due to their identifying the situation onboard the vessel, as a one in which the only impact the leaking acid had on X-Press Pearl was its "*paint work damage*". The Master's message on 16.05.2021 at 2347-2350 hrs stating "… *because smoke I think may be fire, I think it may be fire because smoke is too much*" had not received the attention it deserves. The realisation of the indifferent

approach adopted by the officials who acted on behalf of the Operators is reflected in the WhatsApp messages between the Master and Terence Goh. On 17.05.2021, when Terence Goh queried "*how is the DG leak? haven't heard since last Fri*", the Master has texted back "*ALL SAME*". In the year 2021, 14.05.2021 was a Friday and 17.05.2021 was a Monday. The stoppage of the leak reported on 14.05.2021, as the vessel making its approach to Hazira, obviously did not last long. It was only a very temporary respite. Since the reply by the Master is in block letters, it is clear that the leak that stopped temporarily had re-commenced and continued thereafter until his afore-reproduced text, and even beyond. This could be seen from a conversation the Chief Officer had with a crew member on 12.05.2021. The Chief Officer has stated that "*Once it finishes leaking it will be gone. Yes. Now the leaking is more severe. They saw yellow smoke, the same colour as their clothes, yellow smoke*" (vide VDR recordings at 1411 hrs).

177. It is already noted that Hazira advised the vessel to offload the leaking container at the "*next port*". The next port of call was Colombo. After Hazira, it could be seen that the administration of the affairs of the vessel had shifted from Hamad to Singapore.

178. The Marine Superintendent of the vessel, Captain Yong Sheng Wu, who functioned while based in Singapore, did not feature at any time, either at Hamad or Hazira. His authority over decision making became evident only after the vessel had left Hazira, as the multitude of emails that were exchanged between Hamad and Hazira, indicate that the decision making was mainly by the Planners who issued instructions on the local Agents of those ports.

179. With the urgency shown by the Operators and local Agents at Hamad and Hazira to off-load the leaking container either at Hamad or at Hazira, it is reasonable to expect the Singapore based officials too to have started their enquiries and initiated relevant documentation processes, with a

view to obtain permission to offload the problematic container at Colombo, no sooner they learnt that Hazira refused offloading.

180. In fact, some of them did. Terence Goh, by a WhatsApp message sent on 15.05.2021 at 2000 hrs, confirmed to the Master that he had already kept the Colombo Agent informed of this requirement. This position was re-confirmed by Terence Goh in the affirmative, when the Master queried whether he made any arrangements regarding a broken-down refrigerator container and also of the container that was leaking Nitric acid for the past 10 days.

181. On 19.05.2021, Terence Goh informed the Master at 1728 hrs by a follow up message stating that, "*tomorrow we will know what if we can solve all these issues at CMB*". He also informed the Master by a text message, sent at 1751 hrs, that he had "*already arranged with Suhantha*" and added that "*our agent now in charge for our vsl*". The person "*Suhantha*" referred to in the said text is in fact a reference made to Susantha Sampathawaduge, the Deputy Manager/Operations of Sea Consortium Lanka (Pvt.) Ltd.

182. In addition to the requests made by the Planner Terence Goh, the Master himself had made a request to the officials of the Sea Consortium Lanka (Pvt.) Ltd., particularly Samaranayake, to offload the leaking container at Colombo. The Master in his statement made to CID on 31.05.2021 stated that "*I informed Colombo agent, one Sanjeewa that there is a need of urgent attention of discharging a container which was subjected to the leak*". The Master had sent emails from the vessel's email account to the email account of Sea Consortium Lanka (Pvt.) Ltd. He further stated to CID that "*… I informed by mail to local agent everyday morning from 16th, 17th, 18th and 19th around nine o' clock in the morning*", but received no reply to any of them.

183. This was the consensus reached among the Master and Terence Goh that after the failed attempt to discharge the container at Hazira, they should do so at Colombo. The hurried actions taken by these two in the

initiation of the process by which the required approvals of the receiving port are sought, could easily be understood. The Operators based at Singapore too were fully aware of the fact that the relevant paper work involved with Port Control in that regard would consume a significant amount of time. Lim Kin Seng, states in his Affidavit dated 04.11.2024, (at para 25) that "*… it was unlikely that terminals at unscheduled ports would permit the Vessel to make an unscheduled all to discharge the Nitric Acid Container, and that even in the event a terminal at an unscheduled port would have approved discharge of the said container, the time required to obtain pilot clearance, book a pilot and secure an available berth would outweigh the Vessel's sailing time …".*

184. However, that course of action did not receive approval from Dennis Yeong, an official attached to Operations/ Singapore Agency. He instructed Terence Goh by an email sent through x-pressfeeders.com (on 18.05.2021 at 3.26 p.m.) that "*Said container is bound for port of discharge port klang pl handle this at POD".* The serious gaps in communication could be observed in the correspondences between the different officials, who acted on behalf of the Operators, as it was Terence Goh who pointed out to Dennis Yeong that "*Just confirmed vessel will omit PKG and unit will discharge in Sin*" (vide email sent on 18.05.2021 at 3.35 p.m.). It is not clear who made these decisions, why they were made and with whom those decisions were shared with.

185. The decision taken to discharge the leaking container at the Port of Discharge, Port Klang appears to have been taken, acting on the belief that the leaking had stopped and the crew had controlled the situation by washing away the corrosive liquid from the deck and all that was required to be done was to re-paint the deck, which could be achieved by repairing the damage caused by the corrosive liquid to its paintwork. This erroneous perception entertained by the officials who acted on behalf of the Operators, places them at the farthest point away from the ominous reality that loomed at that very moment onboard the vessel. It is highly improbable whether they considered the questions; where the

leaked Nitric acid, that could not be washed away but continuously leaked out of the container for over 10 days, have ended up, why only the Cargo Hold 2 bilge was filled with water, why the other cargo holds did not have such quantities of water despite heavy rain, what would be the rate of leaking if the vessel were to keep the leaking container until it reached POD Klang and how many litres of Nitric acid would have accumulated inside the cargo hold during that extended period of time, and the effect of the leakage on other dangerous cargo stowed in the cargo Hold No. 2. As a result of that erroneous perception, the situation that prevailed onboard the vessel was deteriorating with each passing hour.

186. Terence Goh requested Dennis Yeong to direct the vessel to send the Master's Report containing the leakage rate, quantity of waste collected etc., by an email sent at 4.52 p.m. on 18.05.2021, and received a reply at 6.09 p.m. on the same day, along with documents identified as "*SDS, packaging certificates and cargo manifest*". On 19.05.2021, Terence Goh provided Dennis Yeong at 11.42 a.m., with a bay plan by an email. The Master kept Captain Yong Sheng Wu informed of the situation onboard the vessel at 2.32 p.m. (local time) as "*The problem is we don't know why orange smoke coming fm container already 10 days and too much. Container locked. Smell not like fm Fire, strong chemical smell. Photos attached but [n]ow understood NO risk of Fire*" (vide email sent at 9.02 a.m. from the vessel to the Marine Superintendent).

187. The Master of the vessel, what appears to be a desperate attempt on his part, wrote a single sentence to Captain Yon Sheng Wu and thereby almost gave him an ultimatum to comply with. That email reads "*Please ensure this DG container to be discharged in port of Colombo*". This was the email sent by the Master on 19.05.2021, at 1.37 p.m. (Sri Lanka time 7.07 p.m.) to the Marine Superintendent, from the vessel's email account. It was also copied to Samaranayake. This email prompted Yong Sheng Wu to contact the Master over the phone, which he followed with a reply email sent at 10.55 a.m. (Sri Lanka time 8.25 a.m.). That email conveyed

the decision of the Marine Superintendent that "*as per telecom the smoke is due to corrosion and "NO" risk of fire at this moment*" nonetheless it also directed Dennis Yeong to "*… check the possibility of discharge this DG container in port of Colombo, ETA Colombo 19May/18:30OUTC*". The only change in the already reached decision that the leaking container would be discharged at Singapore, was to consider the "*possibility*" of discharging it at Colombo. No firm decision was made or any instructions were issued even at this stage, and the effect on the vessel due to extra time consumed in the exploration of the "*possibility*" of discharging it at Colombo was not even considered.

188. It is apparent from examination of the contents of the emails exchanged between the concerned parties that the attitude of the Singapore based officials of the vessel had undergone a significant change towards the mid-day of 19.05.2021.

189. This is because, until mid-day of 19.05.2021, the prospect of discharging the leaking container at Colombo was not considered by the Operators, even as an alternative option. Only at 8.25 a.m. Sri Lankan time, an official was directed by the Marine Superintendent in this regard and that too was limited only to "*… check the possibility of discharge this DG container in port of Colombo*" and was not a specific direction to offload it at Colombo. Interestingly, within a few hours, Captain Yong Sheng Wu had written to Terence Goh and the Master of the vessel issuing instructions to "*… ensure this DG container to be discharged in port of Colombo*" as "*it is very risky to keep it onboard*" (vide email sent on 19.05.2021 at 1.37 p.m. from Singapore and at 11.07 a.m. in Sri Lanka). This email was copied to Samaranayake. The time gap between the two decisions is a mere two hours and forty-two minutes.

190. This being the general mindset of the Operators that prevailed over during the relevant time period, a question necessarily arises in the mind of a reader, as to what made it eventually to direct the local Agent, Sea Consortium Lanka (Pvt.) Ltd., to request the Colombo port

administration on 20.05.2021, to permit the discharge of the leaking container? This is an important consideration since there is only little over a 2 ½ hours gap between the two emails and it must be some significant event that occurred during this window of time that contributed to the change of mind. Despite the earlier instructions to explore the "*possibility*" to discharge the leaking container, there was no follow up action taken either by the Planner or the local Agent. Even without knowing whether the "*possibility*" of discharging the container exists or not, Captain Yong Sheng Wu now wanted to "*ensure*" the discharge of the leaking container at Colombo, because it is very risky to keep it onboard.

191. Perhaps, a clue could be found in the email sent by the Master to Captain Yong Sheng Wu on 19.05.2021 at 10.35 p.m. from the vessel's email account. It is by this email, the Master conveyed that he dropped anchor at Port of Colombo and the smoke detection system of Cargo Hold No. 2, triggered an alarm. However, this development cannot be a determinant factor that made Captain Yong Sheng Wu to consider the Port of Colombo as a port to discharge and change his mind to direct his Agents to "*ensure*" the discharge of the leaking container. This is because the email was sent by the Master at 4.05 a.m. in Sri Lankan time on 20.05.2021, whereas the direction issued to explore the possibility was sent at 8.25 a.m. Sri Lankan time on 19.05.2021. This factor points to the conclusion that the determinant factor came into existence after 8.25 a.m. Sri Lankan time on 19.05.2021.

192. A definitive answer to this question could be found only in the VDR recordings. A conversation that had taken place between the Master and a member of the crew on 19.05.2021, during 9.21 – 9.22 hrs (local time 3.51 p.m.) as appeared in the transcript, is as follows:

"*Mst – too much smoke from inside the container*

CM – from inside the container. The drum[s] are falling, I can, I can hear the noise, this [these] drums are moving …

Mst – yes, already 10 days. Smoke, corrosion. The problem is I cannot open the container, cannot discharge because final destination is Malaysia

CM – now Pelepas?

Mst – I don't know. Before it was port Klang, now they don't know where to discharge. They come back in … already in email, Singapore don't like also to take because leaking. [laughs] Pelepas don't like also because of leaking. Nobody like[s] to take this container because of [this] problem …".

193. This recorded conversation between the Master and one of his deputies gives away a very vital clue. The intention of the Operators to have the leaking container offloaded at Singapore had to be suddenly abandoned after the Singapore Port Control apparently had declined to approve such a move. The Owner and the Operators, appear to have acted confidently on the assumption that they could easily secure approval of the Port Control to offload the leaking container at Singapore. This seemed to have been the most probable explanation for the sudden change of the course of action taken by the Operators.

194. Despite the fact that Terence Goh and the Master made requests to do so no sooner the Port of Hazira had informed them of the refusal of the request to offload, the Operators were comfortable with their decision to omit Colombo totally and was even prepared to keep the container for several more days, until the vessel finally reached Port Klang. It was only when the Operators ran out of all options following the Singaporean authorities declining their request to discharge the leaking container, did it dawn on them that the compromised container should be discharged at the Colombo Port. By then, the delay in the voyage due to the cyclone, had already forced them to cancel the vessel calling on Port Klang. Hence the Marine Superintendent's direction to the local Agent insisting them to "*ensure*" discharging the container at Colombo, could be understood.

195. The limited understanding of the current situation prevailed onboard the vessel on the part of the officials, who acted on behalf of the Operators

is clearly demonstrable from the Affidavit of Lim Kin Seng dated 04.11.2024, wherein he averred that "*the relevant Respondents reasonably understood that the smoke referred to were fumes rather than smoke and that the fumes observed were caused by chemical reaction to the Vessel's deck paintwork and that there was no immediate risk of fire onboard*." Interestingly, he then attributed that the reason to seek permission from Colombo was due to the smoke from the container and the crew having heard noises like drums toppling over from the leaking container. This explanation can not be accepted as being a reasonable explanation, since the Operators, in spite of the fact that the crew heard the IBSs were falling down inside the container and thereby making the Nitric acid flow significantly increased due to these damaged IBS's, nonetheless determined that "*there was no immediate risk of fire onboard*". That determination made no difference to the condition of the vessel as that had been the Operator's consistent position since the vessel left Hazira.

196. However, the real reason for the change of mind was once more confirmed by the Master during his telephone conversation with Captain Yong Sheng Wu, which had taken place on 19.05.2021 during 10.46 – 10.49 hrs, (local time 4.16 a.m. on 20.05.2021) and the transcript of which is reproduced below:

> "*Yes, Captain, Captain of XPP calling about the leakage. Sorry? Yes Captain, ok there is usually … I cannot understand the question but ok, maybe you read my message[s], already 10 days and still leaking, there is still smoke, yes, coming from the container, we already checking everything … no changes. No explosion, this smoke coming due to corrosion. This is, uh, yes, yes. Smoke is not, not due to fire. But any way already 10 days. Not due to fire. Aha, ok, ok, understood. I don't know. Terrance is in charge. We are, we are asking to, we have been asking [them to] discharge [it] every time, every day, but Terrance says cannot, cannot until final destination. Now final destination also, er, change[d] because final one Port Klang, Port Klang [is to] omit. And now I don't know, so many email, you will read those, but every day receiving about 20 or 25 about this container. Yes, so far, [but] still no*

body who control … who will discharge this container … because nobody like, looks like this container, yes may be Singapore, may be, may be Tanjung Pelepas, but no Singapore like to discharge the broken container, no Tanjung Pelepas. Until now nothing. Yes. Sorry? We are now approaching the Port Colombo. Destination final this container Port Klang. Now Port Klang we will not do. Omit, omit. Cancel. We [are] going directly to Pelepas, after Pelepas going [to] Singapore. Then come back to Jebel Ali …".

197. It appears that the land-based officials, including the Marine Superintendents had their say on certain vital aspects of the journey of the vessel over the Master's opinion. The Master was strongly of the view that the leaking container should be discharged at the Port of *Colombo,* a request he made since leaving Port of Hazira, but was ignored by the Marine Superintendent, who decided that the problematic container should nonetheless complete its voyage and should be discharged only at the Port of Discharge. Hence, it is reasonable to assume that the Operators were forced to consider Colombo in order to discharge a leaking container only after the Singaporean authorities shot down its request, which made them desperate to rid themselves of the problem of the leaking container. The instructions issued to the local Agent to make the "urgent" request and that too at the eleventh hour, is thus explained. Examination of the timeline of taking each of these decisions amply supports this finding.

198. This would be an appropriate moment to consider the manner in which the instructions given by the Company to seek approval of the Port of Colombo to discharge the leaking container were implemented by the local Agent. Arjuna Hettiarachchi, who functioned as a Director of Sea Consortium Lanka (Pvt.) Ltd., stated in his Affidavit dated 03.11.2024 that his Company was "*… for the first time, notified by email of any leak of Nitric Acid and/or concern and/or any non-routine request pertaining to the X-Press Pearl Vessel … on the evening of 19th May 2021*". He further averred that his Company had "*not received any other emails and or/notifications*

prior to the above with regard to any leak of Nitric Acid and/or concern and/or any non-routine request as regards the Vessel". He then averred (in paragraph 7) "*… that in the morning of 20th May 2021, at approximately 1019h, the 11A Respondent wrote to the Port of Colombo requesting permission to discharge the Nitric Acid container threat*".

199. The available evidence however points to a totally different factual position to the one taken up by Sea Consortium Lanka (Pvt.) Ltd.

200. Captain Yong Sheng Wu, sent an email titled "*X-Press Pearl V.21018E – Q – AHMD – LEAKAGE CONTAINER NO:- FSCU7712264"* at 1.37 p.m. on 19.05.2021 to the vessel as well as to Terence Goh, directing them to "*… ensure this DG container to be discharged in Port of Colombo*". Captain Yong Sheng Wu added a reason in that email, on why it must be discharged at Colombo and emphasised that it is "*very risky to keep it onboard*". This email, generated at 11.07 a.m. in Sri Lankan time, was copied to Samaranayake, the Assistant General Manager – Operations, on his official email address "sanjeewa@x-pressfeeders.com.lk". This particular email is a follow up of another email that had been already sent by Captain Yong Sheng Wu earlier on the same day to Dennis Yeong at 10.55 a.m. (Sri Lanka time 8.25 a.m.). In this earlier email, the Marine Superintendent directed Dennis Yeong, who handled the operations for the Singapore Agency, to check the possibility of discharging the leaking container at Colombo. This email was not copied to Samaranayake or any other person at Sea Consortium Lanka (Pvt.) Ltd.

201. However, the email sent by Captain Yong Sheng Wu to Terence Goh at 1.37 p.m., and copied to Samaranayake, should have appeared in the inbox of the local Agent, as an incoming mail. Samaranayake cannot plead ignorance to its contents, as unless he opens the email, he would not know whether it was sent directly to him as the principal recipient or only copied to him. The email was sent and received by Samaranayake on 19.05.2021, at 8.25 a.m. Sri Lankan time, within the usual office hours of commercial establishments operating in Sri Lanka. Thus, it is clear that

Sea Consortium Lanka (Pvt.) Ltd. was fully aware of the leaking container onboard of the vessel MV X-Press Pearl, any time after 8.25 a.m. on 19.05.2021 and that her principal wish was to discharge the same at the Port of Colombo.

202. That being the reasonable inference that could be drawn from the established facts, there are other items of evidence that confirms correctness of the said inference into a definitive finding of fact. There is uncontroverted evidence that the email sent by Captain Yong Sheng Wu on 19.05.2021 at 1.37 p.m. (Singapore time, which is 2 ½ hours ahead of local time or + 8000 GMT) and copied to Samaranayake, had in fact been read over and, more importantly deleted by the recipient Samaranayake on the same day within minutes after reading.

203. This vital piece of evidence was presented through the Report dated 11.03.2024, issued by Professor D.A.S. Atukorale, the Director of the School of Computing of the University of Colombo, under reference No. CDF/2023/02/0105, in relation to a questionnaire posed by the learned Magistrate in case No. B 51644/06/21, pending in the Chief Magistrate's Court, which established that disputed fact beyond reasonable doubt.

204. The School of Computing was tasked by the Magistrate's Court to analyse the exchange of emails between a total of 13 email addresses, which included the email address of Sanjeewa Samaranayake (sanjeewa@x-pressfeeders.com.lk), during 11.05.2021 and 20.05.2021, in relation to a particular email chain identified by the investigators and marked as "CID/P-6". The report issued by the School of Computing indicates that there had been certain deletions made to emails received by that account, which are identified in the annexure titled "B 51644_Annexure_Q6", which consists of six pages of analysis. On the 5th page of the annexure, a table appears under the heading "Table 5-2 SM04 Deleted Emails" containing information on five email accounts, inclusive of Sanjeewa Samaranayake's.

205. The relevant entry regarding Sanjeewa Samaranayake's email account is reproduced below:

Email user	Source Folder	Header Date	Deleted Time	Creation Time	Email Status
Sanjeewa	Deletions	2021-05-19 13:36:39.0000000	2021-05-19 19:27:49.0000000	2021-05-19 19:08:47.0000000	Read

206. This refers to the email Captain Yong Sheng Wu had copied to Samaranayake with the title "*X-Press Pearl V.21018E – Q – AHMD – LEAKAGE CONTAINER NO:- FSCU7712264*" at 1.37 p.m. (Singapore time) on 19.05.2021. Not only Samaranayake read the email, he also deleted that particular email in the same evening within 19 minutes of its reception into his official email account.

207. In view of these factors, the question that arises for consideration is what the local Agent exactly did with this vital information in its possession.

208. In these circumstances, the conduct of the local Agent too required close scrutiny. It is evident from the contents of the chain of emails, to which Samaranayake was added as a recipient, that the local Agent had full knowledge of the exact situation that prevailed onboard the vessel - at least from 15.05.2021 the local Agent knew that the leaking container and the Cargo Hold No. 2 had issues arising out of leaking Nitric acid. The Master has made a specific reference in this regard in his statement made to CID on 31.05.2021. The Master claimed that he kept the local Agent informed of the necessity to discharge the leaking container at Colombo by his emails sent to the latter repeatedly on four consecutive days commencing from 16.05.2021. The Master has also spoken to Samaranayake over WhatsApp regarding a defective refrigerated

container onboard the vessel, which also required the services of a technician. The fact that the Master had kept Samaranayake informed of the necessity to discharge the leaking container at Colombo, even prior to 15.05.2021 was revealed from the text message sent by Terence Goh to the Master on 15.05.2021 at 8.00 p.m. to which Terence Goh texted "*I have informed cmb agent*", and this message was sent in the context of the continuous emission of orange smoke from the leaking container.

209. Sea Consortium Lanka (Pvt) Ltd., denies all these claims. The electronic records of the emails that were said to have been sent by the Master to Samaranayake, informing the latter of the necessity of discharging the leaking container at Colombo, could not be traced from the vessel's computer system. The Sea Consortium Lanka (Pvt.) Ltd., did not tender any Affidavit from Samaranayake, either accepting or denying those specific instances of reference made on his inclusion into the email chain and being made aware of the requirement to discharge the container in Colombo.

210. Be that as it may, it is an undeniable fact that in the email sent by the Master to Captain Yong Sheng Wu at 1.37 p.m. (local time 7.07 p.m.) on 19.05.2021, Samaranayake too was added as a recipient. The email, consisting of just one sentence, almost ordering Captain Yong Sheng Wu, demanding its compliance, reads as "*Please ensure this DG container to be discharge in port of Colombo*". With the inclusion of Samaranayake as a recipient, he became aware of the urgent requirement to discharge the leaking container. The Master was insisting on his Marine Superintendent for an urgent discharge. The Master of the vessel, with his ability to conduct visual inspection of the Container and the Cargo hold, had a distinct advantage to assess the situation than any land-based official who had to depend on situational reports and photographs, to make an accurate assessment of the situation onboard the vessel. It was the Master, who was fully cognizant of the developing situation.

211. Captain Yong Sheng Wu was not convinced of any urgency to make a determination, and as a consequence, there was no decision taken to instruct the local Agent to make such a request to the Colombo Port Control. The frustration of the Master over the indecision regarding the discharge of the leaking Container is visible from his conversation between Additional Chief Officer, when he said (vide VDR recordings 19.05.2021 at 1106 hrs) the following:

> "*We try Hazira, firstly. Hazira control, okay we will check. Then looks like, don't know why, maybe everybody afraid to take this problem in port, like I spoke, Hazira reply, oh no this container have some smoke, have some leakage, we don't like to take … But your container, proceed to ask next port. Colombo, I saw nobody, I, I cannot ask, because how can I ask agent, please discharge, check, yes I'm not big boss like- only …*"

212. This statement makes it absolutely clear that, if the leaking container was to be discharged at Colombo, that decision must be taken by the Marine Superintendent and not by the Master. Even at 8.25 a.m., on that day Captain Yong Sheng Wu had not made up his mind to discharge the leaking container at Colombo, but he nonetheless directed the Planner only to explore "… *the possibility of discharge this DG container in port of Colombo*". The result of that exploration, which may have been carried out consequent to the issuance of a direction by the Marine Superintendent, was not made known to this Court.

213. In this context, it is of relevance to insert here the amended Clause 8.1 of the International Management Code for the Safe Operation of the Ships and for Pollution Prevention (International Safety Management (ISM) Code), adopted by Resolution MSC.273(85) on 4th December 2008. After the amendment, it reads that "*The Company should identify potential emergency shipboard situations, and establish procedures to respond to them*". The Owner/Operators either had no such established procedure when the situation onboard the vessel MV X-Press Pearl was reported by the

Master or they have chosen to ignore the established procedure, if there was one.

214. In the Singapore Report it is noted that "*The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.*" (vide foot note 2, at page 5).

215. Interestingly, the email sent by Captain Yong Sheng Wu directed at 1.37 p.m. from his office at Singapore contained a clear decision. With that email, Captain Yong Sheng Wu directed Terence Goh "… *to ensure this DG container to be discharged in Port of Colombo*". Samaranayake also was a recipient of this email, which he read and deleted around 7.08 p.m., on 19.05.2021. This is one of the two emails received by Samaranayake from the Marine Superintendent, which conveyed a specific direction on him to make a request to discharge the leaking Container at Colombo, although he had constantly received requests from the Master, who unsuccessfully tried to initiate the discharging process at Colombo for the past several days.

216. Admittedly, the first email addressed to the Harbour Master by Samaranayake, containing the request to discharge a leaking container, was sent only on 20.05.2021 at 10.19 a.m. It is obvious that this request too was made on the directions received from the Marine Superintendent, who expected his Agent to "*ensure*" that the leaking container is discharged at Colombo.

217. It is clearly evident from the material already referred to and considered in the preceding paragraphs that Samaranayake was fully aware of the requirement of discharging the leaking Container at least from 11.07 a.m. on 19.05.2021, if not earlier. Thus, the senior management of the local Agent of the Company, although acutely aware of the urgency of the requirement to discharge the leaking container in the Port of Colombo

from 19.05.2021, for some undisclosed reason, decided to make the required application only on 20.05.2021 at 10.19 a.m., that too after a hiatus that lasted more than 20 hours. Strangely, the subject of his email is reflected as "URGENT".

218. The obvious inaction on the part of the local Agent to make the request urgently disregarding the specific instructions issued by the Marine Superintendent is surprising as the latter had emphasised in his email that "*it is very risky to keep*" the leaking Container onboard. Hettiarachchi accepted this position when he averred that his Company "… *wrote to the Port of Colombo requesting permission to discharge the Nitric Acid container threat."* The word used by Hettiarachchi to describe the impact of keeping the leaking Container onboard to the vessel by using the word "*threat*", denotes his own realisation of Captain Yong Sheng Wu's reference that "*it is very risky to keep onboard*" that container.

219. But the actions of Samaranayake and the explanation offered for the delay in making the request seems to have been advanced before this Court, in order to conceal an underlying sinister motive. In response to the instructions issued to make a request, Sampathawaduge of Sea Consortium Lanka (Pvt.) Ltd, wrote to Terence Goh at 4.57 p.m., (local time) on 19.05.2021 stating that "*We will check with HM, Safety office and terminal by tomorrow morning and let you know the possibility of discharging same since HM office and Safety office is closed now*." Hettiarachchi, in his Affidavit also had averred that "*Harbour Master's Office and Safety Office were closed at the time the 11A Respondent received the aforementioned email and this fact was informed to those on the email thread*".

220. Therefore, the delay in responding to the Direction by the Marine Superintendent would have disturbed the Master, who was anxious to discharge the Container in Colombo on the first available opportunity. The WhatsApp chat that had taken place between the Master and Terence Goh on 19.05.2021, echoes the explanation offered by the local Agent on the delay in making a request. At 5.28 p.m., Goh texted to Master on

WhatsApp stating that "*tomorrow we will know what if we can solve all the issues as CMB, the ministry in CMB is closed*".

221. The claim that the Harbour Master's office being closed is a deliberate falsehood on the part of the local Agent, probably concocted with the intention to buy time and for the purpose of covering up for their lapses. The statutory Declaration of Dangerous goods was sent at 4.46 p.m., on 19.05.2021 by Lunugama through electronic mail. That declaration was acknowledged and accepted by the Navigation Safety Section of the Harbour Master's office. The acknowledgement was by way of sending a reply email at 8.08 p.m. in the same evening. The reply that was sent is clearly not a system generated automatic reply. The reply made a specific reference in the middle of the body of its text to the name of the vessel, as "*M.V. X-PRESS PEARL*".

222. The primary mode of communication between the Harbour Master's office and Sea Consortium Lanka (Pvt.) Ltd. was through electronic mail. Lunugama made the Declaration of Dangerous Cargo via email. Similarly, Samaranayake also made the request to discharge the Container through an email sent at 10.19 a.m. on 20.05.2021. It is an absurd proposition to claim that while communicating through electronic mail, it is not possible to contact the Harbour Master, unless the recipient's office is kept open. The local Agent need not wait until the following morning to communicate his request, which was sent through electronic mail. The local Agent should have sent that request no sooner than he received the specific instructions issued by its principal. It was for the Port Control to respond in the first available opportunity, which it did in the same evening.

223. Even on 20.05.2021, the email was sent not as the '*first thing in the morning*' but only after almost two hours into the working day (at 10.19 a.m.), but without adducing a reason for the delay on its part. This was the conduct on the part of the local Agent, especially when specific instructions were issued by the Marine Superintendent after stressing the

importance of discharging the container that posed a risk to keep it onboard the vessel with the addition of the word "*ensure*", leaving them with no other choice.

224. With the emphasis placed on the failure on the part of the local Agent to make the application to discharge the leaking container in an expeditious manner, given the importance attached to it with the words "*very risky to keep it onboard*", a question would arise in the mind of the reader, on how a timely request would have prevented the fire on board. There is no direct answer that could be provided in a simple 'yes' or 'no' format. In this complex equation, all the relevant factors have to be considered as variables. However, that question could be answered in this manner. If there was a timely request made with a full disclosure of relevant information, there would have been many other options available to the Port Control, which it could have considered before time ran out, than the ones it had considered and implemented.

225. The following considerations would certainly confirm that proposition. It is noted that the local Agent knew the necessity to discharge the leaking Container at Colombo since 19.05.2021, but only made the request on 20.05.2021 at 10.19 a.m. In the request made to the Harbour Master, Samaranayake conveyed that they have been advised by the Master of MV X-Press Pearl, that one of the containers FSCU 7712264 containing DG (Nitric acid) has been leaking onboard and requested permission to discharge the same at Colombo for re-working. The only other additional information that was conveyed by him was the Master informing them that there is smoke for the last few days but no fire, and the Container stowage is at position 110582.

226. This request could not be criticised for its content, provided that it was made in the ordinary circumstances, as it concerns only an incident of leakage of a corrosive substance from a container, which emitted fumes for the past few days. The wording used in the request gives the impression to its recipient that the Agent was only seeking permission of

the Port Control to discharge the same and to re-work, on behalf of its principal, to make it seaworthy once again, which is apparently a regular occurrence in ports handling containerised cargo in large volumes. The Harbour Master in his public statement, relied on by the MV X-Press Pearl group, admitted that it is so. Similar emails were sent by Agents as well as Ship Managers during Hamad and Hazira episodes, in making similar requests and also in the instance of the vessel 'Seaspan Lahore', which also had a leaking container of Nitric acid onboard.

227. Nevertheless, the available material before this Court presents a very different position, which isolates the situation onboard the vessel MV X-Press Pearl from the rest of such ordinary situations. Perhaps the learned President's Counsel founded his contention on this very factor, when he submitted that if the leaking Container was expeditiously discharged by the Port Control after granting permission to do so, without allowing it to remain onboard, it could have been attended to on land by those qualified to do so, and the starting of the fire, that eventually engulfed the entire vessel and destroyed it, could have been effectively prevented. Hence the allegation that the polluter referred to in the 'polluter pays' principle has to be made against the Port Control.

228. It is the considered opinion of this Court that the said contention necessarily pre-supposes the fact that the only issue prevailed over the vessel at the particular time at which the Agent for the Company made the request for discharge, was only the leakage of corrosive liquid, emitting an orange coloured smoke for the past few days. Therefore, the local Agent contended by applying plain logic, that if the problem container was taken off the vessel as requested and re-worked, the vessel could have carried on with its regular cargo operations that were scheduled for the Port of Colombo and thereupon continued with its remaining part of the planned voyage bound Singapore, unhindered by the problem posed by that leaking container.

229. Sea Consortium Lanka (Pvt.) Ltd., in its Affidavit asserted that it came to know of the existence of a leaking container on board the vessel only in the evening of 19.05.2021. No specific time was mentioned and it was later discovered during investigations that the particular email sent at 1.37 p.m. (Singapore time) had been read over by the recipient Samaranayake before its deletion, and as a result, the local Agent was not in a position to specify the exact time at which it received that email. When considered in the light of this line of reasoning referred to in the preceding paragraph, it has also become questionable whether the actions of Sea Consortium Lanka Ltd. taken in the evening of the 19.05.2021, in making the request by informing the port administration of the problem onboard or waiting until it did on the morning 20.05.2021, and whether the intervening period of over 12 hours between these two emails, would have made any significant difference to the outcome.

Deterioration of the situation inside Cargo Hold No. 2

230. The answer to this question requires an in-depth analysis of all the attendant circumstances. There is no dispute over the fact that the fire on board had its origins traceable to the leaking Container. But when Samaranayake made the request for approval to discharge the same to the Port of Colombo and to re-work it on land, the problematic situation was not confined only to the leaking and smoking container.

231. The Nitric acid leak was first observed by the crew at about 9.00 a.m. on 11.05.2021, as a greenish liquid found on the deck around the container FSCU12264. The leak rate was estimated to be around 0.5 – 1.0 litre/hour. The effect of the leaking of corrosive substances on the deck of the vessel resulted in 'heavy corrosion', which was noted on the hatch cover.

232. The Master ordered the crew to wash down the leaking acid using sea water, as a remedial damage control measure. This method of damage control had to be called off, when the Port administration of Port Hamad raised objections, citing environmental concerns. It was then decided to use sawdust to soak up the leaking acid. Therefore, during the period of

the vessel's berthing time at Hamad, commencing from 9.00 a.m. to 11.00 p.m. on 11.05.2021, for about 14 hours, between 3.5 to 7 litres of 70% Nitric acid had leaked onto hatch covers. It is important to note that before the cargo operations commenced at 9.00 a.m., it was noted that the hatch covers were already "heavily" corroded. With the leaking continued unabated, the flow of Nitric acid would have had the effect of further corroding the hatch covers, now exposed to the 70% concentrated Nitric acid, without any protective paint cover on its surface, which meant to prevent its corrosion. The hatch covers, now exposed to bare metal, had no protection against the effects of the corrosive liquid. Of course, the washing away had begun once more after the vessel left the protected area of sea, but that factor alone was sufficient to prevent the container from emitting orange smoke on 13.05.2021.

233. On the same day, a high-level bilge alarm was sounded from Cargo Hold No. 2 and upon inspection, the Crew found that the "*bilge wells*" of that cargo hold were full of water. It was suspected by the Master, that the water used to wash down the leaking acid, would have flowed down into the Cargo Hold No. 2 through the "*gaps*" between the hatch covers. The VDR recordings confirm this development (vide recordings at 1241 -1242 hrs on 12.05.2021). The crew also noted that "… *this liquid is going around and burning the cover* …" (*vide* recordings 1144-1146 hrs).

234. After a four day voyage from Port Hamad, the vessel reached Port Hazira in India on 15.05.2021 around noon. During this period, it is said that the leaking continued at the same rate along with emissions of orange smoke, but the Singapore Report states (at paragraph 1.1.6.9. at page 22) that the crew noted that the leaking had ceased on 15.05.2021 before the vessel arrived at Hazira. The Master's conversation with a crew member on 16.05.2021 at 029-0251 hrs (vide VDR recordings) also supports this finding when he stated that "… *we know everything inside … some small, many packages … one package was broken and leaking these two three days and now empty. The rest still ok, today no leaking*".

235. As already noted, apparently this is the item of information that led the land-based Operators into a state of complacency. Assuming that the leak was due to a damage in a single IBC stored in the Container, that particular IBC had by then released all of its contents consisting of 1.5 metric tons of Nitric acid in its totality onto the hatch cover, right above the Cargo Hold No. 2 of the vessel. Some of that vast quantity of corrosive Acid would have washed away, while some may have soaked into the sawdust. But a significant volume of that 1.5 metric tons of Nitric acid had certainly found its way down into the Cargo Hold No. 2 penetrating through the steel plates of the hatch covers onto the Containers, stowed within that hold. As a result, those containers were exposed to being washed down with a strong corrosive liquid. The large volume of water found in the bilge of the Cargo Hold No. 2 on 13.05.2021 is a determinant indicator that the hatch covers did not effectively prevent the water, which was used to wash away the Acid, coming into the Cargo Hold No. 2 of the vessel.

236. The respite came with the stoppage of the acid leak which was proved to be only a temporary one. When the vessel departed Hazira, it sailed right into cyclonic weather and navigated through the rough seas. The crew was ordered not to carry out routine inspection of the leaking container on the deck due to safety concerns. As a result, no clear information was available for about four days as to the leaking of Nitric acid other than the emails sent during this time merely indicating a constant leak rate.

237. The Master, through radio transmission, had kept one of his crew members informed of the leak rate at one litre in an hour (vide VDR recordings at 19.05.2021 at 0203 hrs). The leak rate had to increase as the vessel was forced to deviate from its originally plotted down route, in order to avoid an oncoming cyclone, and as a direct result, spent more time at rough seas than usual, in order to reach its next scheduled port of call, Colombo.

238. The condition of the seas through which the vessel had to navigate could be inferred as the Master himself conveyed his surprise of the height of the waves, generated by the cyclonic weather. He described the situation to a caller as "… *this cyclone come … will also die … because wave was unbelievable … totally damaged by waves … 20-meter waves …*" (vide VDR recordings at 0124-0141 hrs on 13.05.2021).

239. In fairness to the Master, it is relevant to note that he in fact wanted to keep his vessel safe within the Port of Hazira until the weather improved, but that suggestion was turned down by the Marine Superintendent. The reasons cited by the Master, in order to convince the Marine Superintendent, are important in relation to the point considered in the paragraph immediately below.

240. On 14.05.2021 (vide VDR recordings at 0425 hrs), the Master during a telephone conversation with Captain Yong Sheng Wu said "*First choice is the most safe for everybody, for cargo, for crew, for vessel, to drop anchor. Anyway, Colombo never berthing alongside, anyway I will arrive [at] Colombo, and we will wait minimum two days at anchorage Colombo*" and then pointed out the negative side of proceeding on "*… anyway, if I will hurry, I will damage your vessel, will proceed through heavy weather then never mind. You just spent fuel, yes fuel because it will be minimum, and … lose some cargo, may be some[time] ship, I don't like, I don't like to do this. Most safely will be wait 48, about 48 hours, inside port of Hazira*".

241. The Master with his long experience at sea, had foreseen the impact that would be on the cargo carried by the vessel, by sailing through cyclonic weather, and predicted the possibility that it would result in losing some of the containers to rough weather.

242. Meanwhile, the condition inside the leaking container became heavily deteriorated. The Nitric acid that was stored in plastic tubs called IBCs, with an outer metal caging for its protection. The corrosive effect of Nitric acid, constantly coming into contact with the metal caging that protected

the IBSs were already considered by this Court at an earlier point in this Judgment. Some of these metal caging of the IBCs, particularly the ones forming the bottom layer inside the container, now weakened by constant exposure to a corrosive liquid for a longer period, would have in all probability given way, when subjected to excessive stresses caused on them due to such extra pitching and rolling, which the vessel had to endure in sailing through rough seas. The bottom layer of the IBCs, that had to bear the weight of the IBSs, because others were stacked on top of them, would not have had the protection of the metal caging to withstand the extra stress, which caused the protective metal caging to collapse and thereby damage the plastic tubs containing Nitric acid to leak their corrosive contents out, at a higher rate and in larger volumes. This is confirmed by the Additional Chief Officer who reported "… *heavy cargo leak from container FSCU 7712264*" to the Master in the early hours of 20.05.2021 (vide Singapore Report paragraph 1.1.8.13 at page 27).

243. The constant emission of orange smoke for several days from the leaking Container during the voyage from Hazira to Colombo too did not receive the attention it deserves. The land-based Operators have held on to their already formed view that it was due to a chemical reaction which started when the acid came into contact with the red paint. The fire expert, whose services were obtained only at the eleventh hour by the Operators, indicated the seriousness of the leak as well as of the emission of orange smoke.

244. Dr. Darren Holling, in his email sent at 3.44 p.m. on 20.05.2021, stated "*Nitric Acid is both corrosive and an oxidiser. Reactions with steel will generate Hydrogen gas, which is extremely flammable with a wide explosive range and contact with combustible materials such as cardboard and wood may result in a fire. Nitric Acid can also generate nitrous oxide which are orange/brown in colour*". Therefore, the constant emission of orange smoke was due to Nitrous Oxide gas that was produced due to the oxidisation process.

245. The opinion of the fire expert, expressed in relation to the cause for the emission of orange smoke, contradicts with the opinion strongly held by the Marine Superintendent, who trivialised it down to a mere chemical reaction of the red paint, applied over the hatch cover, coming into contact with leaking Nitric acid. He did not assess the very likely scenario of leaking Nitric acid coming into contact with the containers carrying caustic soda, that were stowed in Cargo Hold No. 2, immediately below the leaking container. The fire expert, who was alive to this potential danger, thought it fit to alert the Operators of that danger by laying emphasis on a possible exothermic chemical reaction.

246. The expert stated that "*If the nitric acid came into direct contact with caustic soda, it will undergo an exothermic neutralisation reaction that will generate water (perhaps as steam), and sodium nitrate. Some of the other cargoes such a sodium methoxide and methanol would also undergo exothermic reactions with nitric acid, possibly causing a fire and or issuance of brown fumes*".

247. Captain Yong Sheng Wu, in his email to the Master (sent on 19.05.2021 at 10.55 a.m. Singapore time) however stated that "… *smoke is due to corrosion and NO risk of Fire at this moment*", echoing the Master's assessment of the origin of smoke revealed by his own words "… *it is leaking, orange smoke coming out of there, fire, we tried to put the fire out. I see orange smoke, that chemical thing is eating away the red paint … there is chemical reaction and that is why the smoke is orange*" (vide VDR recordings 0345-0405hrs on 13.05.2021). The Marine Superintendent obviously did not re-evaluate his assessment of the situation on 13.05.2021, when sending an email to the Master on 19.05.2021 as he had not sought assistance of a fire expert before making that fateful decision.

248. The potential danger, foreseen by the fire expert, was already turning into an actual critical situation when Captain Yong Sheng Wu stood his ground as to the cause of orange smoke. It was disclosed during a conversation the Master had with his Additional Chief Officer on

20.05.2021 at 0008-0014hrs (5.38 a.m., local time). The transcript of what the Master said during the said conversation is as follows:

> "*Master:* *This cargo hold no. 2 full, inside not, not full, many may be 20 containers same as on bay 10 on the deck. Same, same. Looks like [when] we closed air vent, ventilation due to heavy weather, but inside due to air too much temperature*
>
> *May be start wet and chemical reaction. This looks like this cargo not like any water, wet, moisture, water not like. But due to everything closed, closed inside cargo hold start some chemical reaction. Make smoke too much, too much, too much, too much until now … really very dangerous for breathing … come inside, not come even though … already … try now to arrange at least … discharge … this cargo here. We will, we will see, we will try.*"

249. This is a clear indication that the Master and the land-based Operators of the vessel paid no attention at all to investigate the impact of the Nitric acid, that leaked into Cargo Hold No. 2, had on the caustic soda containers stowed in that cargo hold. This is a vital factor, which they should have considered, particularly after the situation of pumping out the water from the bilge tanks, upon being alerted by the bilge alarm. In spite of the clear indications of a potential threat, they held on to the belief that the simple act of discharging the leaking container at Colombo would bring an end to all their woes.

250. It is clearly evident from the examination of the contents of this chain of emails, WhatsApp messages and VDR recordings that the emission of orange smoke was not confined to the leaking container, which continuously emitted smoke from 12.05.2021, but such emissions were also noted from the Cargo Hold No. 2. In hindsight, the Master laments that the closing down of the ventilation of the Cargo Hold No. 2, a precautionary step he had taken during adverse weather conditions,

must have contributed to the high moisture levels inside the cargo hold. The high temperatures observed inside the cargo hold, which in turn may have contributed to the start of a chemical reaction that may have already commenced inside the containers that are stowed directly under the leaking container, with the leaking acid coming into contact with other chemical substances contained in them. In doing so, the Master sought to identify the cause for the accumulation of orange smoke inside Cargo Hold No. 2, where in addition to the ones that contained caustic soda that were stowed right under the leaking container, there were about 20 other containers also containing different forms of dangerous cargo, stowed in that cargo hold.

251. The Master, by an email sent on 19.05.2021 at 10.35 p.m., from the vessel (in Singapore time at 6.35 a.m. on 20.05.2021 and in Sri Lankan time at 4.05 a.m.) alerted Captain Yong Sheng Wu of the dire situation that prevailed onboard the vessel, subsequent to ringing of the Smoke Detection Alarm of Cargo Hold No. 2. The Master in response had activated the fire drill of the crew following the standard procedure. He then stated "*When we open any air vents of CH#2, found so much chemical [NOT FIRE] same orange [looks like due to night] colour smoke started to come out from air vents.*" He also informed that "*… can't come inside Cargo Hold and identify [the cause] due to dangers to the crew*" and warned that "*… chemical reaction start may be due to raining*". Even reporting of this very serious development by the Master to the land-based Operators had failed to elicit any positive response from them, either in respect of seeking assistance from the Port Control or at least by seeking an opinion of a fire expert to advise them of the possible scenarios that would manifest, under the given set of circumstances.

252. Dr. Darren Holling, by his email sent at 3.44 p.m. (Singapore time) on 20.05.2021 refers to his perusal of information that were made available to him during the past 30 minutes or so, indicating he was consulted and provided with relevant information only after 3.00 p.m. (Singapore time). But the Master reported fire onboard in Cargo Hold No. 2 and sought

assistance from the port administration at 12.05 p.m. on 20.05.2021 (vide Port Control Log Book of Sri Lanka Ports Authority). Thus, the fire that was reported in Cargo Hold No. 2 had erupted at 2.35 p.m. in Singapore time. But the first fire was noted in Cargo Hold No. 2 at 10.30 a.m., according to the Singapore Report (local time). In fact, there is reference to a fire onboard as far back as 13.05.2021. The Master, during a discussion with a crew member said that " … *orange smoke coming out there, fire, we tried to put the fire out. I see orange smoke, that chemical thing is eating away the red paint … there's the chemical reaction and that is why the smoke is orange*" (vide VDR recording at 0343 hrs).

253. The events referred to above indicate that the land-based Operators needed a naked visible fire onboard to convince themselves of the necessity to consult a fire expert on the precautionary steps they should take over a leak of Nitric acid. This could be noted from Dr. Holling's first email itself (sent at 3.44 p.m. Singapore time) where he referred to the release of CO2 into the Cargo Hold, which the Master did after reporting the fire in the Cargo Hold No. 2 for the first time, and the expert approves the step taken.

254. The Singapore Report describes the first fires noted in the Cargo Hold No. 2 (at paragraph 1.1.8.22 at p.28), after the Chief Engineer noticed an "*unusual smell of burning rubber*" which he traced to Cargo Hold No. 2, as follows:

> "*As the both CE and A-2E entered Cargo Hold #2, they saw the space filled with smoke and several small fires at the top tiers between rows 05/07 and 06/08. one of those small fires was around the upper section door (along the rubber gasket) of one of the containers. In addition, the A-2E also recalled leak marks on some containers, as well as signs of melted metal.*"

255. This Court now turns to examine what the fire expert said in his first email (at 3.44 p.m.). Dr Hollings opined that "*If the nitric acid came into direct contact with caustic soda, it will undergo an exothermic neutralisation*

reaction that will generate water (perhaps as steam), and sodium nitrate. Some of the other cargoes such a sodium methoxide and methanol would also undergo exothermic reactions with nitric acid, possibly causing a fire and or issuance of brown fumes".

256. The Master's own realisation, that he urgently needed to check on the contents of the containers that are stowed right below the deck area on which the leaking container was stowed, came only on 19.05.2021 at 9.50 p.m. in ship's time (3.20 a.m. in Sri Lankan time). In instructing someone over the phone, the Master stated that "… *I need from you full information about this container which inside Cargo Hold No. 2. All, full, full cargo plan, DG, DG. And check what do you have. Manifests, SDS … MSDS sheets, packing list, everything, all you have …".*

257. The frantic effort of the Master to obtain information on the containers that were stowed in Cargo Hold No. 2 with dangerous cargo, was made at a very much later stage, since by then the chemical reaction indicated by the fire expert had already begun. It is necessary to note that the opinion of the fire expert, expressed late in the day by his email, aligns perfectly well with the situation observed by the crew in Cargo Hold No. 2, when they saw "*small fires*" and "*melted metal*", which indicated signs of a high level of heat generated by the exothermic reaction, in the top tier of containers that were stowed under the leaking container inside that cargo hold.

258. In fact, some of the containers stowed in Cargo Hold No. 2, under the leaking container, did contain Caustic Soda, which the expert warned, if came into contact with Nitric acid, would result in exothermal chemical reaction. In this regard, it is important to refer to an important factor that should have compelled the Operators of the vessel for very urgent action.

259. After the vessel was submerged and in view of the unprecedented marine pollution that ensued, the Deputy General Manager of MEPA, Jagath Mendis Gunasekara, lodged a complaint with the Harbour Police

Station on 23.05.2021, that it was discovered that certain offences, punishable under Sections 13, 34, 35, 26, 27, 37, 38 and 50 of the Marine Environment Prevention Authority Act, No. 35 of 2008 were committed. The Harbour Police, based on that complaint, reported the facts of that incident to the Magistrate's Court of Colombo in Case No. B 51644/06/2021 on 25.05.2021, in terms of Section 136 of the Code of Criminal Procedure Act, No. 15 of 1979. The Criminal Investigation Department had taken over the investigations from the Harbour Police, and filed a summary of the contents of the statements recorded by it, with a further report to Court on 01.06.2021.

260. The CID, from time to time obtained necessary orders from the learned Magistrate, acting under Section 124 of the Code of Criminal Procedure Act, No. 15 of 1979, to assist the ongoing investigations, directed at various Government entities.

261. One such order from the series of similar orders made by Court was to ascertain the cause of fire that had engulfed the ill-fated ship, which eventually resulted in the said marine pollution.

262. The report of the Government Analyst issued on 06.08.2021 consequent to the said order of Court revealed that the Government Analyst is of the opinion that the fire onboard the ship was caused by igniting the inflammable material contained in the containers stored in Cargo Hold No. 2 due to high temperatures generated by exothermic reaction which commenced when Nitric acid that leaked from the container stored in Bay 11, came into contact with metal surfaces of those containers, after finding its way through the rubber seals of Hatch Covers, which too had perished due to exposure to the highly corrosive Nitric acid.

263. In arriving at that opinion, the Government Analyst had considered the contents of the statements made by Captain Tyutkalo Vitaly, Chief Engineer Oleg Sadilenko, the Harbour Master and several others. The Government Analyst also personally interviewed Captain Tyutkalo

Vitaly, on 12.07.2021 at a Colombo hotel, in the presence of his legal team, in order to verify certain factual matters, in an attempt to form his opinion.

264. In addition to the contents of his statement made on 31.05.2021 to the Criminal Investigation Department, Captain Tyutkalo Vitaly further disclosed to the Government Analyst *inter alia* that;
    a. the Hatch Covers, made out of metal, could be completely removed from the ship's deck, and
    b. each Hatch Cover had rubber beadings/seals preventing water passing through them.

265. This Court accepts the opinion of the Government Analyst, expressed in relation to the cause of fire, that brought about the total destruction of the ship. Of the 1486 containers that were on board, the focal point of this part of the Judgment should be confined to the container bearing No. FSCU7712264, which has been referred to in this Judgment as the 'leaking container'. This container was loaded into the ship at the Port of Jebel Ali on 10.05.2021. That container had 29 metric tonnes of Nitric acid as its cargo. The placards of that container indicated the cargo as IMDG Classes 8 and 5.1, and was positioned on the deck. The position of the container placement on the deck was identified as 110582.

266. The manner in which this positioning is explained in the report prepared by the Transport Safety Investigation Bureau issued on 16.10.2023, at page 17 in the footnote 32. It states that Cargo Hold No. 2 was comprised of bays numbered as 9, 10, 11, 13, 14 and 15. In each bay, the containers are secured in rows which are numbered, beginning from the centreline to a maximum of 7 rows on either side. In such rows, containers are stacked on each other, forming tiers, both on the deck as well as in the Cargo Holds, that are located below the deck. Tiers on the deck are limited to five, whereas in the cargo holds, they begin with Tier 02 from the bottom of the cargo hold and go up to Tier 12, ending just below the hatch cover.

267. The position of container bearing No. FSCU7712264 is given as 110582, meaning that it is stowed in Bay 11, Row 05 and Tier 82. The Bay plan of Bay 11 (aft) shows the positioning of the Nitric acid container. It was placed right on the deck surface, with four other containers being stacked over it forming the Tier 82 over the deck. Under the Hatch Cover, that container had six containers stowed right underneath it in a stack. The container numbers, from bottom to top are FSCU 7753411, FSCU 9403619, BHCU 3029146, FCIU 3974441, BMOU 2277260 and CBHU8450686. The adjacent Row to Row 5, being Row 07, also had six containers, bearing numbers (once more arranged from bottom to top) CAXU 2840628, PCIU 8947111, TCKU 3028002, CAXU 6146531, DOLU 4005310 and CRSU 9045661.

268. Of these six containers stacked in Tier 82, the container BHCU 3029146 positioned at 110506, contained a consignment of Caustic Soda flakes 99% whereas container CAXU 2840628, positioned at 110502 contained a consignment of Urea. Of the six containers that were stacked in Row 7, also located under the container FSCU7712264, the containers bearing Nos. CAXU 2840628 (positioned at 110702), PCIU 8947111 (positioned at 110704) and CAXU 6146531 (positioned at 110708) also contained consignments of Caustic Soda.

269. These containers were stowed immediately below the deck on which a container that was leaking 70% strong Nitric acid was stowed. It is highly probable that the leaking corrosive acid comes into contact with Caustic Soda, which is a strong alkaline substance, through the corroded steel plates of the containers, in which they are stored. The resultant exothermic chemical reaction well supports the Government Analyst's opinion as to the probable cause of fire that eventually engulfed the ship in its entirety and also perfectly in line with the opinion of Dr. Hollins. In this regard it is also relevant to note that the Ship carried a total of 84 containers containing consignments classified as "Dangerous Cargo", including Lithium Batteries, methanol and other chemicals.

270. This fact is referred to by Dr. Darren Holling, in his 2nd email sent on 20.05.2021 to Terence Goh (at 5.42 Singapore time) stating that "*I note that there is a container of lithium batteries on deck at slot 110482*" by bringing it to the notice of those who are concerned with assessing the potential danger it might pose. This is confirmed by the crew members, who entered Cargo Hold No. 2, after the smoke detectors altered them, and saw that "… *leak marks on some containers, as well as signs of melted metal,* …" (vide paragraph 1.1.8.22 of the Singapore Report at p.28). The alarming observation of the incandescent glow on some of the containers that were stowed in Cargo Hold No. 2, at the early hours of 20.05.2021, was a sure sign that the situation was not normal at all. The melted metal in Cargo Hold No. 2, coupled with the observation of an incandescent glow, emitting from some of the containers, should have been treated by all those involved with the decision making over the affairs of the vessel as a red flag situation, which had a high probability of threatening the safety of the crew, the vessel, as well as of the marine environment.

271. If the opinion was obtained at the proper time, and if the officers who were tasked by the Operator with the management of the vessel have acted on that opinion, by instructing the Master to conduct an investigation to verify the nature of the containers with dangerous cargo stowed in the Cargo Hold No. 2, then, with the first signs of trouble emerging, in the form of leaking water into that hold, the situation that eventually developed into a catastrophe could have been substantially avoided, if not totally or at the very least, it could have been effectively mitigated. This being the general mindset of the land-based Operators, with which they have acted in the making of vital decisions regarding the vessel, the consequences that necessarily flowed from them could undoubtedly be taken as due to those ill-considered decisions.

272. With this conclusion, this Court at this stage intends to return to the issue that was already identified at the commencement of this segment, namely, if there was a timely request made by the local Agent with a full

disclosure of relevant information, whether there would have been other options available to the Port Control, which it could have considered other than the ones it did, before the time ran out.

273. The different factors considered by this Court, points to the answer to that question in the negative since the situation inside the Cargo Hold No. 2, when the vessel dropped anchor at Colombo, could not have been remedied as the chemical reactions have already started inside the containers that carried dangerous cargo. The reluctance of the local Agent to make that position known to Port Control might be due to reasons connected to that situation onboard the vessel.

Conduct of Sea Consortium Lanka (Pvt.) Ltd.

274. In addition to the brief reference made at the initial stage regarding the conduct of the local Agent that on its part it had failed to make a full disclosure of vital information in a timely manner, it is important at this stage to undertake an analysis of the available material, in order to arrive at a definitive finding.

275. Contrary to the claim of Sea Consortium Lanka (Pvt.) Ltd. made in its Affidavit, that it came to know of the existence of a leaking container on board the vessel only in the evening of 19.05.2021, the incontrovertible evidence available before us, proves otherwise.

276. Even if one were to totally disregard that the Master of the vessel had conveyed the situation onboard the vessel by electronic mail repeatedly sent to Sanjeewa Samaranayake during 14th to 16th May 2021, solely due to non-availability of the contents of those emails in order to substantiate the Master's claim, at least on 19.05.2021, Samaranayake became aware of the situation when he too was made a recipient to the email sent by the Captain Yong Sheng Wu on 19.05.2021 to the Master at 1.37 p.m. Singapore time (11.07 a.m., local time), directing him to "*Please ensure this DG container to be discharged in port of Colombo. It is very risky to keep on board.*". This is the first reference of Samaranayake adding to the email

chain could be found, and the chain emphasised the recipients to "*use the same string of correspondence to reply*".

277. The addition of Samaranayake to the said email chain, could be understood as a clear indication that the Marine Superintendent had finally made up his mind that the leaking container should be discharged at Colombo. Thus, Samaranayake had the opportunity to examine the contents of the entire thread of emails that indicate gradual deterioration of the situation onboard and he was duty bound to do so, in discharging his duty by the principal. Then, the email sent by the Master at 10.35 p.m. on 19.05.2021 (local time 4.05 p.m. on 20.05.2021), on the same chain would have removed any doubt lingering in the mind of Samaranayake, and convinced him that the situation onboard the vessel was not at all an ordinary one. The gravity of the situation onboard the vessel is very much evident when the Master reported that orange coloured smoke was emitting from the vents of Cargo Hold No. 2.

278. Samaranayake took his own time and made the request to discharge the leaking container only on 20.05.2021 at 10.19 a.m. The only vital detail that was given in the body of that email was the mention of a leak of Nitric acid and emission of smoke from a container for the past few days with the emphasis that there was no "*fire*". But there was a "*fire*" in Cargo Hold No. 2, when Additional Second Engineer had a smell of burning rubber and saw "*several small fires at the top tiers between rows 05/07 and 06/07*" around 10.30 a.m. When Samaranayake finally decided to send the request, the Cargo Hold No. 2 already had small fires that had erupted well before the time of detection. It was the smell of burning rubber that had alerted the crew to trace its origins to Cargo Hold No. 2 and to undertake an inspection of that cargo hold.

279. Lim Kin Seng too, in his Affidavit dated 04.11.2021 has admitted that "*… a fire subsequently broke out in Cargo Hold No. 2 on the 20th May 2021 at approximately 1030h (Sri Lanka time) at which point the Master informed the Colombo Port Control and requested firefighting assistance*". The situation

onboard the vessel as at 9.39 a.m., is reflected from the Master's reply, when Captain Yong Sheng Wu required photographs to satisfy himself of the fact that smoke was emitting from Cargo Hold No. 2. The Master said "*photo we cannot give you because smoke inside cargo hold is not so visible. Believe me. Yes, believe me, this smoke coming from cargo hold until now*." He then insisted that "*… we need full investigation when container will be discharged. Yes, need to investigate what was the packing material, why has this happened, all my life at sea and never had like this problem. I don't know, first time I saw …"* (vide VDR recordings at 20.05.2021 at 0405 hrs).

280. Samaranayake's act of writing to the Harbour Master at 10.19 a.m., on 20.05.2021, making the request to discharge the container and re-work happens to coincide with the reporting of fire in Cargo Hold No. 2 by the Master of the vessel, with leaving only a gap of mere 11 minutes. However, this request seems to be in the format of a routine request made by an Agent on behalf of his principle to discharge a container leaking its cargo onboard a vessel and also to re-work it onshore and to make it sea worthy once more to be taken onboard enabling the vessel to continue with the remainder part of her voyage. It was already noted that the port of discharge of the said container was Klang. Similar requests were made to Hamad and Hazira but the local Agents were unsuccessful in their efforts to discharge the same.

281. The assertions of Sea Consortium Lanka (Pvt.) Ltd., made in its Affidavit that it came to know of the existence of a leaking container onboard the vessel only in the evening of 19.05.2021 and it had not received any other emails prior to that email with regard to any leak of Nitric acid, are not supported by its own evidence as Samaranayake in his first email to the Harbour Master, while making the request to discharge the leaking container, also stating that " *Further, vsl is not calling PKL due to down line delay encountered on her way as a result of Cyclone "Tauktae".* If Samaranayake came to know that he was directed by the Marine Superintendent, to make a request for discharge, by only through that email sent at 1.37 p.m., (local time 7.07 p.m. on 19.05.2021) for the

first time, as his employer had claimed, how is that he came to know that "*vsl is not calling PKL due to down line delay encountered on her way as a result of Cyclone "Tauktae."* Nowhere in that email, or in the one that preceded, Captain Yong Sheng Wu has made any reference to that fact. Hettiarachchi, in his Affidavit clearly averred that his Company had "*not received any other email*" prior to the 1.37 p.m. email notifying them of any leak of Nitric acid.

282. The email sent at 1.37 p.m. carried only two sentences. It only read "*Please ensure this DG container to be discharged in port of Colombo*" and "*it is very risky to keep onboard*". The only way Samaranayake knew that the "*vsl is not calling PKL"* is by perusing the email chain, that contained all correspondence over the developing serious situation, which Hettiarachchi totally denies. The decision to omit Klang was taken on 18.05.2021 as Terence Goh informed Dennis Yeong by email sent at 3.35 p.m., that "*vessel will omit PKG and this unit will discharge in SIN".*

283. This factor alone would suffice to reject the claim of Sea Consortium Lanka (Pvt.) Ltd., that it came to know of the leaking container only in the evening of 19.05.2021. There could be many other communications between the principal and Agent as Samaranayake further conveyed that the reason for the vessel for not calling on the Port Klan was "… *due to down line delay encountered on her way as a result of Cyclone 'Tauktae'".* This explanation for the change of port of discharge could not be found in the contents of any of the other emails on that particular thread.

Decision to discharge the leaking container in Colombo

284. Lim Kin Seng in his Affidavit stated that "… *it was decided on 19th May 2021 to seek the discharge the container in Colombo, instead of Singapore as previously intended and the local agents Sea Consortium Lanka (Pvt) Ltd was informed on the evening of 19th May 2021 of the decision to discharge the Nitric Acid Container at Colombo".* No explanation was offered by Seng why his employer had to change the port of discharge at this late stage. Has the Sea Consortium Lanka (Pvt.) Ltd, decided to deny any knowledge of the

leaking container prior to 19.05.2021, in order to tow the line of its principal?

285. The land-based Operators of the vessel should have considered whether the situation prevailed in the vessel at that point in time qualifies to be described as a "*Ship in Need of Assistance*", in terms of the definition provided in the guidelines issued by the International Maritime Organisation, on places of refuge for ships in need of assistance, by way of a resolution adopted on 05.12.2003 (the resolution adopted in 2023 has no application to this incident that happened in 2021).

286. The ship in need of assistance is defined in clause 1.18 as "… *a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard"*. The high volume of smoke emitted from the Cargo Hold No. 2 and the high temperatures recorded off the body of the vessel around that said cargo hold (measured at 105 degrees Celsius) taken together with the "…*leak marks on some containers, as well as signs of melted metal"* that were noted among the containers that were stacked immediately below the leaking containers, containing dangerous cargo, are likely to have satisfied, in the least the term "*navigational hazard*". The presence of a high volume of dangerous cargo carried within the vessel would, if released out without control, as in this instance happened, indeed present a very serious environmental hazard.

287. If the Operators considered these multiple aspects in proper perspective, when it had the opportunity to do so, the Port of Colombo would have become a "*Place of Refuge*", which was defined in the said resolution in clause 1.19 as "*a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment*". That opportunity arose, after Hazira refused discharge and the vessel ran into rough weather before coming to Colombo.

288. Instead, the Operators found themselves placed in a desperate situation only when the Singaporean authorities had refused permission to discharge the leaking container at their port. Since the vessel was to omit Port Klang due to downline delay, the only available port to consider discharge of the container was Colombo. The vessel had a legitimate berth already booked there, as she was carrying cargo which were bound for Colombo as well as cargo meant for transhipment.

289. If one were to entertain a notion whether the local Agent had deliberately restrained itself from providing the actual situation onboard the vessel to Colombo Port Control was a direct result of the apprehension it may have entertained that if the authorities were duly informed of the actual situation that was developing within the Cargo Hold No. 2 of the vessel, such a complete disclosure would result even in the Port Control denying the vessel's very entry into territorial waters of this country. The consideration of the relevant attendant circumstances on this point seems to be capable of justifying such a notion.

290. Given the desperate situation the Operators found themselves in when the Singaporean port administration refused the request to discharge, leaving them with no other option but somehow to seek refuge in a port, such a course of action could be clearly be taken as a probable conduct, when considered in the light of "*human conduct and public and private business*" in their relation to the facts of the particular case, in terms of Section 114 of the Evidence Ordinance.

Suppression of material information

291. Added on to these multiple factors is the allegation made by the State parties who are named in these applications as Respondents, that there was not only wilful suppression and deprivation of relevant and vital important information by the Operators and her Agent to the Port Control, but they were also engaged in a concerted effort to impute total responsibility for the disaster totally on Colombo Port Control, has merit, particularly in view of the discovery of some vital material.

292. The Harbour Master relied on certain screenshots on a chat he had with crew members of the vessel, that were retrieved from the mobile phone of the Master of the vessel. Information regarding the WhatsApp chats indicative of this mindset were tendered to this Court by the 1st to 10th and 14th to 17th Respondents in SC/FR/168/2021 by their motion dated 11.03.2025.

293. The textual conversation between the Master and Samra Balraj reads as follows:

Mst. - "*When we arriving, it was no any leakages or smoke on deck or under deck*
After arrival on 20th when we observe smoke it was already vsl inside port. And have called by VHF Ch. 10. Port Control and informed him about fire and we are strycktly [strictly ?] request assistance from port.

SB. - *Thts the true*"

294. The textual conversation between the Master and the 2nd Officer of the vessel, Zhou Junnan, reads as follows:

Mst. - "*In this moment, when we have informed authorities- all responsibility going to Port Authorities*

ZJ. - *OK*"

To this text Samra Balraj too responds by texting back "*okzzzz*".

295. The textual conversation between the Master and Chief Officer Yan Yahua reads as follows:

Mst. "*They must arrange everything*.
But we have called many times for assistance fm port but finally port are not arrange proper measures to assist us.
"I repeat again: 18-19 and when we arriving it was NO ANY leakages or smoke on deck or under deck."
"read it"

" You understand Yan ?"

YY. *"yes"*

Mst. *"Pls remember and to any of authorities always say only this"*

YY. *"OK"*

Mst. *"Never say to one like say MARPOL this but to Police another. All local authorities are destroyed [destroyed] our vsl"*

296. The first contact made by the local Agents with the Port Control on behalf of the Operator of the vessel was confined to sending routine information for a regular calling of a vessel. But the situation prevailed at that point in time was very far from being ordinary and was becoming critical with each passing hour. When Samaranayake requested discharge of the leaking container at 10.19 a.m. on 20.05.2021, the situation onboard had deteriorated to such an extent, that it prompted the Master to send an email directly to Captain Yong Sheng Wu, inviting his urgent attention to the situation onboard, particularly to the situation prevailed in Cargo Hold No. 2. Samaranayake was privy to all this information. However, he chose to confine the request only to discharging the leaking container. There was no indication in that email of the urgency of the situation onboard the vessel. It was a situation that he was privy to at least from the morning of 19.05.2021. But he was careful not to mention that vital information, either in the email sent requesting permission for discharge or even by way of a separate communication, given the seriousness of the situation onboard, providing information to the Colombo Port Control to prepare for the imminent distress situation onboard a vessel, within the port. A carefully planned step was taken by Samaranayake in attaching the email thread consisting of a lone line of emails, that described the grave situation prevailing onboard the vessel. The Harbour Master said it was he who first contacted Samaranayake on his mobile phone to request a report.

297. Why did Samaranayake deliberately withhold these vital pieces of information from the Harbour Master, simply being blinded or overwhelmed with the issues created by the leaking container? The

totality of the circumstances indicate that the likely scenario would be the first, rather than the second since it is apparent that the set of moves designed on behalf of the Operators by the local Agent to keep the Port Control in the dark, without disclosing the actual situation onboard the vessel, and thereby depriving them of any knowledge regarding the dangers the vessel would pose to the port as well as to its environment. The deliberate attempt made by the local Agent to lure the Port Control to permit the vessel to berth as scheduled, for the purpose of facilitating the discharge of a leaking container, using the berthing permission already granted for usual cargo operations, whilst concealing the imminent danger the situation of Cargo Hold No. 2 posed to the crew, the vessel, the port and its environment, in view of this Court is clearly bereft of any trace of *bona fides*. The text messages sent by the Master that are reproduced above strongly supports that proposition. It strongly suggests the proposition that even before the vessel dropped anchor in Colombo, its land-based Operators, have acted on the theory that once the Colombo Port permits the vessel's entry into the port area, whatever happens to it becomes the responsibility of the Port Control. This seems to be the ploy, behind the Operator's / Master's / Agent's acts of wilful and deliberate suppression of vital information from the Colombo Port Control, adoption of by which they thought would enable them to erase their own serious management lapses. The words of the Master to his subordinate, "*All local authorities are destroyed [destroyed] our vsl"* lay bare the ploy on which the Operators, the Master and the Agent have chosen to adopt, in relation to the situation on board the vessel X-Press Pearl.

298. In fact, this very factor was identified by the investigators after the initial stage of their investigation, and had appraised the Magistrate's Court of these offences by way of a further Report tendered to that court on 7th June 2021. In this Report, the CID informed the court that its investigation revealed that offences under sections 194, 198, 200, 201 and 278 of the Penal Code are disclosed. Section 194 of the Penal Code refers to the offence of issuing or signing a false certificate, whereas section 198 refers to causing disappearance of evidence of an offence committed or

giving false information touching upon it to screen an offender. Section 200 refers to the offence of giving false information in respect of an offence committed while section 201 deals with the offence of destruction of documents to prevent its production as evidence. Section 278 defines the offence of negligent conduct in respect of any combustible matter.

299. One of the factors that was heavily relied on by the learned President's Counsel for the X-Press group during the hearing of the instant matters requires special consideration. It was strongly urged before us by the learned Counsel that the situation onboard the vessel had deteriorated beyond any form of control due to the catastrophic failures of the Colombo Port.

300. It was contended by the learned President's Counsel that, the acts of the Harbour Master, first, by not acceding to the request of the vessel for an emergency berthing in the morning of 20.05.2021, and second, by cancellation of the berthing slot already reserved for the vessel in the same evening, were the primary causes for the disaster that followed. The third was that the Colombo Port control had failed to provide urgent firefighting assistance when requested by the vessel.

Urgent request for immediate berthing

301. Earlier on, it was noted that the claim made by the Operators, that a request for an emergency berthing had been made by the Master from the Port Control, but the response received was confined only to a direction to keep on monitoring the temperatures of Cargo Hold Nos. 1 and 3. This claim of requesting berthing permission is not supported by any of the contemporaneous and could only be found in the Singapore Report. There too, the investigation team, having noted that in the absence of VDR records to corroborate the said claim made by the Master and Additional /chief Officer, notes that such a request was made at the time "*when the smoke alarm was triggered*" (vide paragraph 2.7.1.1.1 at p. 117).

302. It is evident from paragraph 1.1.8.16 (at p. 27) of the Report quoted by the Master, who claimed that "*… considering the extent of leak and smoke, he [the Master] requested Colombo Port Control for an urgent berthing*". The investigation team issued their report over the investigations they carried out in 2023. The Master's first statement made to CID on 31.05.2021, which was made in the presence of his legal team, does not indicate that he mentioned to CID the fact that he requested for an urgent booking from Colombo Port Control, after the alarms altered the emergency in the early hours of 20.05.2021. In answering the question put to him by the CID "*When did you observe any unusual thing while anchoring in Sri Lanka territorial waters?*", the Master had answered stating "*at about 0200 hrs signalled the smoke alarm and I immediately informed to Port Control Colombo and sent e-mails to the Company, local agent and the owner. I have been informed by the port control to communicate to them the temperature of the cargo holds No 1, 2 and 3 each hour*".

303. It is clear from what he stated to CID that the Port Control was only "*informed"* of the situation onboard. The Master did not make a request for urgent berthing as he claimed before the team of investigators who prepared the said report. The claim of informing the Port Control too seemed doubtful as there was no contemporaneous record indicative supporting his assertion of conveying such information to Port Control. The Deck Log Book of the vessel too is silent over this issue, except for the entry describing the situation that prevailed onboard the vessel after the alarm.

304. The fact that a fire broke out at 1200 hrs and along with the fact that "*Port Control was also informed and asked for immediate assistance*" were entered in the Deck Log Book, supports the inference that could reasonably be drawn to the effect that if there was in fact a request for urgent berthing in the early hours of 20.05.2021, as the Master claims quite belatedly, it would, in all probability, be entered in the said log book maintained by the vessel, under his own command. But there was none.

305. The only communication initiated by the Master addressed to Captain Yong Sheng Wu was the email sent at 10.35 p.m. on 19.05.2021 (ship's time and early hours of 20.05.2021 in Sri Lankan time). This was copied to Samaranayake. The email informed its recipients of the smoke alarm and also contained a detailed description of the situation onboard. Having posed the question that "*Smoke is too much that we don't know how crew will come on Deck for berthing and how stevedores can work*" the Master ends his email with the sentence "*Waiting your advices*". It was this email that made the Marine Superintendent to direct Dennis Yeong issuing instructions to Terence Goh "… *to check the possibility of discharge this DG container in port of Colombo".* The VDR recordings also do not support the position that the Master had made a direct contact requesting Port Control for an emergency berthing (vide his phone call to Captain Yong Sheng Wu at 2308 hrs on 19.05.2021 (at 4.38 a.m. local time on 20.05.2021)).

306. The Harbour Master in his Affidavit ("Y1") while referring to the Singapore Report in paragraph 1.1.8.16 (at p. 27) has stated that "… *to my knowledge, no such request was received by Port Control from XPP on 20 May 2021. The only request received was to permit the re-working of the leaking container upon scheduled berthing, which was originally planned to take place at 0100 hours on 21 May at CICT".*

307. The allegation of the Master in denying a request made to the Harbour Master for an immediate and urgent berthing is therefore clearly an afterthought. If the Master awaited the advice of Captain Yong Sheng Wu after having reported the situation, and if the reply was simply "… *to check the possibility of discharge this DG container in port of Colombo",* it is clearly an improbability that there was a request made for "*an urgent berthing*" because in the absence of an approval by Port Control for the discharge of a leaking container, even if an urgent berthing is permitted, it would not provide any solution to the pressing problem the Master had for over ten days since the leak was first noted. This contradiction within

his own narrative that could be noted of the position taken by the Master justifies the drawing of an inference that such a request was not in fact made but the claim that was made, was only as advanced as an afterthought.

308. The Port Control Log Book carried the following entry, reproduced below:

25.05.2021 at 3.45 a.m.	Capt requested to make arrangements to take V/L inside A/S berth. Checked with tug … informed that fire still existing

309. This entry made in the Port Control logbook that the Master requested it to make arrangements to take the vessel inside "A/S berth" indicates that such a request was made only on 25.05.2021 and not on 20.05.2021, as he told the Singaporean investigators. The request to move the vessel from her current position at the anchorage, into the inner harbour area and to allow berthing was turned down by the Port Control, after verifying the situation onboard the vessel with the tug employed to firefight. Upon being informed that the fire still continued onboard the vessel, the Port Control denied that request. This too seems to be a twist introduced to an actual fact by the Owner / Operator / Master / Agent, in order to gain some advantage over their act of suppression of vital material from the Port Control.

310. The textual conversation that had taken place between the Master and Chief Officer Yan Yahua, which is reproduced below, becomes relevant in this context and sheds light as to providing an explanation to that claim:

Mst. "*They must arrange everything*.
But we have called many times for assistance fm port but finally port are not arrange proper measures to assist us.

I repeat again: 18-19 and when we arriving it was NO ANY leakages or smoke on deck or under deck."
read it
You understand Yan ?

YY. *yes*

Mst. *Pls remember and to any of authorities always say only this*

YY. *OK*

Mst. *Never say to one like say MARPOL this but to Police another. All local authorities are destroyed [destroyed] our vsl"*

311. The emphasis laid on by the Master in issuing his instructions what to say and more importantly what not to say, if and when local authorities ask questions "*I repeat again: 18-19 and when we arriving it was NO ANY leakages or smoke on deck or under deck. read it. You understand Yan?"* needs no specific highlighting. The message of the Master is very clear. This textual instructions of the Master provides the answer to the question why the Operators or the local Agents were reluctant to disclose the actual situation onboard the vessel.

312. The claim of making an urgent and immediate berthing made by the Master, when viewed against the contents of the textual conversation that had taken place between him and his Chief Officer Yan Yahua, indicate that either the Master on his own or at the behest of some party, was engaged in an exercise by which he deliberately tried to add a different twist to the actual narrative, perhaps with an intention to ward off imposition of any responsibility on the Owner / Operator / Master / Agent for the environmental disaster. To borrow a word from the learned President's Counsel's submissions, on the contrary, it is the Owner / Operator / Master / Agent who conducted themselves in such a manner which befits the use of the word "*mendacious*".

313. Thus, the contention of the Owner / Operator / Master / Agent that the refusal of the emergency berthing requested by the Master had been made without a valid factual basis to support the same and therefore

ought to be rejected in total. The same conclusion should apply to the learned President's Counsel's contention that hinges on this very claim, when he submitted that there were several other sister vessels belonged to the Company which had already scheduled berthing slots at the Port of Colombo, and the port administration should have permitted emergency berthing of X-Press Pearl by 'switching' any one of those slots, in view of the emergency. Once again there was no request made by either the Master or the local Agent, who coordinated very effectively with her principal in maintaining a total silence on the actual situation onboard the vessel, in seeking permission to discharge a leaking container.

Cancellation of berthing

314. Admittedly, the vessel was scheduled initially to be berthed at the Colombo Port in the early hours of 21.05.2021 for the discharge of cargo meant for Sri Lanka and also to conduct the transshipment activities. The Harbour Master had taken a decision at 6.30 p.m. on 20.05.2021, to cancel the berthing of the vessel, after the Master of the vessel reported a fire onboard. It was contended that the said cancellation was made by the Harbour Master "*wrongfully*".

315. This claim was made on the narrative that the fire tug "Mega" was sent to the vessel at 4.55 p.m. on the 20.05.2021 and returned only at 7.55 p.m., but the decision was taken at 6.30 p.m., by the Harbour Master, even without his team reaching ashore. The team of port officials, led by the Fire Chief, who travelled in the tug, had boarded the vessel and made their inspections. They only observed fumes but no fire. However, none of them were able to go inside the Cargo Hold No. 2, due to the risks such an exercise would pose, as it was continuously emitting smoke in high volume. They also considered the fact that the Cargo Hold No. 2 was filled with already released CO2 gas, which apparently extinguished fire within the Cargo Hold.

316. Learned President's Counsel relied on certain references contained in the statement issued by the Harbour Master during a press conference conducted on 03.06.2021, during which he;

i. did not assign any blame of any kind whatever to the vessel, its Owners or Managers,
ii. stated that the Colombo Port is well equipped to handle vessels carrying leaking Nitric acid containers,
iii. stated that vessels carrying leaking Nitric acid are no strangers to the Colombo Port,
iv. stated that the Colombo Port is an international hub and can handle situations of this nature,
v. stated that in fact did handle this situation and the whole incident was controlled until the weather worsened on 24th May 2021,

and submitted that the said contemporaneous, authentic expressions made on the day after the sinking of the ship should be given due weight by this Court.

317. The complaint of the Owner / Operator / Master / Agent in this regard is that, even after the vessel had successfully extinguished the fire in Cargo Hold No. 2, and after the Fire Chief conducted an assessment of the situation onboard the vessel and found that there were no fires, the Harbour Master, even without waiting for the return of the Fire Chief, made the decision to cancel the berthing of the vessel, which the learned President's Counsel contented of clearly indicative of the "*mendacious*" approach adopted by Colombo Port Control.

318. In this respect, it is of importance to reproduce the narrative of the Harbour Master at this stage on this particular aspect, before considering the said contention advanced before this Court on behalf of the Owner / Operator / Master / Agent. The factual narrative of the events that unfolded within the same day since the reception of the email sent to port administration at 10.19 a.m., by Samaranayake on 20.05.2021, requesting

its permission to discharge a leaking container, as described by the Harbour Master, could be found contained in paragraphs 30 to 54 of his Affidavit "Y1".

319. The important features extracted from that Affidavit are re-arranged below in a chronological order:

a. The email sent by Samaranayake indicated a leaking container onboard the ship and the Harbour Master was made aware of such a leak for the first time. That email had a thread of emails attached to it and, upon perusal of the same, around 10.30 a.m., he came across a reference made to a fire alarm that sounded in Cargo Hold No. 2 at 2000 hrs but not reported to the Port Control.

b. At 12.05 p.m., the vessel reported fire in Cargo Hold No. 2 and the Master informed that he would use the vessel's CO2 system to extinguish the same. He also requested for firefighting assistance from the port. With the reporting of smoke from Cargo Hold No. 2, Harbour Master contacted Samaranayake over the phone and requested a report concerning the status of the current situation onboard the vessel.

c. The situation report became a necessity in order to make an assessment of the situation prevailed aboard the vessel, and particularly after the use of CO2 system, a survey must be undertaken to ascertain the state of the fire and the reserves of CO2, that were retained unused, and the ability of the vessel to fight fire, should there be another fire onboard erupting.

d. At 1.00 p.m., the Master informed the Port Control that the fire was under control, the boundary cooling was in progress and bottles of CO2 would be released in Cargo Hold No. 2 to fight

the fire. At 1.50 p.m., Samaranayake requested permission to send a P&I Club appointed surveyor aboard the vessel to inspect and report back on the status of the fire and DG containers. Harbor Master granted permission to that request by email sent at 1.56 p.m. and also made a request to Samaranayake by email sent at 2.03 p.m. to provide him with a bay plan indicating locations of the stowage positions of the containers containing dangerous goods.

e. At 2.10 p.m., the Master requested urgent firefighting assistance from the port administration after having exhausted all CO2. Port management sent out firefighting teams only after this request. However, before any officers were sent to fight fire, the Harbour Master was required to obtain clearance from Health Authorities to make an exception to the rules that were put in place restricting mobility, in view of the Covid-19 pandemic. The Launch "Pilot 14" and tug "Megha" were despatched to fight fire around 4.55 p.m. after the said approval.

f. The Harbour Master was informed by the Fire Officer who boarded the vessel that there was no fire observed onboard but a thick orange billowing smoke with a bad chemical smell was emitting from Cargo Hold No. 2, that prevented them from inspecting that cargo hold.

g. The request made to the local Agent to provide the report of the P&I surveyor was not heeded, and in fact there was no surveyor who boarded the vessel, in spite of the approval granted by the Harbour Master.

h. At about 6.30 p.m., the Harbour Master notified the local Agent of the Company that the scheduled berthing of the vessel was cancelled.

320. The Harbour Master then proceeded to describe the reasoning adopted by him in making the decision to cancel the berthing permission granted to the vessel. He stated as follows:

> *"(a) There was no written process or procedure in place for how situations of this nature should be managed. Instead, I relied on my experience and expertise as Harbour Master and acted in accordance with my statutory responsibilities and powers.*
>
> *(b) I did not have a complete picture of what was happening onboard, with XPP at anchorage. The P&I appointed surveyor had not attended on board and I did not want to allow a ship that was a fire risk to enter the Port without knowing all the details of the situation. Further, the boarding team had returned approximately 1830 hrs on 20.05.2021 and also informed me that the situation was uncertain. The situation on board XPP had to be brought under control before I could allow it to berth. It was not safe to bring the XPP into a berth when it is on fire as this would have jeopardised the safety of the crew, port personnel, as well as property and infrastructure.*
>
> *(c) Hypothetically, even if I had the XPP to berth, the problem was no longer contained to just one container, as the whole of cargo hold No. 2 was full of smoke and fumes, and the fire was spreading. It is far more difficult (and dangerous) to manage a cargo hold fire than a single container. I needed to be absolutely certain that Port could rectify the problem aboard the XPP, and ensure the protection of crew and port personal first and foremost."*

321. It is correct to state that during a press conference on 03.06.2021, the references made by the Harbour Master to the vessel are relevant, as they were made within a few days of reporting fire onboard and just after the vessel sank. The contents of his statement indicate that it was made for the purpose of public information, as there was an urgent need to reassure the capability of the port administration under his leadership to

handle situations of leaking dangerous cargo. The reference to worsening of weather was made in the context of spread of fire onboard the vessel and not in relation to its probable cause. The only helpful portion in that statement which favours the position of the Owner / Operator / Master / Agent is that no allegations were made against it.

322. Nonetheless, the dispute presented before this Court for determination should be decided within the instant legal proceedings and confined to admissible, reliable and credible evidence presented before it by way of pleadings. The Affidavit in which the Master had averred the factual narrative leading to cancellation of the berthing, was intended to be used for legal proceedings in opposition to the claim pending before the Admiralty Court in England. The important factor is that its contents on the disputed facts were supported and confirmed by relevant documentary evidence which provide corroboration.

323. The impugned decision to cancel the berthing was arrived at by the Harbour Master upon consideration of several factors. The primary reason cited by the Harbour Master was that he did not have a complete picture of the situation that prevailed onboard the vessel, enabling him to take an informed decision.

324. In this context, the complaint of the learned Additional Solicitor General on wilful suppression of vital material becomes relevant. The Harbour Master had rightly realised, as the subsequent events proved the correctness of his decision, that the "*problem was no longer contained to just one container as the whole of cargo hold No. 2 was full of smoke*" and the fire fighters were unable to go inside Cargo Hold No. 2 to make an assessment of the situation inside the cargo hold and to determine the reason for the voluminous emission of toxic fumes, mixed with CO2 that were already released into it by the crew.

325. The appointment of a P&I surveyor by the Company to inspect the situation onboard the vessel and report, for some undisclosed reason did

not materialise, despite the necessary approvals being granted by the port administration in time. The Harbour Master urgently needed that inspection report to plan out his strategy for the management of the dangerous situation. The surveyor, for some undisclosed reason, never boarded the vessel and hence there was no report. During the hearing of these applications and when this Court sought a clarification as to the reason for the surveyor not boarding the vessel and making a report, the President's Counsel's response was that he had no reason to offer to explain that conduct on the part of the local Agent.

326. One of the reasons given by the Harbour Master for cancelling the berthing permission was that he found that it is not safe to bring the vessel to a berth when it is on fire "*as this would have jeopardised the safety of the crew, port personnel, as well as property and infrastructure*". The Master himself already noted of this risk posed to crew members in the berthing of the ship due to the situation that prevailed onboard. The email sent by the Master on 20.05.2021 at 7.26 a.m. (local time 12.54 p.m.) cautioned Captain Yong Sheng Wu that "*smoke is too much that we don't know how crew will come on deck for berthing and how stevedores work*". This was the situation onboard, after the fire that erupted in Cargo Hold No. 2 around noon, and reported to the port administration for the first time. During early hours of 20.05.2021, there was another fire that broke out onboard the ship but no firefighting assistance was sought.

327. The decision to cancel the berthing was taken after the reporting by the Fire Chief of his inability to find the cause as it was not possible to inspect Cargo Hold No. 2. The complaint of the Owner / Operator / Master / Agent is that the Harbour Master did not wait until the Fire Chief physically returned ashore after his inspection and reported the situation to the Harbour Master to make the cancellation. The fact that the Fire Chief returned ashore after the cancellation of the berthing would affect the decision, if the only mode of communication between the two senior officers of the Port Control required them to meet each other personally. The communication method adopted by two senior officers of the port

administration in this instance to communicate the situation prevailed on board the ship, in all probability could not be such a primitive method, especially several decades after the advent of radio and digital communication technologies into the field of communication and information technology.

328. The office of the Harbor Master is a statutorily created senior position in the administrative structure of the Sri Lanka Ports Authority. Section 14A of the Sri Lanka Ports Authority Act, No. 51 of 1979 (as amended) created the position of Harbour Master and Sections 84A, 84B and 84C set out his powers in relation to vessels.

329. Particularly in relation to a situation under consideration, Section 84B(1), states that "*In the event of fire breaking out onboard any vessel in any specified port, the Harbour Master may proceed on board the vessel with such assistance and persons as to him seem fit, and may give such orders as seem to him necessary for scuttling the vessel or for removing the vessel or any other vessel to such place as to him seems proper to prevent in either case danger to other vessels and for the taking of any other measures that appear to him expedient for the protection of life or property*".

330. In this instance, issuing a direction for the removal of the vessel did not arise, as the vessel was still at the anchorage, when for the first time a fire was reported, and hence only the cancellation of the berthing permission would arise. When considering the circumstances under which the Harbour Master made the decision to cancel the berthing of the vessel, this Court is of the considered view that he was exercising his statutorily conferred duty "*to prevent in either case danger to other vessels and for the taking of any other measures that appear to him expedient for the protection of life or property*" when he made that decision. This Court is also of the view that the said decision made by the Harbour Master is indeed qualified to be termed as a decision that had been made reasonably, upon due regard being paid to the relevant attendant circumstances.

Seaspan Lahore

331. This is a convenient point to refer to another important factor that arose during the submissions. Learned ASG complained that there was wilful suppression of vital material to the Harbour Master when the local Agent sought his approval to discharge the leaking container. This submission is based on the Harbour Master's assertion contained in paragraph 71 of his Affidavit "Y1" which reads as follows:

> "*'Seaspan Lahore' came into Port with the container still leaking nitric acid but with the Port's full knowledge of the situation relevant information having been provided well in advance of the scheduled arrival of "Seaspan Lahore" and with the first report being made very shortly after the discovery of the leak onboard. On arrival at Colombo, the container was not emitting any smoke nor was there any other evidence of fire. The 'Seaspan Lahore' was piloted to berth and the leaking container was discharged*".

332. The submission on behalf of the local Agent was that it had complied with all the statutory requirements and duly tendered the Declaration of Dangerous Goods, in the format provided by the Sri Lanka Ports Authority itself, which had no specific place to mention a situation such as the one faced by the vessel.

333. Leaving aside the consideration of the issue of whether there was due compliance by the local Agent in making the Dangerous Goods Declaration to a later stage of this Judgment, at which point the provisions of both local and international legal instruments that prescribe the applicable protocols to be followed in this type of a situation would be considered in great detail. At present this Court is concerned only with the consideration whether, if a full and timely disclosure was made by the local Agent who represented the Owner / Operators/ Master, would the situation be any different to what it eventually turned out to be.

334. The merchant vessel Seaspan Lahore sailed from the Port of Mundra in India on 26.07.2021 was carrying a container which contained Nitric acid

65% among other cargo. The container No. DFSU 1304721, with a cargo of Nitric acid, was towed on the deck of the vessel in Bay 33, Row 1 and at the bottom of the stack of containers, closest to the hatch cover. After leaving the port, the Master of the vessel was notified of a Nitric leak. The Master reported the leak immediately to the Agent Hapag Loyd, based in the United Arab Emirates by electronic mail sent at 5.22 p.m. The Master, in addition to informing the Agent of the details of the container and its stowage, also notified that there was "*red fuming, with less than 65% nitric acid*" as the Master of X-Press Pearl did by referring to emission of "*orange smoke*". The Master of Seaspan Lahore attached photographs of the leakage that depicts the "*cleaning process and after the cleaning*" to that email. Importantly, he instructed his Agent to "*Please arrange to discharge and check the unit in first port, LKCMB, Eta 29.07.2021/06:00LT*".

335. This is because the next scheduled port of call was Colombo. The vessel had over two days of voyage time to reach Colombo, which constituted a little over 60 hours. The email informing the leak and the necessity to discharge the leaking container at Colombo to re-work was addressed to Samantha Dias of Hapag Loyd, and was replied to by him at 04.04 p.m. Samantha Dias called for the following information from the Master; last port sailing time, when the DG leaking was noticed, the measures taken by DG leaking and the current situation of DG leaking. At 7.36 p.m., Samantha Dias once more wrote to the Master of Seaspan Lahore attaching the MSDS, DGD and informed the latter that "*I am adding LKCMB Ops team to liaise with the local team to obtain all the necessary permission to discharge this leaking container @LKCMB and inspect the container to determine source of leakage and its seaworthiness for on-carriage*". This communication indicates that the leakage of Nitric acid from the container did not make that container unseaworthy but the Master was anxious to ascertain the impact of the leakage of Nitric acid had on the container and its continuing voyage onboard the vessel. Unlike in the situation onboard the X-Press Pearl, there was no reporting of "*heavily corroded hatch cover*" by the Master of Seaspan Lahore, owing to the leakage of corrosive acid on the deck surface.

336. In response to the Agent's request for more information, the Master of Seaspan Lahore sent an email on 27.07.2021 at 10.15 a.m., containing the following details:

> *" Pls see below:*
> *-LAST PORT SAILING TIME: 26.07.2021/09:00 LT*
> *-WHEN WAS NOTICED THE DG LEAKING: 26.07.2021/11:00 LT, observed small amount of leakage.*
> *In the afternoon, at 16:00 LT, rechecked the area and observed that the leakage was increased (during this period of time vessel was underway, pitching and rolling moderately)*
> *-WHAT ARE THE MEASURES TAKEN FOR DG LEAKING? : as per Ems : S-B. Today (27.07.2021) at 08:00 LT start washing with copious a.m.ount of seawater and flushed overboard, the Hatch Cover, Cross-Bay of Bay 34 Fwd and Aft and Port Side Main Deck. We will keep close monitoring of DG Leakage and wash the Hatch Cover and areas affected as much is necessary.*
> *CURRENT SITUATION OF DG LEAKING; last inspection was done on 27.07.2021 at 08:00 LT, found Leakage on Hatch Cover, and we found the Leakage source, from below the unit (please see attached photos). Container is still leaking we will keep close monitoring and updates.*"

337. The contents of this email were duly noted and the Agent for the vessel, based in Sri Lanka, Sampath Kulatunga, wrote to Colombo Port Control on the same day at 8.30 a.m., providing the details received from the Master and conveying those details. He wrote:

> *"Pls note that as advised by master of Mv SEASPAN LAHORE V2130W, there is a leaking DG container on board & details as follows for your reference.*
> *Container DFSU1304721*
> *POL – AEJEA*
> *POD – GHTEM*
> *Position on Board – 330182*
> *IDMG Class 8*

UN 2031
Nitric Acid, other than red fuming, with less than 65% nitric acid.
EmS – S-B"

338. The next email sent by the local Agent to the port administration was at 10.32 a.m. That email reads "*Pls advise in advance whether the subject vessel can be handled at SAGT if we are to discharge the subject leaking container.*" The Agent also undertook to forward the photos of the leaking container by separate mail to the port administration.

339. Response of the South Asia Gateway Terminal of the Colombo Port (referred to in the acronym "SAGT" in the email) which was issued by the port administration within 45 minutes of sending the request (at 11.16 a.m. on 27.07.2021), read as follows:

> "*Noted your message, as this vessel is for SAGT, will facilitate subject to prior approvals from Harbour Master, MEEPA and Central Environmental Authority.*
> *Pls provide cargo manifest of the subject container and keep us posted on the condition of the leakage every 12 hours until arrival CMB.*
> *Further, if HLL intend to re-work the container upon dish at SAGT, necessary approvals and contracted party with equipment's to be arranged in advance to commence operations in day light on the same day. All PPE and safety measures are mandatory in this expect out of this leaking unit."*

340. The contents of the last two emails between the local Agent for Seaspan Lahore and the port administration reveals an important feature. The local Agent first made a total disclosure of the situation onboard the vessel to the post administration. Having provided that information, he then enquired whether the port administration would undertake the discharge and re-working of the leaking container. One wonders whether this cautious approach taken by the local Agent in dealing with the port administration was due to the disastrous encounter it had with X-Press Pearl and it would therefore act in a manner befitting the idiom "*once*

bitten twice shy". In contrast, the approach of the land-based management of the vessel X-Press Pearl was to "*ensure*" the discharge of the leaking container. One could argue that it could be taken as an effort to keep the near explosive situation in Cargo Hold No. 2 restricted within the X-Press Pearl group, and to divert the attention of the Port Control by seeking approval for the discharge of the leaking container which had by then become an almost futile exercise in view of the situation which prevailed on board the vessel at that point of time.

341. It is important to note that despite the fact that the estimated time of arrival being 29.07.2021 at 6.00 a.m., the local Agent had urgently sought to have arranged with the Port Control for the discharge of a leaking container, well in advance. The local Agent of the shipping company sprang into action, even when the vessel was over almost two full days (45 hours to be exact) away from the Port of Colombo, in order to keep themselves ahead of estimated time of arrival in making the request. This prudent approach could also be considered in the perspective of the local Agent's concerns. If the Colombo Port Control, for some reason, decided not to permit the discharge of the container involved in the leaking Nitric acid, as Hamad and Hazira did to X-Press Pearl, they needed sufficient time to consider other available alternatives.

342. The Colombo Port Control too, on its part, responded positively. Despite having strong memories of the nightmarish experience, it has had over the vessel X-Press Pearl, Port Control nonetheless indicated its willingness and readiness to facilitate the discharge and re-working of the leaking container, provided all the approvals of the relevant State agencies are obtained along with the employment of a suitable contractor with required equipment. The leak was first reported by the Master of Seaspan Lahore on the 26.07.2021 at 5.22 p.m. (ship's time) and by mid-morning on the following day, Colombo Port Control already decided to receive the leaking Nitric acid container from the vessel Seaspan Lahore and to permit re-working of the same at its port.

343. The most striking feature in the handling of the leaking container onboard the vessel Seaspan Lahore was the effective decision making of the Master. It was the Master's decision to discharge and re-work the leaking container in the next port of call, Colombo. He was not required to await a land-based Manager, who could not be convinced of any urgency of the situation, to take the decision on his behalf to make the request for the discharge. The decision made by the Master was accepted by his Agents as the final decision on the matter and had hurriedly attended thereafter to implement it.

344. The situation onboard Seaspan Lahore was not at all as grave as the situation onboard the vessel X-Press Pearl was, as the leak of Nitric acid was detected almost immediately as it occurred, and the crew had taken remedial action to ensure the safety of the vessel by continuously washing down the corrosive liquid from the deck.

345. Seaspan Lahore had no encounter with adverse weather conditions and with a downline delay that resulted in, when attempting to avoid a cyclone that cut across its route. Yet, the swift decision making, and the advance notice, coupled with full disclosure of the situation onboard, made the difference with no adverse impact at all on the crew, to the vessel or to the port. There was hardly any prospect of causing any form of marine environmental disaster, consequent upon the situation that prevailed on board the vessel Seaspan Lahore.

Allegation of inadequate firefighting assistance

346. In relation to the vessel X-Press Pearl, however, the situation was very different. Until and unless the Cargo Hold No. 2 smoke was detected and fire alarms warned of an emergency situation within, the involvement of the crew in keeping watch on top and below the deck was not considered as a viable precautionary option. This could be justified, in view of the threat posed to the safety of the crew, owing to adverse weather conditions. But the four-day gap since leaving Hazira, and the situation onboard was not monitored at all, along with the extent of the

deterioration of the situation both on the top of the deck and below the deck due to the doubtful assessment of leakage of Nitric acid, being constant. The Master admitted during a conversation recorded in the VDR, that the leak rate was one litre an hour when his vessel was approaching Colombo.

347. The fire expert, consulted by the Operators, too was worried over this very issue. In his first email sent on 20.05.2021, he posed a pointed question at the Marine Superintendent expecting an answer. Dr. Darren Holling asked "*How much nitric acid is believed to have leaked into the cargo hold?*". The reply email was not provided in the material available before this Court. But the subsequent email of Dr. Hollins at 5.42 p.m. on the same day, makes no reference to any answer provided to him over the quantity of Nitric acid leaking into Cargo Hold No. 2. The fire expert apparently had discovered another hidden threat. He wanted Terence Goh to clarify the position on another container onboard the vessel containing Nitric acid. He noted that "*As I can see only one container of Nitric Acid on the provided DG manifest. Is there another container somewhere else onboard that is stuffed with other 18 IBCs of nitric acid? If so, where is it? Is it also leaking?*". This is because, Dr. Holling, discovered from the documentation provided that "*I note from the Nitric Acid packing list that the consignment comprises SOMT net of Nitric Acid divided into 36 IBCs*". The leaking container onboard the vessel carried only 18 of the 36 IBCs that were reflected in the "packing list" provided. Naturally, he was anxious about the fate of the balance 18 IBCs. This is one among many such lapses on the part of the Operators as they failed to take note of any of them.

348. Long before the Fire Expert raised this issue, the Master himself realised the importance of it. On 19.05.2021, the Master instructed a crew member "*ok, just now I need from you full information about this container which [is] inside cargo hold no. 2. All. Full cargo plan, DG, DG, and check what you have. Manifests, SDS … MSDS sheets, packing list, everything, all you have …*" (vide VDR recording at 2150 hrs).

349. After about an hour, the Master, while issuing instructions to another crew member, again said "… *same problem we found after midnight local ship time, smoking too much inside cargo hold no 2 … too much … too much. Same, same, same type of cargo, same cargo number, same …*" (vide VDR Recordings at 2308 hrs). Apparently what Dr. Hollings feared had become a reality as it indicates that there was another container with Nitric acid stowed in Cargo Hold No. 2.

350. The Master also realised that the Cargo Hold No. 2 was stowed with many other containers carrying dangerous cargo and conveyed this information to his Additional Chief Officer on 20.05.2021 "*this cargo hold no. 2 … may be 20 containers the same as on bay 10 on deck*".

351. There seems to be a gap of communication over the situation prevailed onboard as either it was not made known effectively to the land-based Operators by the Master of the X-Press Pearl in exact terms or the Operators were not prepared to accept what the crew said. The Master and the crew had a reasonable assessment of the seriousness of the situation developing inside Cargo Hold No. 2, when their Agent was preparing to make the request to discharge the leaking container. The Master told his Additional Chief Officer that "*This looks like this cargo [does] not like any water, wet, moisture, water not like. But due to everything closed inside the cargo hold [it] started some chemical reaction. Make smoke, too much, too much, too much, too much, until now … really very dangerous to breathe in…*" (vide VDR recording at 20.05.2021 at 0008 hrs, Sri Lankan time 5.38 a.m.).

352. The land-based Operators too, on their part, did not bother themselves with any of the issues onboard the vessel, indicated by their failure to call for regular updates from the Master or requiring him to provide clarifications. The knee jerk reaction to make a request to "*urgently*" discharge the leaking container at Colombo, happened only after Singapore denied their request to discharge the leaking container at its

port. That decision was not made, until they ran out of the options of making the request to any other alternative ports, compelling them to somehow discharge the leaking container at Colombo.

353. It was the fire alarms that went off in Cargo Hold No. 2 that made the land-based Operators realise the seriousness of the situation onboard the vessel, compelling them to take a decision on that container. Until then, all were content with the Master's assessment of the leakage rate at constant 0/5-1.0 litre/hour and there was only hatch cover damage, which could be rectified with a fresh coat of paint. However, neither the land-based Operators nor the Master, ever anticipated the effect of the Nitric acid on the hatch covers, that burn through the exposed metal and rubber gaskets into the Cargo Hold No. 2, into the consignment of caustic soda, stowed under the leaking container, to start a series of exothermal chemical reactions.

354. The Deck Log Book of the vessel contains an entry made on 20.05.2021 that reads as follows:

> "*Around 0200 hrs got a cargo hold no2 fire alarm. On checking found some smoke coming. Called Master, C/E & C/O same time. keeping masks on bridge. 2/O went with C/E. found no fire in cargo hold but found continuous leaking with chemical*"

355. This is a more probable claim as the Master, by then, had realised that the leaking of Nitric acid from the container on the deck had already caused damage to the containers stowed in Cargo Hold No. 2, and the condition of those containers deteriorated, presenting them with a very serious emergency situation. At a later point, after the situation had deteriorated further, the Master conveyed the seriousness of the situation by email along with his observation that "*smoke is too much that we don't know how crew will come on deck for berthing and how the stevedores can work*".

356. Nevertheless the contention made before us was that the discharge of the container would have been the solution for the situation that

prevailed onboard X-Press Pearl and the cancellation of the berthing scheduled around midnight the same day was the cause for the disaster.

357. The local Agent's action of requesting the discharge of a leaking container from the port administration at 10.19 a.m. on 20.05.2021, and the Port Control Log Book carries an entry regarding X-Press Pearl, entered at 12.05 p.m., stating that " *vsl reported fire in c/h No. 2 & requested assistance …*" seemed a strange co-incidence.

358. This obviously is the first formal reporting of fire onboard the vessel X-Press Pearl. The time gap of just 101 minutes between the two, seem to suggest that the late submission of the request to discharge was not an act of an individual, who is totally unaware of what was happening on board the vessel and made without a purpose in mind. Particularly when considered in the light of the fact that Samaranayake's email was designed to confine the situation onboard the vessel only to a leaking container, indicating absolutely nothing about the 'explosive' situation that developed in Cargo Hold No. 2, that was observed by the crew since 12.45 a.m., of the same day.

359. The "*fire alarm*" sounded from Cargo Hold No. 2 and the *"black smoke"* noted by the crew around the time of making the seemingly innocent request to discharge the container, the fire alarm of the same cargo having sounded for the second time at 10.35 a.m., the observation of "*heavy cargo leak*" coupled with "*heavy smoke*" and "*high temperatures*" observed by the Additional Chief Officer coupled with the assertion that all this information were conveyed to "*Colombo agent*" by 4.10 a.m., along with a non-existent request for "*urgent berthing*" (vide Singapore Report paragraph 1.1.8.17 at p. 27), amply supports the proposition that the manner in which the request was made by confining its scope only for the discharge of a leaking container, was not at all an accident nor an innocent act on the part of Samaranayake.

360. Thus, in view of the considerations adverted to in the preceding paragraphs, it is reasonable to conclude that the local Agent's assertion that they were informed of the situation onboard the vessel only on the evening of 19.05.2021 could not be accepted as a truthful statement made with the intention of *bona fide* disclosure of the narrative.

361. The references being made to the handling of the situation on board the vessel Seaspan Lahore and the comparison made with the situation of X-Press Pearl were necessitated when the local Agent, in support of its contention that discharging the leaking container would have solved all of the problems, relied on a newspaper report annexed to the Affidavit of *Ravi Muttusamy* dated 18.11.2024, marked as "X6" with the heading " *SLPA successfully mitigates nitric acid leak on ship*" with the averment that " *… even after the X-Press Pearl incident, the Port of Colombo successfully discharged and reworked a leaking nitric acid container that was aboard the MV Seaspan Lahore*."

362. It must be emphasised here that the purpose of making a comparison of the two situations was not because, if there was timely disclosure, the vessel X-Press Pearl could have been saved from its inevitable doom, but to impress upon the manner in which a vessel, when encountered with a similar situation, could have acted *bona fide* and disclosed the relevant and vital information to the Port Control well before its planned arrival, allowing the port administration to arrive at a well informed and considered decision. When compared with the information presented to respective Port Controls of Hamad, Hazira and Singapore and the duration of the time those ports had to make an informed decision on the request to discharge the leaking container, a clear disparity in the disclosure of information to Colombo Port Control could easily be identified.

363. In this context, it must not be misunderstood that the findings made over the delay or failure to make the request for the discharge of the leaking container is the basis on which the liability that should be

imposed on the Owner / Operator / Master / Agent for the resultant environmental disaster, but the dismal level of mismanagement on the part of the Operators throughout the period beginning from the point at which the leak of Nitric acid was first reported. It was stressed on the part of the Petitioners that the Operators ought to have returned to Jebel Ali, when it was made known that Hamad was not prepared to discharge the container for re-working, since they have already faulted the shipper for the situation and indicated that he must take responsibility. The Petitioners alleged that this decision was not taken purely for commercial expediency.

364. The mismanagement by the Operators of the whole issue became more apparent since Hazira too rejected their request for discharge of the leaking container at its port, citing that it might damage port assets and suggested to try with the next port. Not only they mismanaged the issue of handling the leaking container, but they totally shut themselves from recognising the more acute danger that lied within the Cargo Hold No. 2, where a large consignment of other dangerous cargo was stowed, and ignored the early signs of flooding bilges and its connection to the leaking Nitric acid penetrating through the hatch covers. The total mismanagement of the leak onboard the vessel is the determinant factor that accrues liability on the part of the Operators, for the resultant environmental disaster of gigantic proportions. The manner in which the request was made to discharge the container to Colombo Port Control is only one of the factors that ought to be considered among a multitude of other factors that are considered in this Judgment.

365. The remaining point that needs to be addressed at this stage is the contention of the learned President's Counsel who appeared for the local Agent that the port authorities have failed to provide urgent firefighting assistance. However, in view of the considerations that should be dealt with in the third segment, which includes the factual narrative since the cancellation of the berthing permit to the point at which the vessel sank, this contention shall be revisited at the end of the third segment, when

this Court could consider its validity in the backdrop of the said factual narrative.

Conclusions regarding segment two

366. The obvious indecision of the Marine Superintendent, over determining the port at which the leaking container was to be discharged, could be cited here as a prime example. That long period of indecisiveness had incurred the cost of a vessel to her Operators, and effectively denied an opportunity for the Colombo Port Control, to manage the situation onboard the vessel, in the most effective manner, perhaps even saving the vessel from its doom.

367. The threat posed by the continuous leakage of Nitric acid into the Cargo Hold No. 2, to the crew, the cargo, the vessel and to the marine environment, was unfortunately totally ignored or at least overtly trivialised by the decision makers by placing the commercial interests of the Company as their foremost consideration. When the Company ran out of any other option to discharge the leaking container, it made an attempt to do so at Colombo, not by making a full disclosure of the situation but by wilful suppression of vital information from the port administration, whom it feared might prevent the vessel to enter the territorial waters, if the true situation is disclosed well in advance.

368. It is unavoidable in these circumstances to inquire into whether the Master as well as the Marine Superintendent have had any prior experience in handling similar situations that arose in their respective careers.

369. The Master of the vessel X-Press Pearl Captain Tyutkalo Vitaly, commenced his shipping career as an officer cadet in 1994 and had been promoted to the rank of Master Marina in the year 2005. He held a Master's Licence, along with Licenses for Communication (Distress) issued in the year 2017. He joined as the Master of the vessel X-Press Pearl in April 2021. On his own admission, the Master had no prior experience

of handling situations where leaking dangerous cargo was reported onboard a vessel. On 19.05.2021, during a conversation with a crew member, he said at 22.53 hrs, "*All my life at sea, all my life I carry DG, all classes, even 1. All my f…… life. Never had any problems …*".

370. There were no specific references, either in the pleadings or the voluminous documentation tendered to Court by the parties, shedding some light on the issue of the qualifications and the professional experience of Captain Yong Sheng Wu, that enabled him to effectively discharge his duties as the Marine Superintendent of the vessel X-Press Pearl. The few instances where such had been referred to, could only be found in the VDR recordings, where the Master during his conversations with members of the crew had indicated what he knew of his Marine Superintendent. According to the Master, Captain Yong Sheng Wu "*just joined the Company may be December or January*" (19.05.2021 at 2323 hrs), would not either accept the situation reporting made verbally or would not believe what the Master states (vide 20.05.2021 at 0406 hrs). The Master once again describes the Marine Superintendent to his Chief Officer stating that " … *totally new Captain, fresh, thirty years old. First time Captain, first time the Company, don't know nothing. Very young, like second mate …*" (vide 19.05.2021 at 0126 hrs).

371. In the absence of any reliable details of his credentials, this Court desists itself from forming any adverse inference from these unmeritorious references made against him. However, it must be noted that the anger and frustration expressed by the Master over the manner in which the Marine Superintendent proceeded to handle the situation onboard the vessel could not be termed unjustified.

372. In view of the factors that were referred to in the preceding section of this Judgment, the conclusion that could reasonably be reached by this Court is that the Master and the land-based Operators of the vessel, have collectively failed to act in a diligently and reasonably prudent manner, when Port Hazira refused to discharge of the leaking container at their

port. The manner in which the Marine Superintendent had handled the situation that had arisen during the voyage of the vessel X-Press Pearl during her voyage from Port of Hazira to Colombo, heavily contributed to the disastrous end the vessel had to suffer. As a necessary consequence of the said mishandling, the unprecedented level of marine pollution ensued, coupled with the adverse impact it had on the socio-economic situation of the local population who are dependent on that environment for their sustenance.

From the cancellation of the berthing to the sinking of the vessel
20.05.2021

373. The Owner / Operators / Master / Agent, in support of their claims that it is the State parties who ought to be named as the "*polluters*", in relation to the 'Polluter Pays' principle, have advanced a contention before this Court that the port administration had "*catastrophically*" failed to provide urgent firefighting assistance.

374. In support of the said contention, the learned President's Counsel submitted that the information regarding the leaking container was provided to the port administration in the early hours of 20.05.2021, after the smoke alarm went off and the response from the Port Control was that no such information was received and no assistance was offered. When the Harbor Master was advised that all CO2 was depleted and temperature inside the cargo hold was increasing at 2.10 p.m., there too was no assistance offered for the second time. It was after a period of about three hours since making the request for "*urgent firefighting assistance*" from the Port Control (at 4.55 p.m.), the launch "Pilot 14" and tug "Megha" were dispatched with instructions to "*inspect the situation onboard the XPP*".

375. The Owner / Operators / Master / Agent therefore alleged in their submissions that the tug "Megha" was sent to the scene with instructions to "*fight the fire*" only after a lapse of approximately 24 hours since the smoke alarm rang for the first time, to engage in actual firefighting. It is

in these circumstances, the Owner / Operators / Master / Agent claim that the Colombo Port did not provide the required firefighting assistance urgently sought by the vessel.

376. Lim Kin Seng, in his Affidavit dated 04.11.2024 stated (at paragraphs 40 and 41) that " … *a smoke detector in Cargo Hold No. 2 of the Vessel was triggered and this prompted the crew to investigate the cause of the alarm. Upon investigation, chemical fumes that appeared in orange in colour were observed emitting from air vents of Cargo Hol No. 2*" and " … *following the alarm, the Master verified that there was no fire onboard the Vessel at the time and that the fumes observed on the deck were likely caused by a chemical reaction*".

377. Seng, further stated (at para 46) that "… *the crew were well trained and competent and the Vessel had procedures in place to ensure the crew were familiar with fire safety training. The Safety, Environmental & Security Orientation Training checklist in the SMS provided for training on the 'Location & activation of CO2 systems for CH & Engine room' for all personnel within two weeks of joining the Vessel and for the Master, Chief Engineer, second officer and chief officer within one week of joining or before taking over duty (whichever is earlier). Further, all crew had undergone training for firefighting which included donning of the SCBA set as required by the provisions of the STCW Table A-VI-1-2 and those possessing a certificate of competency had undergone relevant training under STCW Table A-VI/3*".

378. Describing the point at which the Master requested the Port Control for firefighting assistance, Seng stated (para 44 and 45) that "… *a fire subsequently broke out in Cargo Hold No. 2 on the 20th May 2021 at approximately 1030h (Sri Lanka time) at which point the Master informed the Colombo Port Control and requested firefighting assistance*." Continuing the events, Seng further stated (at para 45) that " … *the crew of the Vessel initially tried to extinguish the fire with CO2 fire extinguishers but this was not successful and the Master subsequently deployed the Vessel's fixed CO2 system in the hold*", which had extinguished the fire in the Cargo Hold No. 2.

379. In paragraph 48 and 50, Seng alleged that "*on 21st May 2021, the Master contacted the Colombo Port Control to request emergency berthing for the Vessel so that firefighting could be undertaken with shore assistance*", which was rejected by indicating that "*… the Vessel would not be allowed to berth until the fire onboard was under control*". He then alleged that "*… no assistance was provided by Sri Lankan authorities until approximately 0120 (Sri Lankan time) on 21st May 2021 …*" and "*the tugs sent for firefighting had various limitations and were ineffective and the Port of Colombo failed and neglected to offer continuous firefighting support*".

380. Learned Counsel who represented the Petitioners, too made similar allegations against both the State parties as well as the Owner / Operators / Master / Agent, during their respective submissions.

381. The Petitioners in SC FR 277/2021, alleged that the State parties have failed to act with due diligence in the assessment of the imminent risks and dangers associated with the vessel in carrying dangerous and hazardous cargo in close proximity to the coast of Sri Lanka and also failed to take immediate precautionary measures to prevent or mitigate the risks posed by the vessel X-Press Pearl. Similarly, they alleged that the Owner / Operators / Master / Agent were grossly negligent in fully disclosing the situation onboard the vessel, particularly on the highly hazardous Nitric acid leak onboard the vessel while being aware of the potential danger and risks that are ordinarily associated with such a leak. Similar allegation was made by the learned Counsel who appeared for the Petitioners in SC FR 168/2021, highlighting on the failure on the part of the Owner / Operators / Master / Agent to disclose the leak of Nitric acid well in advance, while alleging the failure on the part of the State actors to prepare a proper system to handle maritime disasters, such as this, and to put that system in place heavily, contributed to the infringement of the Petitioners' Fundamental rights.

382. The Harbour Master, in his Affidavit dated 03.09.2024, after having denied the multiple allegations made by the Owner / Operators / Master

/ Agent, stated that on 20.05.2021, the Master of the vessel had reported a fire in Cargo Hold No. 2 at 12.05 p.m., via VHF but at 1.00 p.m., it was reported to Port Control that the fire was under control. However, at 2.10 p.m., the Master once again informed the port administration that all of the CO2 onboard the vessel contained in the firefighting system of the vessel were used in the firefighting and since the temperature inside the Cargo Hold No. 2 kept on increasing, requested "*urgent firefighting assistance*" from the Port Control.

383. Consequent upon the said request, the Maritime Rescue Coordinating Centre (MRCC), operated by Sri Lanka Navy, under the delegated authority of the Director General of Merchant Shipping, which was set up to meet with such contingencies, dispatched the launched "Pilot 14" and the tug "Megha", manned by firefighting personnel at 4.55 p.m., to inspect and assess the situation onboard the vessel after the Master reported that the fire was under control. When the team from MRCC boarded the vessel, they found no "fire" but observed "*smoke*" and "*fumes"* emitting from Cargo Hold No. 2. The team also reported that the Cargo Hold No. 2 could not be accessed, due to safety concerns. With already released CO2 into that cargo hold, the team was prevented from ascertaining properly the cause for the fires that were reported in that cargo hold.

384. It is after the consideration of the circumstances in totality, the Harbour Master acting upon his professional experience decided to cancel the berthing of the vessel at 6.30 p.m., in terms of his statutory obligations.

385. When the Master of the vessel requested "*urgent shore-side assistance*" at 11.00 p.m. on 20.05.2021 from the Port Control when fire erupted onboard, the tug "Megha" was despatched immediately. The tug had reached the vessel at 1.20 a.m., on 21.05.2021, as the anchorage was nine Nautical miles (over a distance of 16 Km) away from the port. Tug "Megha" was thereafter joined by tugs "Hercules" and "Maha Wewa", to assist the vessel with firefighting.

386. The Director General of Merchant Shipping, in his Affidavit dated 31.10.2022 supported the sequence of events that followed regarding the reporting of fire onboard the vessel at 12.05 p.m., as averred by the Harbour Master. He further stated that " … *in terms of obligations contained in the International Convention for the Safety of Life at Sea (SOLAS), which has been ratified by Sri Lanka, the maintenance of a Marine Rescue Coordinating Centre (MRCC) is required and the Director General of Merchant Shipping has delegated such functions to the Sri Lanka Navy and the MRCC was being operated by Sri Lanka Navy"* and the situation onboard the vessel too was notified to MRCC.

387. With the reporting of fire onboard the vessel, the Merchant Shipping Secretariat, which is the flag State Administration in Sri Lanka, directed immediate activation of the National Oil Spill Contingency Plan (NOSCP) at 4.30 p.m. on 20.05.2021.

388. The Director General of Merchant Shipping further stated that the "*Senior Deputy Harbour Master, Chief Fire Officer, Deputy Chief Fire Officer and a Station Officer of SLPA were again sent to the scene on Fire Tug "Megha" at 0015 hrs a.m., on 21.05.2021 and the tug commenced dousing the fire with foam and later commenced boundary cooling with sea water at 0130 hrs.* The tug "Megha" returned at 7.45 a.m. on 21.05.2021, only after handing over firefighting duties to the tug "Hercules".

389. The Harbour Master, the Chairperson of Marine Environmental Pollution Authority (MEPA) and the Government Ship Surveyor have travelled to the vessel X-Press Pearl, onboard Navy vessels, with the Commander – West, of Sri Lanka Navy at 9.47 a.m. on 21.05.2021 and upon their return, the Chairperson – MEPA directed Killiney Shipping Pte. Ltd., West of England P&I Club, McLeran's Shipping Ltd., GAC Shipping Ltd., and Sea Consortium Lanka (Pvt) Ltd to;

a. take action to control/extinguish fire onboard to avert toxic air emission,

b. take all necessary actions in order to avert any potential, chemical and bunker oil spill/leakage in Sri Lankan waters,
c. obtain assistance of foreign experts, if it is evident that the capacity of the local stakeholders is not sufficient to manage the situation,
d. make necessary contingency arrangements to respond to any possible chemical or oil spill, and
e. informed them that "… *it is the advice of this authority to tow away the vessel away from Sri Lanka waters, if the situation goes beyond out of control, which might pose a severe threat to the environment, port operations, human health and socio-economic activities of the country at large*".

390. The Director General of Merchant Shipping further states that the "*owners of the Vessel had appointed Salvors and the Tug "POSH TEAL" designated by the Salvors arrived at the location at 1640 hrs on 22.05.2021 and 12 personnel of the Salvors arrived in Colombo and bordered the Tug Post Teal at 0440 hrs on 23.05.2021*" and they were joined by "*another Tug of the Salvors "PRANTIC SARWAR" arrived at the location.* The 12 personnel sent by Salvors, boarded the "*vessel in distress*" at 1.30 p.m. on 23.05.2021.

391. This sequence was followed from the time of the reporting of the fire onboard the vessel at 12.05 p.m., on 20.05.2021. Particularly regarding the assistance provided by Port Control in the firefighting requirement, the contents of the Affidavits of the Harbour Master and Director General of Merchant Shipping were supported by the emails sent by them, MRCC and also from the entries contained in the Ports Authority Log Book and the Deck Log Book of the vessel MV X-Press Pearl. Thus, the position advanced by them is certainly credible and acceptable to this Court.

392. The Deck Log Book of the vessel carried an entry made on 20.05.2021 at 12:00 hrs, and it reads as follows:

> "*Alarm was sounded (General Emcy Alarm 1.2) E reported fire in cargo hold No. 2. All crew were mustered & CO2 were released in cargo hold*

No. 2 after turning several Counts. Port Control was also informed and asked for immediate assistance."

The entry on 20.05.2021 at 23:05 hrs reads as follows:
"*Vsl call Colombo Port Control over CH 12. Request urgent assist from shore side."*

The entry made on 21.05.2021 at 08:00 hrs is to the following effect:
"*Vsl continue firefighting … the tug from shoreside "Hercules" and Maha Wewa" assist with firefighting."*

The entry on 21.05.2021 at 13:00 hrs reads as follows:
"Firefighting operation on Bay 10. Cargo Hold No. 2F on deck fire. Assistance is provided by Colombo Port Control and by Sri Lankan Navy. Maintaining VHF Ch 08 with assisting party for communication. Firefighting tug "Hercules" and firefighting tug "Megha" assisting the vessel. Ship staff assisting boundary cooling."

393. Deck Log Book entries that describe the gradual escalation of the scale of the fire onboard the vessel and the continued firefighting assistance rendered by the port administration supports the assertions made by the Harbour Master and Director General of Merchant Shipping in that regard.

394. The Deck Log Book entry on 23.05.2021 at 00:01 hrs reads "*Tug Maha Wewa assisting in firefighting. Sri Lanka Navy standing by for assisting the crew"*. At 12.00 hrs (noon) the entry reads "*Tug Hercules and Salvage vsl 'Posh Tael' fighting fire from both sides"* and "*Firefighting team of 11 members arrived and the Chinese crew and officers except 3/O & Ch Cook were signed off"*.

395. The last of the Deck Log Book entries are found in relation to activities carried on board the vessel on 24.05.2021 and the entry at 14:14 hrs reads

"All crew & Salvage team standby to fight fire with Fire Tugs. Astro Capella pulling the vsl against the wind."

396. The Port Control Log Book of the Sri Lanka Ports Authority also contained the following series of entries made in relation to the vessel X-Press Pearl, during the period of 19.05.2021 to 29.05.2021, which are reproduced below, in tabulated form, for the purpose of convenience in reference:

Date and time of the entry	**Particulars contained in the entry**
19.05.2021 at 10.50 p.m.	ETA 23.50
20.05.2021 at 12.30 a.m.	VSL dropped anchor
20.05.2021 at 12.05 p.m.	VSL reported fire in C/H No. 2, Requested assistance, HM informed
20.05.2021 at 1.00 p.m.	Confirmed fire under control
20.05.2021 at 1.30 p.m.	Confirmed fire under control
20.05.2021 at 2.10 p.m.	All extinguishers used, requesting assistance Navy ops MRCC
20.05.2021 at 4.50 p.m.	Reported that 03 fire officers 01 Naval person bordered, informed HM/DGMS
20.05.2021 at 6.35 p.m.	Informed that fire team Naval personnel left along with Tug Mega but still smoke continuing from the cargo hold
20.05.2021 at 8.20 p.m.	Hatch No. 1 &2 temperature 105, cannot check temperature @ hatch No. 3 smoke
20.05.2021 at 9.45 p.m.	Port side Bay No. 10 – Temp 74 C
20.05.2021 at 11.20 p.m.	Reported that again fire spreading out in the Cargo Hold No. 2, on the deck, request fire tugs to extinguish it
21.05.2021 at 5.05 a.m.	Fire on Cargo Hold & Explosion, informed HM

22.05.2021 at 6.25 a.m.	Overheard Captain of X Press Pearl communicating with slvs Sagara asking them to await inst for evacuating the crew
22.05.2021 at 12.30 p.m.	Request from Maha Wewa, informed HM
24.05.2021 at 9.00 p.m.	Reported about 4 containers fell down overboard (STB) side
24.05.2021 at 9.00 p.m.	Another 2 container boxes fell down overboard (STB) side
25.05.2021 at 3.45 a.m.	Capt requested to make arrangements to take V/L inside A/S berth. Checked with tug … informed that fire still existing
25.05.2021 at 4.40 a.m.	Fire is getting worse and we have decided to abandon the V/L
25.05.2021 at 2.00 p.m.	[page not photo copied properly]
28.05.2021 at 11.15 p.m.	Observed V/L at anchorage (X Press Pearl) got fire again, Tug Aries confirm that one of the oil tanks Blast & bunkering. Informed HM, ops room

397. After the vessel reported fire onboard at 12.05 p.m., for the first time to the Port Control on 20.05.2021, several correspondences had taken place between the stakeholders, through the communication medium of electronic mail.

398. At 2.03 p.m., the Harbour Master requested Samaranayake to "*ask them to send the Bay plan indicating the DG cargo*". The contents of this email are indicative of the Harbour Master having called for vital information required to manage the emergency situation on the part of the Port Control. It is important to note that the information called by the Harbour Master is the information provided to the respective local Agents to Hamad and Hazira. Even for Singapore Port, prior to the shifting of discharge of the leaking container to the Port of Colombo, there were emails sharing this information. However, when it came to Colombo Port Control, the Harbour Master had to call for that information. Interestingly, that too after the fire onboard the vessel was reported and assistance was sought for firefighting. Without disclosing this

information on a voluntary basis, the Master and the local Agent have withheld them, depriving the Harbour Master an opportunity to arrive at an informed decision in a timely manner.

399. The email by which Samaranayake made available the required information carried the title "URGENT – X-PRESS PEARL V.21018E – QAHMD – LEAKAGE OF FUMES FROM CONTAINER IN VESSEL HOLD". This was the situation that prevailed onboard the vessel since the early hours of 20.05.2021. Only after the Harbour Master contacted Samaranayake over the phone followed with an email, calling for details of dangerous cargo the vessel carried, the subject of the email was changed from "URGENT – X-PRESS PEARL - V.21018E – QAHMD – LEAKAGE CONTAINER NO:- FSCU7712264" to "URGENT – X-PRESS PEARL V.21018E – QAHMD – LEAKAGE OF FUMES FROM CONTAINER IN VESSEL HOLD". Samaranayake sent another email at 1.45 p.m. to the Harbour Master stating that "*Bay 10 DG with marking class pdf underdeck, email from XPP at 9.24 p.m. attached – FIRE*", which he kept for himself without forwarding even though the vessel sent it at 9.24 p.m., presumably on 19.05.2021.

400. It is not clear from the Affidavits of the Harbour Master as to the circumstances that made him to inform the Chief Fire Officer by his email sent at 11.12 a.m. on 20.05.2021, with the text "*Further to telecom*" with several attachments, including images, and documents identified as "*TSVAEJA21043843 DRAFT BL.PDF; BAY 110582 dg leakage FSCU 7712264.xisx; BK – Nitric Acid. pdf; CARGO MANIFEST. XLS; Packing List.pdf*". It is obvious that the Harbour Master had received this information from a third party. The Owner / Operators / Master / Agent offered no explanation as to who provided those details to the Harbour Master. However, one factor is clear. Irrespective of the fact that the party that provided that information to the Harbour Master, judging by his act of sending this email to Chief Fire Officer, supports the proposition that he had anticipated the prospect of developing a fire situation onboard

the vessel sooner or later, and forewarned his Fire Chief of that eventuality.

401. In the absence of the report of the surveyor appointed by the P&I Club to assess and report the situation onboard the vessel, the Maritime Rescue Coordinating Centre requested the Master of the vessel by email sent at 9.08 p.m. on 20.05.2021, stating that *"We came to know there had been an emergency situation onboard XPP, pl send us a detailed report on the incident for us to assess the situation and to take onward actions to assist you"*. Here too, even after a fire erupted onboard the vessel, the reluctance to provide relevant vital information on the part of the Owner / Operators / Master / Agent could clearly be noted.

402. On 21.05.2021 at 3.22 a.m., the MRCC sent an email to Sri Lanka Air Force, requesting assistance as it reads "*Megha of SLPA engaged in fire during dark hours and request SLAF assets for possible assistance by first sight 21.05.2021"*. The MRCC also informed the SLAF of the request made by the Harbour Master by email sent at 1.39 p.m., "*HM requests airdropping dry chemical powder to extinguish the fire on board"* and requested "*to an inspection of distressed XX P this morning airdropped dry chemical powder to extinguish the fire on board"*. At the same time, the Director General of Merchant Shipping informed the "*Sea Consortium, Master XPP, MEPA, Singapore Maritime Authority, Transport Safety Protection Authority-Singapore*" of their view by stating that "*After a visual inspection, notify you to appoint a qualified Salvor immediately to deal with the fire incident. Until such time owners are further advised to initiate emergency response service with the vessels' class. You are advised to take all necessary precautions to prevent marine pollution"*. In fact, Bell 212 Helicopters were used to drop fire retardant chemicals from the air to douse the fire onboard the vessel.

403. On 22.05.2021 at 10.35 a.m., MRCC sent an email to Manish Makan of eastaway.com, informing him of the "*Option available to drop sea water by air using Ba.m.bi buckets from SLAF Helicopters to arrest the spreading of fire on board. If the ship owner consent is granted to above, this can be arranged*

through MRCC with consent of SLPA". It is important to note here regarding the cautious approach adopted by the MRCC to fight the fire onboard the vessel caused by a chemical reaction, and being alive of the unintended consequences it might result in, hence the permission was sought from the owner of the vessel.

404. This course of action could be contrasted with the approach of the Master, who used sea water to wash away the acid leakage on the deck, which then found its way into Cargo Hold No. 2 bilges. It is at a very late stage the Master realised that, in situations involving Nitric acid leakages, usage of water was not recommended. This is seen from several conversations recorded in the VDR. On 19.05.2021, the Master instructed a crew member stating "… *looks like today now it stars raining and some water come inside, and mixing of water and leakage, and some yes, some chemical reaction due to water. Ensure we … any water in cargo hold …"* (vide conversation at 2220 hrs).

405. On 20.05.201, the Master instructed another crew member "… *and this cargo, just for your information, must be extinguished only by CO2. It is prohibited to use any water. We just using boundary cooling water, but not water inside …"* (vide conversation at 0724 hrs). The emphasis on using CO2 was made once more by the Master during a conversation he had with a member of his crew, on the same day, at 0845 hrs.

406. Confirming the urgent firefighting response offered by the Port Control and the preparations made by it to ensure the safety of the crew onboard the vessel, Arjuna Hettiarachchi sent an email to POCC - Singapore on 22.05.2021 at 1.02 p.m., informing them that "*SLN deployed two crafts to the location for monitoring the situation and possible assistance, the situation is continuing for the 3rd day and 3 tug boats SLPA engaged in firefighting operations with SLN ships in the vicinity to assist the evacuation of crew."*

407. Manish Makan, in response to an email sent by DGMS, replied on 22.05.2021 at 1.03 p.m., stating "*We have engaged a salvage company for*

firefighting and assist the vessel, expected to arrive at 4.00 p.m. rest of the team will arrive on 23/05/2021 at 0035 hrs and will take over operations. Master is engaged in firefighting and coordinating with multiple authorities". As indicated in this email, the firefighters engaged by the Salvage company arrived in Sri Lanka on 23.05.2021. The MRCC informed Manish Makan by email sent at 1.03 p.m., that "*12 salvage/firefighting experts boarded Salvage Tug on 23.05.2021. Inform Salvage Master to indicate action plan, daily progress, and other important information".*

408. The required information and the feedback of the situation onboard the vessel as expected by the MRCC from the Salvage Master was not readily forthcoming and as a result, an email was sent to Manish Makan at 10.36 p.m. on 24.05.2021 which reads that "*Radio communication between XPP and tug boats reveal that some containers fallen to water and master confirmed all of them submerged. It is understood that the action plan, daily progress and special events such as above incidents need to be shared by the ship/expert team with other stakeholders as agreed during the virtual meeting held this morning".*

409. The situation onboard the vessel was deteriorating at a rapid pace, posing a threat to the crew, as indicative from the contents of an email sent on 25.05.2021 by MRCC at 6.00 a.m., to Manish Makan informing the latter of the following"

> "*1. One explosion occurred on board around 5.15 hrs and all crew and salvage team rescued*
> *2. Fire is still visible onboard*
> *3. Crew and expert team 25 ps are transferred ashore*
> *4. Further updates will follow".*

410. At 9.28 a.m., the situation onboard the vessel was described by MRCC to Manish Makan as "*Observed heavy fire on board spreading towards astern part of the vessel after the explosion. Appreciate take immediate actions/steps to intervene as discussed. It was decided that the vessel to be shifted to a safe location immediately avoiding possible marine pollution/oil spill damage".* This was followed by a request to the Indian Coast Guard, sent by MRCC at

12.00 noon seeking " … *assistance from Indian Navy/Coast Guard for firefighting/ pollution".*

411. In the afternoon of 25.05.2021, the MRCC sent an email to Manish Makan and the Indian Coast Guard, informing them of a serious situation that had developed with the fire onboard raging continuously for the past few days. The email sent at 2.38 p.m. reads as follows:

> "*The fire spreading to forecastle area. If the fire engulfs the anchor windlass and securing arrangements the strength of the cable and equipment will be weakened which may cause a parting of the anchor cable.*
>
> *SLN stressed today meeting the importance of preventing fire from spreading to the anchoring arrangement since the whole ships wight is borne by the port anchor.*
>
> *Due to heavy rain condition experienced in the area of operation, if the anchor cable is securing arrangement is damaged, the casualty ship can drift very close to the shore line in a short period of time.*
>
> *This can cause tremendous marine and air pollution near coastal line which is densely populated with a large number of fishing community.*
>
> *In view of the above MRCC representing the coastal State direct ship owner to inform ship salvors to take all possible action to prevent fire spreading to ship bow and anchor arrangement, which has a bearing on casualty ships structural integrity."*

412. Thereby, the MRCC apparently had conveyed its assessment of the threat posed to the anchoring arrangement of the vessel by rapidly spreading fire onboard the vessel to all areas, as a very serious impediment to implement its directive that "*the vessel to be shifted to a safe location immediately avoiding possible marine pollution/oil spill damage*" and, hence issued the instructions, that the "… *ship salvors to take all possible action to prevent fire spreading to ship bow and anchor arrangement, which has a bearing on casualty ships structural integrity."*

413. Despite the instructions of the MRCC that the vessel should be shifted to a safe location and that it be carried out "*immediately*", in order to avoid possible marine pollution and oil spill damage, even as at 30.05.2021, this directive was not complied with by the Owner / Operators / Master / Agent, as the MRCC wrote to at 8.5Arjuna Hettiarachchi 2 a.m., to forward the "*Request of SMIT Salvage to tow casualty ship*" for necessary action.

414. The merchant vessel X-Press Pearl sank on 02.06.2021 off the coast of *Pamunugama*, to a depth of 19 to 21 meters, after fighting to stay afloat for 13 days with a raging fire onboard. Her stern had grounded during towage operation. The MRCC sent an email on that day at 9.47 a.m., informing the Naval Chart Depot to install warnings to passing ships, that reads "*XPP partially submerged. Containers fallen to water floating/submerged*". The MRCC also informed the MEPA by an email sent at 10.17 a.m., informing that "*XPP partially submerged. Suspect Engine room flooded. Debris and Sludge mix with chemicals may be discharged to water and oil pollution cannot be ruled out*".

415. Returning to the contention that the learned President's Counsel, who appeared for the X-Press Pearl group of company had advanced during the hearing, namely, that the Port Control failed to provide urgent firefighting assistance and also to the allegation made by the Petitioners that the State parties have failed to act with due diligence in the assessment of the imminent risks and the dangers that are associated with a vessel carrying dangerous and hazardous cargo in close proximity to the coast of Sri Lanka along with the contention that they failed to take immediate precautionary measures to prevent or mitigate the risks posed by the vessel X-Press Pearl, this Court needs to test the validity of these multiple contentions and allegations, by assessing each of them in the light of the evidence presented before this Court by the parties and also on the material called by this Court that contain relevant admissible evidence.

416. The Owner / Operators / Master / Agent, in presenting that contention, have latched onto a factual statement, contained in the Statement of Claim presented before the Singapore Court, indicating that soon after the smoke alarm went off in the early hours of 20.05.2021 and the crew had noted orange smoke emitting from Cargo Hold No. 2, that reads "*This was reported by the Master to the XPF Defendants. At the same time, Colombo Port Control was informed for the first time of the leak from the Nitric Acid container*".

417. Learned President's Counsel placed heavy reliance on a particular phrase contained in the said Statement of Claim. He relied on the part of the statement that reads "*At the same time*" to impress upon this Court that the information regarding the leak of Nitric acid was in fact reported to the Port Control, not at the time of Samaranayake's email sent at 10.19 a.m. as they originally asserted in the Affidavit of Hettiarachchi, but at 2.00 a.m.

418. The Statement of Claim is said to have been signed by a Senior State Counsel of the Attorney General's Department, and filed in the proceedings pending before the Singapore court, instituted on behalf of the Republic of Sri Lanka. It is not clear the material on which that factual statement was inserted into that claim. The author of the Statement of Claim is not a witness to any of the events that had taken place in relation to the vessel X-Press Pearl and had to rely on others and relevant documentation to draft the factual statement.

419. This Court, however, was presented with the contents of contemporaneous entries made by relevant officers in the Port Control, the emails that were exchanged over the vessel under consideration, the VDR recordings, the WhatsApp text messages, the Log Book entries etc., which no party to these proceedings sought to challenge, either on the authenticity of contents or of their accuracy.

420. It is self-evident from the copious quotations of the contents of these contemporaneous entries, emails and forms of conversations made in the preceding section of this Judgment, that the said contention of the Owner / Operators / Master / Agent had no factual basis to render any legitimacy to it. This conclusion is further strengthened with the conduct of the Owner / Operators / Master / Agent, when they failed to substantiate the same with any acceptable and reliable 'evidence'. This is related to the starting point at which the port administration failed to provide urgent firefighting assistance.

421. The Owner / Operators / Master / Agent further submitted, based on a sequence of events that described as follows, that the "*Port Control Authorities are guilty of gross negligence and dereliction of duty, compounded and made immeasurably worse by the Harbour Master's untruthful denial of the information given of the leaking container in the early hours of the 20th morning*";

a. at 02:00 hrs there was a smoke alarm and the Statement of Claim admits that the Port Control was informed,
b. at 12:05 hrs there was a minor fire which was contained,
c. by 14:10 hours, the Master said that all CO2 was depleted and requested "*urgent firefighting assistance*",
d. it was only at 16:55 hrs, almost three hours after the 14:10 hrs, it was requested for urgent assistance by way of providing CO2, and that a team be sent out, but only to "*inspect the situation*" and not to engage in firefighting activities,
e. in fact, there was no actual firefighting at any stage during the entirety of 20th May 2021,
f. the Master once again at 23:00 hrs requested urgent shore-side firefighting assistance,
g. it was only at 01:20 hrs that tug "Megha" was sent to the scene to "fight the fire" and a few hours later (in the morning of the 21st May) that two other tugs were sent to assist with firefighting,

h. therefore, it took approximately 24 hours after the first smoke alarm was informed to Port Control, for the taking place of any actual firefighting.

422. The Petitioners, on the other hand, in making their allegation of a failure on the part of the State parties to act with due diligence in the assessment of the imminent risks and dangers associated with the vessel in carrying dangerous and hazardous cargo in close proximity to the coast of Sri Lanka along with the allegation that they also failed to take immediate precautionary measures to prevent or mitigate the risks posed by the vessel X-Press Pearl, did criticise the manner of firefighting undertaken by the Port Control, but relied on the body of evidence available before Court as a whole in support of their allegation.

Evidence relating to the first reporting of fire

423. Learned President's Counsel for the Owner / Operators / Master / Agent, advanced the said contention on the presumed factual basis that the first fire onboard the vessel had erupted at around 2.00 a.m. on 20.05.2021, and remained unassisted for well over 24 hours, in spite the repeated requests made by the Master for assistance to fight that fire. Nevertheless, the material before this Court in this regard strongly points to a contrary position.

424. The Deck Log Book entry discloses vital information in this regard. It is correct that the alarms went off from Cargo Hold No. 2 in the early hours of 20.05.2021, and that the Singapore Report indicated the crew members who investigated the cause for the alarm noted "small fires" in the top tier of the stack of containers in that cargo hold. However, there is no entry in the Log Book that it was reported to the Port Control. No firefighting assistance was sought from the Port Control at that point in time.

425. The Master eventually did seek firefighting assistance after reporting of fire at 12.05 p.m., as the Deck Log Book carries the entry "*Port Control was also informed and asked for immediate assistance*". The Master, in order to

control the situation, used the CO2 fire extinguisher system of the vessel and had the situation under control within a short period of time. Port Control Log Book carried entries at 1.00 p.m. as well as 1.30 p.m., that the fire was under control, as reported by the Master.

426. It was at 2.10 p.m., the vessel informed Port Control once more that "*All extinguishers used, requesting assistance*". The Harbour Master arranged a fire crew headed by the Fire Chief of the Port, who set out from the port in order to board the vessel. They boarded the vessel at 4.50 p.m., as the Port Control Log Book carries an entry that "*Reported that 03 fire officers 01 Naval person bordered, informed HM/DGMS*". They returned shore after leaving the vessel at 6.35 p.m., and reported that the Cargo Hold No. 2, still emitted smoke from its vents, although no fire was seen. Since the Master used all the CO2 to control the fire that erupted at midday in the Cargo Hold No. 2, the fire crew did not enter the cargo hold to conduct an inspection.

427. The fire situation that erupted once more on board the ship occurred only at the late night of 20.05.2021. The Deck Log Book entry at 11.05 p.m. indicated the request made by the vessel for urgent assistance from shore-side. This was the first active fire, which could not be managed by the crew of the vessel, as the vessel had by then exhausted all of its CO2 reserves. The entry on 20.05.2021 at 11.05 p.m., reads "*Vsl call Colombo Port Control over CH 12. Request urgent assist from shore side*". The corresponding entry in the Port Control Log Book, indicated that with the reporting of fire onboard, fire tugs were dispatched.

428. The firefighters deployed by the Colombo Port Control commenced their firefighting and the entries made in the Deck Log Book did not indicate that the assistance rendered by the officials of the Port Control in the firefighting operations was inadequate, ineffective or limited in extent and that it had no effect on the fire onboard. Indicating quite the opposite of the contention, the Deck Log Book entry of 21.05.2021 made at 8.00 a.m., reads that "*Vsl continue firefighting … the tug from shoreside*

"Hercules" and Maha Wewa" assist with firefighting." The entry at 1.00 p.m., reads *"Firefighting operation on Bay 10. Cargo Hold No. 2F on deck fire. Assistance is provided by Colombo Port Control and by Sri Lankan Navy. Maintaining VHF Ch 08 with assisting party for communication. Firefighting tug "Hercules" and firefighting tug "Megha" assisting the vessel. Ship staff assisting boundary cooling".*

429. On 21.05.2021, at 3.22 a.m., the MRCC sent an email to Sri Lanka Air Force, requesting its assistance as the mail reads "*Megha of SLPA engaged in fire during dark hours and request SLAF assets for possible assistance by first sight 21.05.2021".* The MRCC also informed the SLAF of the request made by the Harbour Master by email sent at 1.39 p.m., on the same day "*HM requests airdropping dry chemical powder to extinguish the fire on board"* and requests "*to an inspection of distressed XX P this morning airdropped dry chemical powder to extinguish the fire on board".*

430. The Deck Log Book entry on 22.05.2021 at 12.01 a.m., reads "*Fire on deck above cargo hold No. 2 (Bay 10) continue Firefighting in progress, carried out by ship staff and by shore assistance. Fire tug "Megha" assisting to fight fire. Sri Lanka Navy standing by for assisting the crew".*

431. The 12.00 noon entry on the same read "*firefighting continues on deck. Fire tugs assisting to fight fire. The fire tugs requested to stop the boundary cooling done by the ship staff as they will not be able to control the fire and requested Master to call back the ship staff inside. Now fire tugs are doing boundary cooling as well as fighting the fires."* The entry at 6.50 p.m., mentioned the arrival of the Salvage vessel 'Posh Tael'.

432. The entry at 12.01 a.m. on 23.05.2021 read "*firefighting operation continues … Tug Hercules and Tug Maha Wewa assisting in firefighting. Sri Lankan Navy standing by for assisting the crew".* At 12.00 noon, the entry reads "*Tug Hercules and Salvage vsl 'Posh Tael' fighting fire from both sides"* and "*Firefighting team of 11 members arrived and the Chinese crew and officers except 3/O & Ch Cook were signed off".*

433. In view of this overwhelming evidence confirming the nature and the extent of the resources used in the firefighting assistance rendered by the Colombo Port Control, along with the support of the Sri Lanka Air Force, and later with the assistance of the Indian Coast Guard, it is the considered view of this Court that the contention "*Port Control Authorities are guilty of gross negligence and dereliction of duty,*" is made only upon highlighting selected items of evidence that gives a distorted picture, rather than on a reasonable assessment of the available material, in its totality and therefore is rejected as an unsubstantiated proposition.

434. The Owner / Operators / Master / Agent claim that the vessel should have been moved when it was possible to do so on the vessel's own engine power but the Harbour Master and the Director General of Merchant Shipping, despite the power conferred under Section 84B(1) of the Sri Lanka Port Authority Act, made no such a decision.

435. With the spread of the fire onboard the vessel on 20.05.2021, the Chairperson of MEPA issued a written directive on the Owner/ Operators/ Master/ Agent on 21.05.2021 containing several directions. One such direction was to tow away the vessel from the Sri Lankan waters. This directive was made subject to the condition "*if the situation goes out of control*".

436. On 25.05.2021, the crew abandoned the vessel at 4.15 a.m. The same day morning the MRCC directed Manish Makan by an email sent at 9.28 a.m., that "*It was decided that the vessel to be shifted to a safe location immediately avoiding possible marine pollution/oil spill damage*." The MRCC sent another email on 30.05.2021 at 8.52 a.m., to Arjuna Hettiarachchi directing him to "*request of SMIT Salvage to tow casualty ship is forwarded for f. n. a.*".

437. The Solicitors of the Owners of the vessel, X-Press Pearl wrote to the Director General of Merchant Shipping on 29.05.2021 via electronic mail stating *inter alia* that "… *the developments onboard overnight show that the*

situation remains volatile. The worst-case scenario with this casualty, is the vessel sinking in her current location, in shallow waters in the Colombo anchorage on a lee shore, where all debris will be pushed by the prevailing monsoon conditions onto the coastline". The Solicitors further indicate that the "*Owners wish to minimise this worst-case scenario immediately. The vessel needs to be moved as a matter of priority before this situation potentially occurs*" and therefore requested the "… *approval on behalf of the Government of Sri Lanka that the vessel is permitted to be moved from her current location as expeditiously as possible by Smit under the terms of the Lloyds Open Form Salvage Agreement using assets onsite and taken to a more sheltered position off the east coast of Sri Lanka, where she is out of the monsoon swell*.".

438. The Harbour Master in his Affidavit dated 03.09.2024 stated (at paragraph 45) that " … *GOSL expressed concerns on 31.05.2021 by email to owners and P&I insurer representatives of XPP regarding the lack of detailed Plan of Action for the proposed towage of the XPP, including an assessment of the vessel's structural integrity*.".

439. The position of the Petitioners, although they differ in certain specific areas under scrutiny, is presented based primarily on two premises.

440. The failure of the State parties to act with due diligence, in the assessment of the imminent risks and dangers associated with the vessel in carrying dangerous and hazardous cargo in close proximity to the coast of Sri Lanka is one such complaint.

441. The other being that the State parties have failed to take immediate precautionary measures to prevent or mitigate the risks posed by the vessel X-Press Pearl.

442. The complaint that the State parties have failed to act with due diligence in assessing the imminent dangers when a vessel that has dangerous cargo on board, should necessarily be considered in the context of the imminency of the risk involved. In the context of international trade, the

transportation of dangerous cargo by sea, being one of the most economical ways of transportation, is an obvious choice for the trading partners. The increase in the transportation of dangerous cargo by sea also gives rise to the increase in the frequency of maritime incidents involving dangerous goods in stowage, transit and loading as well as in discharging. Hence, each time a vessel carries a consignment of dangerous cargo, there is an inherent risk involved with such activity, which of course could not be avoided in totality.

443. In order to address these issues, the International Maritime Organisation has put in place several international instruments, by which such activities are sought to be regulated. The International Convention for the Safety of Life at Sea (SOLAS) and Code for the Safe Management of Ships could be cited as primary examples of such instruments.

444. The Colombo Port Control, in terms of the applicable law, imposed a duty on a vessel calling at its port to provide required information specified by Regulations in relation to the dangerous cargo it carries. These Regulations were put in place, envisaging situations where it is required to facilitate regular trading and shipping activities and not to cater for emergency situations such as these. The existence of such emergency situations, which the Port Control would be totally unaware of, could not be effectively managed, if and unless a timely and truthful disclosure is made by the relevant parties, who are in possession of the relevant information.

445. The said complaint of the Petitioner, should therefore be considered from the point at which the Port Control was first notified of the situation developing on board the vessel. It was noted that the Harbour Master had some prior information of the leak of Nitric acid onboard the vessel X-Press Pearl on 20.05.2021 around 11.00 a.m., and only at 10.19 a.m., he was in receipt of a request made by Samaranayake seeking approval to discharge a leaking container in Colombo. When he made the request, the vessel had controlled two fire situations that had erupted in Cargo

Hole No. 2. Before the Harbour Master even decided on that request, a fire broke out in Cargo Hold No. 2 of the vessel around 12.00 noon and then the focus of the Port Control shifted to find ways of managing the fire situation onboard the vessel, and the request to permit discharge a leaking container became irrelevant, under the circumstances.

Conclusions regarding segment three

446. In the three segments, during which this Court considered the factual narrative and its analysis on the material, since the initial detection of the leak of Nitric acid which made the hatch covers of the vessel heavily corroded, the various steps taken by the Master and Agents at Hamad and Hazira to discharge the leaking container, the effect of the cyclone had on the vessel and its dangerous cargo along with damaging rubber gaskets that allowed the leaking corrosive liquid to run into Cargo Hold No. 2, which then turn penetrated through the metal covers into the containers carrying Caustic Soda, led to a chemical reaction making the containers glow in heat and detonated a chain of explosive reactions involving other dangerous cargo stowed in that cargo hold. When the vessel dropped anchor, the Cargo Hold No. 2 had become a virtual 'time bomb', with small fires and melted metal glowing in red.

447. None of these factors were brought to the attention of the Port Control when the vessel sought permission to drop anchor. The Port Control had to call for the required information which it thought was relevant from the Master and the local Agent, from time to time, in order to make somewhat a realistic assessment of the situation onboard the vessel to determine the manner and extent to which its response should be adjusted to manage the fire situation at hand. This Court, having carefully considered the available material placed before it, is of the view, that the Harbour Master and the Director General of Merchant Shipping, in functioning in their respective official capacities, have acted with due diligence, taking the vital decisions reasonably and performed their statutory duties, under the given set of circumstances within which they had to function, according to law.

448. The only institutional failure that could be pinned on the part of the Harbour Master and the Director General of Merchant Shipping is that there was no action plan already prepared for casualty management, when X-Press Pearl reported fire onboard around 12.00 noon on 20.05.2021, which was put in place. This was immediately attended to after the disaster and when the vessel Seaspan Lahore reported a leak of Nitric acid onboard the vessel, the Port Control acted according to the said action plan and managed the situation successfully.

449. It is necessary to re-emphasise that the situation on board the vessel Seaspan Lahore cannot be compared to the situation prevailed onboard the vessel X-Press Pearl. The only issue Seaspan Lahore had was the leaking container, which the Master kept under control, until it was re-worked after discharging at Colombo, unlike the vessel X-Press Pearl. The X-Press Pearl, even at the time of dropping anchor at midnight of 19.05.2021, had the potential danger hidden inside Cargo Hold No. 2, which the Master and the crew had no assessment of its proportions. They, in their own perception, were content with discharging the leaking container immediately.

450. In the X-Press Pearl situation, when the belated request was made to discharge the leaking container, the situation in Cargo Hold No. 2 had already deteriorated to a level that it almost became unmanageable. The Port Control was totally unaware of the scale and the magnitude of the risks as well as the immediacy of dangers that the situation had posed to the crew, the port and to the environment and were fighting a fire, under the presumed information as to what fuels that fire was raging onboard the vessel.

451. The land-based Operators and the local Agents, with the fire expert's input, had the full knowledge of the risks and dangers that would pose by the situation onboard the vessel to its crew, to the port and to the marine environment, however, apparently for ulterior motives, they

have decided to withhold that vital information from the Port Control, fearing that they would have no other port to turn to.

452. The other complaint of the Petitioners was that the State parties have failed to take immediate precautionary measures to prevent or mitigate the risks posed by the vessel X-Press Pearl when they failed to tow it out of the territorial waters. The relevant State functionaries who had such powers are the Harbour Master and the Marine Environment Protection Authority.

453. Section 84B(1) of the Ports Authority Act states as follows:

> "*In the event of fire breaking out on board any vessel in any specified port, the Harbour Master may proceed on board the vessel with such assistance and persons as to him seem fit, and may give such orders as seem to him necessary for scuttling the vessel or for removing the vessel or any other vessel to such place as to him seems proper to prevent in either case danger to other vessels and for the taking of any other measures that appear to him expedient for the protection of life or property.*"

454. In terms of this Section, if fire breaks out onboard of any vessel, the Harbour Master had the authority to order on "… *removing the vessel … to such place as to him seems proper to prevent in either case danger to other vessels and for the taking of any other measures that appear to him expedient for the protection of life or property*". But his authority seemed confined to "*any specified port"* as Section 2(3) and 2(4) speaks of the limits of any specified port as defined by the Minister in charge of the subject. The vessel was at the anchorage of the Port of Colombo and not within the sea area protected by its breakwaters. Since the vessel remained at the anchorage, there was no immediate concern for the Harbour Master to act under any of these Sections, when the fire was reported around noon on 20.05.2021.

455. The Maritime Rescue Coordinating Centre, which functioned under the delegated powers of the Harbour Master, by its email sent on 25.05.2021

at 9.28 a.m., informed Manish Makan that "*it was decided that the vessel to be shifted to a safe location immediately avoiding possible marine pollution/oil spill damage*". After the crew of the vessel was evacuated for their safety, the MRCC lost no time in issuing this direction and the vessel was under the control of the Salvors since 23.05.2021.

456. The other State functionary, the MEPA, on the other hand, too was conferred with authority, in terms of Section 15(1) of the Marine Environment Prevention Authority Act, as amended, where, "*as a result of any maritime casualty or in consequence of any act resulting therefrom, there is pollution or an imminent threat of pollution to Sri Lanka waters or to its fore-shore or any interests relating to such waters or fore-shore, the Authority may, in consultation with the Minister, give directions*" to the owner or the person in whose possession the vessel is or the Master, the Salvor or any other person.

457. In terms of Sub-Sections 15(2)(a) and 15(2)(b), such direction issued may be the ship is to be moved to a specified place, or is to be removed from a specified area or locality; or that the ship is not to be moved to a specified place or area or locality or over a specified route.

458. The MEPA, did in fact issue a direction on 21.05.2021 to tow away the vessel, provided that "*if the situation goes beyond control*". It is unclear who was to determine the applicability of the direction, which was dependent on that qualification and who was to determine whether the situation was beyond control.

459. The response to the situation that was developing on board and inside MV X-Press Pearl by MEPA (as an organisation) and by its Chairperson will be discussed elsewhere in this Judgment.

Impact of the MV X-Press Pearl environmental disaster

460. The consequences of the X-Press Pearl disaster can be broadly classified under two headings, namely;

i) Unprecedented and widespread environmental damage; and
ii)Economic losses caused to the nation and to the fishing sector in particular.

Environmental Damage (Marine and Coastal environment pollution)

461. Sri Lanka is an island nation with a land mass in extent of 65,610 sq.km. However, our country possesses an Exclusive Economic Zone of 517,000 sq.km. The coastal and marine environments in and around Sri Lanka are home not only to features such as beaches and coral reefs but to mangrove forests, estuaries, sandbars and lagoons too.

462. These features, especially around the western coast and Negombo in particular, nurture numerous species of marine flora and fauna, some of which are endemic to Sri Lanka. The coastal environment serves as an eco-system that is rich in bio-diversity and a barrier against adverse geological and climatic effects. These beaches and coasts and its bio-diversity are the key features in the tourism and fishing sector which bring much needed revenue to the country.

463. As discussed earlier in this Judgement, these are the beaches and coasts that were severely affected by the X-Press Pearl catastrophe.

464. The contention of the Petitioners was that the far-reaching ecological harm caused to the environment was largely by plastic nurdles. Thereafter hazardous chemicals and substances, namely, Nitric acid, Ethanol, Lead, Epoxy Resin *et al.* Bunker oil and heavy fuel oil also caused damage to the environment.

465. The vessel X-Press Pearl carried approximately 78 Metric Tonnes (78,000 Kg) of micro plastics, spherical in shape, referred to as nurdles. These 75 to 100 billion nurdles are used to manufacture plastic products. These nurdles consist of High-Density and Low-Density Poly Ethylene (HDPE and LDPE). These nurdles are not inherently toxic, but when exposed to intense fire and heat and charred may give toxic properties or further break down into micro particles.

466. Moreover, the density of nurdles is lower than sea water and therefore floats on sea water and gets carried away by ocean currents and tides to far distance areas and countries too. Some of these nurdles which are exposed to the weather and sea water sink to the sea bed and get embedded in the sea-bed and others buoyant in the ocean may be consumed by fish, mammals and sea birds leading on to disastrous and life-threatening consequences. Researchers have also found nurdles lodged around the gills of fish.

467. Petitioners have tendered to Court multitudes of documents and reports substantiating the damage caused by the nurdles. The Respondents have not challenged these documents except the estimates referred to in the 2nd Interim Report prepared by the "Thirty Nine Experts Committee" appointed by the MEPA for the Environment Damage Assessment of the X-Press Pearl Maritime Disaster ("The 2nd Interim Report"), which will be discussed in detail later on in this judgement.

468. Most of the Reports and Scientific Literature relied upon by the Petitioners are in the public domain and this Court does not wish to reproduce the material referred to therein in this Judgement as it would only lead to lengthening of this Judgement.

469. Upon perusal of some of the literature and especially the Report of the UN Environmental Advisory Mission prepared in July 2021 ("UN Report") and the 2nd Interim Report published in January 2023, we have no hesitation to hold that the pollution (whether it be marine, plastic

chemical, oil or air) caused by the X-Press Pearl catastrophe is immeasurable, unfathomable and infinite.

470. Furthermore, the documents before Court establish that only 40% of nurdles carried aboard the vessel had been washed ashore at the time of filing of these applications, implying that another 60% of nurdles continue to be still in and around the coastal waters. This statement too appears to be correct, since even at the time of penning this judgement, beach clean-up operations are going on and loads of nurdles are collected upon a daily basis. Moreover, the reports highlight that Epoxy Resin is harmful to the environment and it is toxic to aquatic life and can have a long lasting effect on marine fauna. Similarly, the chemical and oil pollution caused especially from the ship wreck and the lost containers are a risk for the marine wildlife.

471. The aforestated UN Report also notes that the lost containers of the vessel and the shipwreck being close to the proximity to the port of Colombo, being one of the busiest transhipment ports in the region, is also a navigation hazard to vessels arriving in Sri Lanka, which also affects and interrupts, trade and business. Furthermore, the UN Report noted that the shallow waters in which the catastrophe occurred is endowed with high biodiversity, namely, reefs and soft bottom habitats. These reefs are also the breeding and nursery grounds for marine aquarium fish. The mangroves in the Negombo lagoon, being environmentally sensitive, were also strewn with chronic marine litter, polyester yarn and other debris.

472. The Magistrate Court's reports before this Court, indicate that as at 30.07.2021, 417 sea Turtles, 48 Dolphins and 08 whales had been washed ashore, pursuant to the pollution and contamination of the ocean following the X-Press Pearl disaster. The preliminary report of the University of Padova (annexure I to the 2nd Interim Report) indicate unusual mortality event of cetaceans and other marine species at an abnormal large scale, had taken place compared to average stranding

reports and X-Press Pearl incident, deemed the worst marine ecological disaster in Sri Lankan history, offering the opportunity to create a functional stranding network for both sea turtles and cetacean.

473. The Final Report titled "Fire on Board X-Press Pearl at Colombo Anchorage on 20.05.2021" prepared by the Transport Safety Investigation Bureau of the Ministry of Transport of Singapore dated 16.10.2023 ("the Singapore Report") have also highlighted the ensuing pollution brought on by the fire and subsequent sinking of X-Press Pearl, caused an overwhelming economic, social and environmental impact.

474. In light of the aforesaid circumstances, this Court has no hesitation to hold that the damage caused to the environment and the pollution which is still continuing and ongoing, has been caused entirely due to the X-Press Pearl disaster and the X-Press Pearl group, consisting of the Owner, Operator(s), Master and Agent of the vessel X-Press Pearl, and thereby are solely responsible for such catastrophe.

Economic and financial losses caused to fishing communities

475. Our nation as stated earlier has an extensive coastline and a number of water ways, where coastal and deep-sea fishing and inland/aquaculture fishing and shrimp farming takes place. Out of these modes of fishing, the coastal fisheries sector is the most expansive and productive and provides several direct and indirect job opportunities especially to the people of the western coasts. In terms of the economic contribution, the fishing industry is a substantial contributor to Sri Lanka's Gross Domestic Production (GDP) and fishing and related sectors, constituting the livelihood and source of income of several communities residing in Gampaha, Colombo and Kalutara districts.

476. Upon the immediate aftermath of the X-Press Pearl disaster, consumption of fish and shell fish significantly reduced upon the public perception of consuming contaminated fish, which caused sales of

seafood and consumption to plummet across the country which had a severe impact on the livelihood of 20,000 fishing families.

477. This loss of livelihood in addition to other factors caused by poverty, malnourishment and loss of security among these communities, led to the social and economic degradation of the people of this country.

478. This Court observes that the Fisheries Statistics Report published by the Ministry of Fisheries and produced before Court, which was not challenged by the Respondents, indicates that the coastal sub-section of the marine sector fish production is significantly more extensive and productive than the other sub-sectors of the fishing industry. This gives credence to the submission of the Petitioners that the imposition and the extension of the fishing ban within a 20 nautical mile radius from the site of the X-Press Pearl disaster, although necessitated to ensure the safety of fisherman, and fishing equipment and protecting health of consumers, had the consequential effect of denying thousands of families their only source of livelihood.

479. In light of the aforesaid circumstances, this Court holds that the economic consequences caused to the fishing communities and their livelihood is also due to the X-Press Pearl disaster and the X-Press Pearl group should be held responsible for the said economic consequences too.

Payment of compensation

Interim payments

480. This Court classified the impact of the X-Press Pearl disaster on Sri Lanka, under two broad headings, namely, unprecedented and widespread environmental damage and economic and financial losses caused to the nation and to the fishing sector in particular and discussed

the consequences which are and will have an effect on the citizenry of this nation and the generations to come.

481. Whilst the damage caused to the environment has still not been computed and quantified in Rupees and Cents and Sri Lanka has still not been compensated for such loss, certain steps have been taken to compensate the fisheries sector.

482. The learned ASG informed the Court that in the aftermath of the X-Press Pearl disaster, notices were published in the newspapers and through ground level fisheries societies, inviting the affected fishing community of the X-Press Pearl disaster to submit claims for the losses suffered (vide Affidavit of the Secretary to the Ministry of Fisheries ("Secretary, Fisheries"), the 5th Respondent in SC/FR 176/2021).

483. Accordingly, the learned ASG contended that claims were received from 15,032 fishermen who had been directly affected owing to the losses of income and 4888 indirectly affected persons, who also suffered losses due to fisheries related activities, which totalled up to 19,920 claims. These claims were then vetted and referred to a cabinet appointed compensation committee, where a single value for both directly affected and indirectly affected fishing communities was arrived at. The claims were then submitted to the Director General of the Department of Fisheries and Aquatic Resources (7th Respondent in SC/FR 168/2021), who tendered the said 19,920 claims to the London P&I Club, the liability insurer of the owner and the Operators of the MV X-Press Pearl, for payment.

484. The London P&I Club, independently assessed the fisheries claims, through a London based Fisheries Consultancy Firm MRAG, which conducted their own verification process by visiting Sri Lanka and made the following payments, as partial settlement of the fisheries claims:

(a) First Interim Payment - LKR 720,000,000.00 (USD 3.6 Million)
(b) Second Interim Payment - USD 2,187,751.78
(c) Third Interim Payment - USD 361,563.00

(d) Fourth Interim Payment - USD 1,755,168.00

485. Out of the 1st Interim payment of Rs. 720 Million received from the London P&I Club, Rs. 420 Million were allotted for payment of fisheries claims. However, prior to the same, in order to mitigate the hardships caused to persons engaged in fisheries and related activities, a payment of Rs. 5,000.00 per household was granted by the Government. (Vide Affidavit dated 18.01.2022 of Chairperson MEPA)

486. Thereafter, the learned ASG contended that two other USD payments (USD 794,082.15 and USD 633,465.71) and a LKR payment (LKR 911,526,476.68) were received and that the LKR payment was utilised to disburse the claims of the directly affected fishermen. (Vide MEPA Chairperson's supplementary Affidavit dated 31.10.2022)

487. Summarising the above, learned ASG contented that the 19,920 claims received were submitted to the London P&I Club by way of a Cumulative Claims Report and four instatements of a sum of LKR 3,070,293,028.26 were received. Disbursement was to be carried out in four rounds. Three rounds were effected and the fourth round was not completed by the time the Affidavit was filed and a balance sum of LKR 551,693,385.96 remains to be disbursed. (Vide Affidavit dated 22.09.2023 of the Secretary Fisheries)

488. In the written submissions tendered on behalf of the State parties, it was contended that further claims and appeals had been received and the verification process is yet to be completed; certain claims submitted to the Killiney Shipping (11B Respondent in SC/FR/176/2021) had not been honoured; process of compensating for and claiming compensation for fisheries is an ongoing process and has not been completed as at present due to the default of the Owner/ Operator(s) / Insurer of the vessel and further compensation payments would be made once the money is received, and that after 22.09.2023 no further payments of fisheries compensation were received from the Owner /Operator(s) /Agent of the vessel; and that a total sum of LKR 3,070,293,028.26 (USD

15,200,079.17) has been received and USD 41,709,242.31 remains due to the State for fisheries compensation.

489. The X-Press Pearl group in its post-hearing written submissions whilst admitting that a sum of Rs 3,070,293,028.26 was paid out on behalf of the Owners to the Ministry of Finance on behalf of the direct and indirect fisheries claims, submitted that no evidence whatsoever of the veracity of the fisheries claims have been provided to the Court by the Petitioners or the State and the Court has been wittingly or unwittingly starved of material and thus, the Court is being treated with a lack of deference which if it had been shown, would have necessitated detailed evidence of damages claimed prior to seeking orders for compensation.

490. Learned President's counsel Dr. Romesh De Silva appearing for the X-Press Pearl group challenged the documents annexed to the Petitions to claim damages as preposterous claims and submitted that they are unsubstantiated and outrageously inflated and should be sanctioned. The learned President's Counsel, in the written submissions took up the position that the fishing ban was gradually eased over a period of time and was completely removed in June 2022 and such factor has not been given due credit, when claiming compensation. As an example, Dr. De Silva drew the attention of Court to the fact that the ban on the Negombo lagoon was removed as early as 12.06.2021 and likewise a proper assessment of fisheries claim *viz-â-viz* identification of the fisherman affected by each stage of the fishing ban is not before Court. He also drew the attention of Court to the fact that the period in question was punctuated by the Covid lockdown when fresh fish were not available in the market, that fisherman do not go fishing every single day during the monsoon season and that it's a known fact that fishermen on the Western coast move their fishing operations to the North and East during the South and West monsoons.

491. Nevertheless, learned President's counsel Dr. Romesh De Silva during the hearing indicated to this Court that the X-Press Pearl group is willing to pay compensation to the fishermen who have not been compensated.

Hence, for such purpose and in order to arrive at a settlement the Director General of Fisheries was summoned to Court but a consensus could not be arrived at as there were discrepancies in the figures in US Dollars and SL Rupees cited by the parties.

492. Moreover, it was also brought to the attention of Court consequent to the position taken up by the Director, Fisheries (vide Affidavit dated 22.09.2023 referred to above) that further disbursements had been made of the fourth round of payments and a balance of Rs. 194,309,463.59 is still being held by the Ministry of Fisheries.

Claims unrelated to fisheries

493. From the written submissions filed on behalf of the State parties, it is observed that the payments received by way of interim payments from the London P&I Club, have been utilised not only for disbursement to the fishing folk, but also to the MEPA for operational and beach clean-up processes.

494. Moreover, the Deputy General Manager of MEPA by Affidavit dated 21.09.2023 admitted that twenty interim clean-up claims have been submitted and in respect of 18 claims, payments have been received.

495. The Harbour Master by an Affidavit dated 13.11.2024 stated that the clean-up efforts are still on-going and further steps are being taken with respect to a contractor-led response approach for collection and management of the MV X-Press Pearl related waste.

496. In the written submissions, the State parties submitted that on 07.01.2025 Killiney Shipping made payment for the 19th claim for beach clean-up submitted by MEPA, and as at the date of filling of written submissions four more interim claims (totaling 24) have been submitted amounting to a total sum of USD 51,841,151.04 from the Owner /

Operators of the vessel out of which the treasury has received USD 16,984,122.45.

Compensation for environmental pollution and damage

497. The submission of the State parties is that no claims have been made under this heading for environmental pollution, owing to the overall damage being complex and assessment being ongoing. The submissions suggest that it is currently being evaluated by a team of independent foreign experts appointed by the Government. However, this Court observes, that the alleged data collection assessment and evaluation is shrouded in secrecy, as this Court has not been presented with any credible evidence in respect of the same.

498. From the foregoing it is apparent that although certain payments have been made by the X-Press Pearl group for fishing claims and non-fishing claims, no payments, ex-gratia or otherwise have been made in respect of the marine pollution caused to this island nation.

Criminal and other Investigations

499. As stated elsewhere in this Judgment, learned counsel representing several of the Petitioners accused the Attorney General of *inter alia* prosecutorial inaction or at the least insufficient action having been taken against those responsible for having caused the catastrophic marine and coastal pollution. The reference made by such counsel to the polluter was an unequivocal reference to the X-Press Pearl group of companies who had been made Respondents to some of the Applications. Learned counsel pointed out that other than for one case filed in the High Court (to which reference shall be made), the Attorney General had not instituted criminal proceedings and thereby launched criminal prosecutions against those who had committed offences. They urged the Court to view their allegations in the backdrop of the overarching allegation against State actors, that one or more of them were culpable for having engaged in corruption. The *innuendo* being, that due to such corruption, there was prosecutorial inaction, by the Attorney General.

This is not a common allegation that is made against the Attorney General before this Court, and possibly these Applications stand as being solitary in that regard. Be that as it may, in the light of the accusations made, it became the duty of this Court to probe into the matter.

500. Conscious of the fact that the institution of criminal proceedings and the prosecution of offenders must be founded upon lawful conduct of criminal investigations, this Court called for and received the case record (pre-trial) of Magistrate's Court Hulftsdorp action No. B51644/06/2021. That case record contained *inter alia* reports filed by the police following the commencement of criminal investigations and the corresponding 'initiation' of criminal proceedings (as opposed to the 'institution' of criminal proceedings) in the Magistrate's Court.

501. An examination of that case record contains vital information. The Attorney General chose not to submit that information as part of the pleadings he submitted on behalf of the State-party Respondents whom he represented. That was notwithstanding the fact that such investigation had been conducted by the Criminal Investigation Department on legal advice provided by the Attorney General. Be that as it may, the following notable information can be gathered from the afore-stated case record:

    i. That the first Report (commonly referred to as a 'B Report') had been filed in the Magistrate's Court (MC) by the Officer in Charge of the Harbour Police Station on 24th May 2021. According to the said Report, on 23rd May 2021, the Deputy General Manager of the MEPA A.J. Mendis Gunasekera had made a complaint to the Harbour Police Station regarding the marine pollution that had commenced due to a chemical spill from MV X-Press Pearl, which had by that time been anchored 9 Nautical miles away from the Colombo Port. Reference had been made in that complaint to the incident involving the fire on board the vessel. The OIC had reported that his officers had commenced an investigation into the complaint, and that offences contained in sections 13, 26, 27,

34, 35, 37, 38 and 50 of the Marine Environmental Protection Act were disclosed as having been committed.

ii. In subsequent B Reports, the MC had been notified of a liquid emanating from the vessel that had been on fire by that time. The processes of court had been obtained from the learned Magistrate on the Government Analyst to examine samples of red colour sea water obtained by the police from the sea surrounding the vessel.

iii. By an undated Report (filed in the MC between 28th of May 2nd June 2021), the Officer in Charge (OIC) of the Marine Investigations Unit (MIU) of the Criminal Investigation Department (CID) had notified the learned Magistrate of the CID having taken over the investigation based on instructions received by the Inspector General of Police (IGP).

The OIC, MIU of the CID had also briefed the learned Magistrate of the conduct of investigations and recording of statements relating to the ongoing harm being caused to the marine environment, including to marine fauna and flora in ears surrounding the vessel.

The Court had been informed of the interview and the recording of the statement of the Master of the vessel Tyutkalo Vitaly that took place on 31st May 2021, and a summary of the contents of his statement had been included in the Report.

In the said Report, the OIC, MIU of the CID had reported to the learned Magistrates that investigations conducted up to that point of time had transpired that offences under sections 273, 261 and 277 of the Penal Code, sections 30A and 31B of the Fauna and Flora Protection Ordinance and section 26 of the Marine Pollution Protection Act have been committed with regard to this incident.

iv. By Report dated 10th July 2021, the OIC – MIU of the CID had briefed the learned Magistrate that, based on investigations conducted, it had transpired that officers of Sea Consortium Lanka (Pvt.) Ltd. and its capacity as the local Agent for MV X-Press Pearl and its officials Ajantha Lakmal Dissanayake (Director), L.M.R.A. Premaratne Basnayake (Deputy Manager), Kirilideniyage Nimal (Assistant Manager - Operations), Lishan Kuruppu (Junior Executive) and S.L. Fernando Sampathawaduge (Deputy Manager – Operations) had notwithstanding their possessing adequate information of the seriousness of the situation that was evolving within MV X-Press Pearl prior to its arrival into the territorial waters of Sri Lanka, by not taking necessary steps to prevent a disaster, had submitted a false document (ostensibly for the purpose of gaining entry into the Colombo Port) and thereby committed offences under sections 102, 113(b) and 400 of the Penal Code. Accordingly, the Attorney General had advised the Director of the CID to produce the afore-stated suspects before Court. Thus, they had been arrested and produced before the learned Magistrate.

v. On several occasions, the CID had sought and obtained orders of Court to facilitate the conduct of further investigations, including digital forensic examination of several digital devices.

vi. The Court had been regularly briefed on the outcome of criminal and forensic investigations conducted.

vii. In the course of the investigation, several key personnel of Sea Consortium Lanka (Pvt.) Ltd. had been arrested and produced before the learned Magistrate.

viii. On 29th May, 18th June, 17th July, 26th and 6th August 2024, the CID had tendered detailed Reports containing summaries of criminal and forensic investigations conducted, statements recorded and investigational findings. These Reports contain *inter alia* the following investigational findings:

i. That according to the first statement made to the CID by the Master of the vessel, on the 16th, 17th 18th and 19th of May 2021, he had by email notified the X-Press Pearl group of companies and others who were handling and associated with the management of the ship and the evolving situation, information relating to the leaking container containing Nitric acid and details of what was happening on board and in the vessel. Such emails had been copied by the Master to Sea Consortium Lanka (Pvt.) Ltd.

ii. The afore-stated emails the Master of the vessel had sent to the local Agent of the vessel Sea Consortium Lanka (Pvt.) Ltd. were not available in the bundle of emails handed over to the investigators by such company.

iii. Detailed digital examinations had been conducted relating to the email system of Sea Consortium Lanka (Pvt.) Ltd.

iv. Digital forensic examination of the email data system of x-pressfeeders.com.lk of Sea Consortium Lanka (Pvt.) Ltd. conducted by competent digital forensics experts of the University of Colombo's Computer Science Unit had shown that some of the emails contained in the said email's data system had been deleted.

Thus, the CID had reported to the learned Magistrate of the inference that Sea Consortium Lanka (Pvt.) Ltd. or those acting on behalf of the said company had deleted the earlier mentioned emails copied to the company by the Master of the vessel.

502. A consideration of the investigation reports submitted by the CID to the learned Magistrate does not reveal any attempt by the investigators aimed at suppressing the investigation, or conducting such investigation in a manner detrimental to the objectives of criminal justice. It also appeared to this Court that the CID had been appropriately advised by the Attorney General and his officers regarding the manner in which a complicated investigation in the nature of what had been conducted should be carried out. Court notes that none of the learned counsel who represented the Petitioners criticised the manner in which both criminal and forensic investigations had been carried out.

503. The Marine Pollution Prevention Act, No. 35 of 2008 makes no specific reference as to who may conduct investigations into the committing of offences contained in the Act. However, section 12(1) provides that any 'authorised officer' may arrest without a warrant in the area other than within the area of the exclusive economic zone, any person who commits an offence under the Act. Following arrest, the arrested person shall be produced before a Judge of the High Court having jurisdiction or before the High Court exercising admiralty jurisdiction. Thus, the inference being, that the conduct of investigations relating to the committing of offences contained in the MPP Act shall be conducted by an 'authorised officer'. Section 13(1) provides that every police officer or any of the following officers, namely a member of the armed forces, ship surveyors of the Merchant Shipping Division of the Ministry of Shipping and officers of the Sri Lanka Ports Authority having specialised knowledge in the prevention, control and mitigate reduction of pollution shall be an 'authorised officer'. Due to these reasons, it is understandable that officers of the CID conducted the investigation into this incident, founded upon a complaint lodged by the Deputy General Manager of the MEPA. In these circumstances, this Court appreciates the inability on the part of MEPA to have conducted a criminal and forensic investigation into the incident.

504. In view of the foregoing, **this Court arrives at <u>no</u> adverse findings against the Attorney General, the Marine Environment Protection Authority or against the Criminal Investigation Department pertaining to the investigations conducted into the marine environmental and coastal pollution disaster associated with the MV X-Press Pearl**. However, this Court notes the incomplete status of the investigations conducted by the CID, and that it is possible that several other offences may have been committed by both corporate entities as well as by individuals associated with the afore-stated incident. The Court notes the need to re-activate the investigation (which appears to be now stalled), and investigate into the possible committing of such offences as well.

Prosecution of offenders

505. Dr. Ravindranath Dabare appearing for the Centre for Environmental Justice (Guarantee) Limited, accused the Attorney General and the Executive at large for not having taken adequate action against those responsible for marine and coastal environmental pollution that was caused by this disaster, including the enforcement of necessary and adequate prosecutorial measures. He submitted that the polluter (referring to the MV X-Press group of companies including its local Agent) had in addition to committing the offences contained in sections 25 and 26 of the MPP Act, were responsible for having committed the following offences as well:

i. Unlawful emission of pollutants into the atmosphere – offence under section 23K of the National Environmental Act, No. 47 of 1980.
ii. Destruction and degradation of protected species and ecosystems – offences under sections 31A, 31B read with schedules 5, 6 and 7 of the Fauna and Flora Protection Ordinance, No. 2 of 1937.

506. As regards section 25 of the MPP Act, the allegation is that, while the Chairperson of the MEPA had issued several directives under the said section, the Master / Owner / Operators and the local Agent of MV X-Press Pearl had failed to comply with such directives, which constitutes

an offence under the said section. As regards these directions issued and the response of the vessel, there is an extensive examination elsewhere in this Judgment. In view of the circumstances in that part of the Judgment relating to the directives issued by the Chairperson of MEPA, as to whether the Master / Owner / Operators of the vessel could be held liable is a debatable matter and is highly questionable. In the circumstances, it is the view of this Court that the Attorney General cannot be faulted for not having instituted criminal proceedings and prosecuted the Master / Owner and the Operators of MV X-Press Pearl.

507. Section 26 of the MPP Act to the extent relevant to the MV X-Pearl incident, provides as follows:

> *"If any oil, harmful substance or other pollutant is discharged or escapes into the territorial waters of Sri Lanka … and the coastal zone of Sri Lanka from any ship … then, subject to the provisions of this Act, (a) where the discharge or escape is from a ship, the owner, operator, master or the agent of the ship … shall be guilty of an offence under this Act and shall be liable on conviction to a fine not less than rupees four million and not exceeding rupees fifteen million."*

During the hearing, it was agreed by counsel that section 26 of the MPP Act is a provision of law which enables Sri Lanka to give effect to the MARPOL standard which enables not only on the ship's owner but also the Operators, Master, and potentially others (like Agents) the imposition of criminal responsibility for marine pollution from a ship. Thus, it is clear that though section 26 contains the words "*… the owner, operator, master or the agent of the ship …*" all of them can be held criminally accountable for marine pollution caused. ASG Mr. Pulle also agreed with this proposition.

508. Following the conduct of criminal investigations, in November 2022 the Attorney General preferred an indictment to the High Court of Colombo against the Master of MV X-Press Pearl (Tyutkalo Vitaly), the local Agent of the vessel (Sea Consortium Lanka (Pvt.) Ltd.) and its Directors and

principal officer (Arjuna Indrajith Tissera Hettiarachchi, Devinda Indrajith Hettiarachchi, Milinda Indrajith Tissera Hettiarachchi, Aminda Indrajith Tissera Hettiarachchi, Panduka Weerasekera and Sanjeewa Kalpriya Samaranayake) accusing them of being criminally responsible for having committed the offence contained in section 26 paragraph (a) of the MPP Act. While the criminal responsibility of the Master and the Agent (company) arises directly out of section 26 paragraph (a), the criminal responsibility of directors and principal officers of the local Agent arises out of section 26 paragraph (a) read with section 58(a), which statutorily extends criminal responsibility of a company which commits an offence to its directors and principal officers. This case is presently pending in the High Court following the commencement of the trial.

509. During the hearing, following an examination of the Indictment, this Court inquired from the learned ASG as to why only the Master and the local Agent (and its Directors and principal officers) were indicted and why the Owner and Operator(s) of the vessel were not indicted in respect of their criminal responsibility arising out of section 26(a) of the MPP Act. At that point of time, the learned ASG did not have a prompt response to provide. The purported explanation of the Attorney General is contained in the post-hearing written submissions tendered. It appears from the said submissions, that while the learned Attorney General appears to be on the one hand harping on the 'prosecutorial discretion' that is inherently vested in him, the 'explanation' provided by him for having indicted only the Master, the local Agent and the latter's Directors and principal officers is that only they were available within the territory of Sri Lanka. He has argued that, in the circumstances, only they were indicted. Therefore, the position of the learned ASG is that the trial could proceed without steps being taken to have the presence of others at the trial either through mutual legal assistance or extradition. He has also hinted that the Owner and Operator may be indicted in the future.

510. This Court has examined the 'explanation' provided by the Attorney General for the non-prosecution of the Owner and the Operator(s) of MV X-Press Pearl. Court notes that, if the Attorney General was genuinely interested in indicting the Owner and the Operator(s) of the vessel, steps could have been taken since November 2022 (even after despatching the indictment), and if such steps were taken in an expedient manner and in good faith, a second indictment against such Owner and Operator(s) could have been preferred by now. Furthermore, while the Court agrees that extradition is a time consuming and challenging process, merely indicting a company incorporated overseas is not a time consuming, protracted or challenging process. What would be required is for the completion of the investigation and summons of Court to be served on such Owner and Operator(s) through the relevant procedure. This Court notes that the said procedure is not a challenging process, particularly given the ability to invoke the relevant provisions of the Mutual Assistance in Criminal Matter Act of Sri Lanka and the corresponding statute of Singapore. Thus, even if it was not practically possible for the Owner and the Operator(s) to have been indicted in November 2022 alongside the Master and the local Agent of the vessel, had the Attorney General been discharging his statutory functions in good faith and diligently, the second indictment could have been dispatched quite some time ago and that case would also be pending by now. The learned ASG in his post-hearing written submissions has made no reference at all to that procedure having been even commenced. Furthermore, this Court also notes that the raising of certain preliminary objections in the High Court by learned counsel for the accused in the case filed against the Master, the local Agent and its Directors and principal officers, in no way would have been an impediment towards the non-indictment of the Owner and the Operator(s) of MV X-Press Pearl.

511. This Court notes that, notwithstanding the accusations made against the Attorney General with regard to the manner in which he had purportedly exercised prosecutorial discretion, the learned ASG made no attempt to produce to Court (even under 'confidential' cover) the Reports

and minutes of the relevant Attorney General's Department files, reflecting the decision-making process with regard to the afore-stated impugned matters. In the circumstances, the Court remains doubtful as to whether the purported 'explanations' provided by the learned ASG were in fact the reasons for the Attorney General's decisions or mere afterthought to justify the impugned prosecutorial decisions or inactions.

512. In view of the foregoing, this Court hold that, the Attorney General has failed to perform his statutory function of indicting the Owner and the Operator(s) of MV X-Press Pearl, with regard to their criminal responsibility arising out of section 26 paragraph (a) of the Marine Pollution Prevention Act. Court notes that prosecution of any person responsible for having committed an offence should take place, if (a) in view of the investigational material collected in the course of a lawful investigation conducted by a law enforcement authority competent to conduct such investigation gives rise to a reasonable prospect of securing a conviction, and (b) if the prosecution of the alleged offender is in national and public interest. It is a fundamental statutory responsibility conferred on the Attorney General to (i) advice law enforcement authorities regarding the conduct of criminal investigations, (ii) following the conduct of such investigations to objectively consider the institution of criminal proceedings, and (iii) if a decision is taken in the affirmative, to institute criminal proceedings in a court of competent jurisdiction, and (iv) prosecute offenders. He cannot be selective, subjective or discriminatory in his advisory and prosecutorial decision-making process. A violation of such duty would amount to an abuse of prosecutorial discretion. A decision on the institution of criminal proceedings must be taken diligently, in good faith and objectively. Non-prosecution of those against whom a decision to prosecute should have been taken, offends the rule of law and violates the doctrine of equal protection of the law enshrined in Article 12(1) of the Constitution. The Attorney General must be mindful of the fact that he too being a custodian of power conferred by Acts of Parliament should exercise such powers mindful of the corresponding duties cast on him, and in the

faithful discharge of the Public Trust Doctrine. Due to these reasons, **this Court holds that the Attorney General had infringed the fundamental right guaranteed by Article 12(1) of the Constitution, of the Petitioners, those whom they represent, and through extension the People of Sri Lanka by not having diligently prosecuted the Owner and the Operator(s) of MV Express Pearl in respect of their criminal responsibility arising out of section and 26(a) of the Marine Pollution Prevention Act**.

Allegations of corruption against State officials

513. Representing the Intervenient Petitioners (Transparency International and Another) who were added as the 20th and 21st Respondents in SC/FR 168/2021 following the allowing of their Application for intervention, Mr. Senany Dayaratne submitted that his clients decided to intervene in these proceedings due to their having taken note of the serious allegations of bribery and corruption against certain public officials surrounding the action taken following the X-Press Pearl maritime disaster. Elaborating on that allegation, Mr. Dayaratne submitted that his clients were gravely concerned about the possibility of the failure on the part of the Government of Sri Lanka (GOSL) to obtain the optimum quantum of compensation due to Sri Lanka in respect of the damage caused to the environment by the X-Press Pearl disaster. He alleged that the unenthusiastic and imprudent action taken by public officials was *inter alia* due to acts of bribery and corruption on the part of Sri Lankan State officials. He submitted that the allegations were largely referrable to the (i) assessment of damages caused to Sri Lanka, (ii) quantification of the same in monetary form, (iii) understatement of the claim for compensation, (iv) involvement of public officials and State agencies to understate the quantum of compensation receivable and (v) the institution of civil proceedings in a foreign court to recover compensation for damages caused by the disaster. He emphasized that the main allegation related to the choosing of the Singapore International Commercial Court (SICC) as the forum in which Sri Lanka's claim in

respect of the compensation receivable for the damages caused by the disaster is to be adjudicated. He submitted that serious note should be taken regarding these allegations, particularly due to the fact that the then Minister of Justice Dr. Wijedasa Rajapashe, PC had made a statement in this regard in Parliament and had also lodged a complaint with the Criminal Investigation Department (CID) that a private individual had received USD 250 million to a bank account in connection with the X-Press Pearl disaster.

514. Mr. Dayaratne submitted that in May 2023, some Members of Parliament had debated this matter in Parliament, and had complained of the delay in the institution of legal proceedings, and had criticized the decision to select Singapore as the forum for the adjudication of the claim of the Government of Sri Lanka seeking compensation in respect of the harm caused by this maritime disaster. Learned counsel urged that these accusations be investigated independently and comprehensively, and the wrongdoers be identified and held accountable and culpable. Learned counsel supporting his allegation of bribery and corruption referred to the alleged *'lackadaisical attitude'* shown by the relevant authorities regarding the presentation of the claim for compensation. He submitted that it may be due to corruption.

515. Learned counsel also submitted that given the fact that the State had received a Notice of Action sent by the Petitioners of the case filed in the Admiralty Court of London, and since the Bank of Ceylon, some private banks and several companies in Sri Lanka having also received Notice relating to that case, the State as well as relevant officials of the Attorney General's Department cannot take up the position that they were unaware of such proceedings having been instituted in London. He submitted that the several speeches made by Parliamentarians (referred to below) shows the possibility that the institution of legal action for the claim for compensation was delayed due to extraneous reasons, ulterior motives and undisclosed interests of unknown persons.

516. Mr. Dayaratne presented to this Court excerpts of certain speeches made in Parliament by some Members of Parliament. Further excerpts of what was presented to this Court by Mr. Dayaratne appear below. They are re-produced in this Judgment for the purpose of highlighting the main observations, comments and concerns expressed by the relevant Members of Parliament, who include the present President of the Democratic Socialist Republic of Sri Lanka and the then and present Leader of the Opposition.

25th March 2023

i. Hon. Dr. Wijedasa Rajapakshe, PC, MP, Minister of Justice – As at that moment, the claim reflecting harm caused to the marine environment had been estimated by an expert team commissioned by the Marine Environment Pollution Authority (MEPA) at USD 6.4 Billion, and that Report (interim) had been presented to the Attorney General's Department. Certain claims had been presented by the Attorney General to the insurers of the X-Press Pearl vessel. [Indirectly the Minister has acknowledged that up to that point of time, legal action seeking compensation for damages had not been instituted.]

   The local lawyers (D.L. & F De Saram) representing the X-Press group of companies and their insurer had been summoned for a meeting of the Sectoral Oversight Committee of the Parliament. Officers of the Attorney General's Department and members of the expert panel (who computed the compensation due) were questioned on several important matters in the presence of those lawyers. That was highly inappropriate.

   Have received information that a sum of USD 250 million had been transferred to account No. 154793334 of one Chamara Gunasekara (Natwest Sort Code 50000 – IBAN:GB53NWBK50000015479234 – BIC – NWBKGB21). An investigation into this matter is being conducted by the Criminal Investigation Department.

ii. Leader of the Opposition Hon. Sajith Premadasa, MP – A team of experts had computed the total loss to the State and other affected parties as USD 6.4 Billion. Only USD 10 million has so far been received. The GOSL has so far not filed legal action to recover damages. Only a few days are left for the claim to become prescribed. Therefore, action must be expedited to claim damages.

iii. Hon. Chandima Weerakkody, MP – That action claiming compensation for damages that were caused should have been filed several years ago. The claim is about to be prescribed. The reasons for the delay must be investigated. Who is Chamara Gunasekera? On whose behalf did he accept money? Due to the acceptance of money, was there an intentional delay? The statements of all relevant persons including the former President should be recorded. Has proposed that a special committee of Parliament be established to inquire into the matter.

9th May 2023

iv. Hon. Dr. Wijedasa Rajapakshe, PC, MP – Following participation at a meeting held on 4th April 2023 of the sectoral oversight committee of Parliament that inquired into this matter, Hon. Ajith Mannapperuma (who chaired the sectoral oversight committee) sent a WhatsApp message on 6th April 2023, and informed that USD 250 million had been bribed to officials of the Attorney General's Department. He further said that this (the bribe) is supposed to have gone to the State Attorneys. The account holder is supposed to be a relative of the Attorney. Therefore, he required that the matter be inquired into. In the circumstances, on 7th April 2023, complained about this incident to the CID. There is information that the person named Chamara Gunasekera is also known as Manjusiri Nissanka. He is said to be a close associate of a former Minister.

v. Hon. Prof. Charitha Herath, MP – Had the case been filed in a Sri Lankan court, it would have been possible to secure the maximum amount of compensation. The action filed in Singapore is subject to the limitation of liability proceedings filed in a London court. [He has queried as to why a risk was taken by filing action in a foreign court.] Had the main case been filed in a Sri Lankan court and to arbitrate the claim had Singapore been chosen as a forum, it would have been understandable. There has been a delay in filing action with regard to the disaster associated with the X-Press Pearl. There is a need to appoint a Parliamentary Select Committee to inquire into this matter.

Have observed that MEPA had used the representatives of the insurance company of X-Press Pearl, as their own representatives. That is highly improper. The former Chairperson of MEPA should be summoned for discussions. The Legal Officer of MEPA Kariyawasam had not been even allowed to touch the files relating to this matter.

vi. Hon. S. Rasamanikkam, MP – That there is some doubt as to why the GOSL did not expeditiously take action to file a case by which a large sum of money could be secured. There is information that a company representing the shipping company of X-Press Pearl has set up an office inside the MEPA. How was such an office established?

vii. Hon. Udayana Kirindigoda, MP – Sri Lanka is not a party to the Convention of Liability for Maritime Claims. Why should a country that has not signed that Convention file action in a court of a country which is a party to that Convention? Why did the Attorney General's Department delay to enter into the case filed in London and file objections?

viii. Hon. Anura Kumara Dissanayake, MP – The Insurance company of X-Press Pearl has filed an action in London seeking a declaration that the maximum amount the insurer was obliged to pay is Singapore Dollars 12.5 million (USD 26 million). Notwithstanding the fact that the GOSL has been cited as a party to that action, and the lapse of over one and a half years since the filing of that action, why has not the GOSL filed papers in that case? The local law firm representing the party that has filed the action in London has notified the Australian law firm retained by the GOSL regarding the case. Why is it that nothing was done in that regard, till this matter was raised in Parliament?

ix. Hon. Ajith Mannaperuma, MP – Referring ostensibly to the limitation of liability proceedings in London, has alleged that the Attorney General's Department had not intervened in those proceedings in a timely manner.

x. Hon. Dayasiri Jayasekera, MP – The GOSL and the Attorney General's Department has waited till the limitation of liability proceedings proceeded *ex-parte* and a decision has been arrived at by that court. If successful, the Singapore based companies will have to pay only up to Sterling Pounds 19.5 million.

The Singapore company knew in advance that the main case would not be filed in Sri Lanka's courts. That is why they filed action in London seeking a declaration on the limitation of liability. Had they suspected that the main case would be filed in Sri Lanka (as is to be expected), then they would not have filed the case in London.

xi. Hon. Anura Priyadharshana Yapa, MP – During the proceedings before the Parliamentary Select Committee, noted the lackadaisical approach taken by the former Chairperson of MEPA. The MEPA

should not have delayed in consulting the Attorney General's Department for the purpose of claiming damages.

xii. Hon. Dr. Nalaka Godahewa, MP – If a bribe has been given, it would have been given for a purpose. That purpose being to get the Attorney General's Department not to interfere with the case filed in London. To-date, no step has been taken to intervene in the case filed in London. Another reason for the bribe is to get an action filed in Singapore, as opposed to filing the case in a court in Sri Lanka.

517. Mr. Dayaratne also submitted that the circumstances referred to by the several Parliamentarians reveal that grossly irregular practices had been followed by the 11th Respondent (ESO RO PTE Ltd.), 12th Respondent (X-Press Feeders) and the 13th Respondent (Sea Consortium Lanka (Pvt) Ltd.) as well as their Attorneys.

518. Concluding his submissions, Mr. Dayaratne submitted that particularly in view of the comments, observations, and queries made by the several Parliamentarians who raised this issue in Parliament (quoted above), there are reasonable grounds to believe that the (a) delay in Sri Lanka joining the limitation of liability proceedings in London, (b) delay in filing the main case seeking compensation for damages caused due to the X-Press Pearl disaster, (c) choosing the SICC for the main case seeking compensation, and (d) understatement of the claim for compensation contained in the case filed in the SICC, were decisions influenced by corruption.

Observations and conclusions

519. This Court notes that the allegations made by Transparency International against certain public officials are very serious. This Court has also given its anxious consideration to the allegations that have been made by certain Members of Parliament who have also raised this issue while delivering speeches in Parliament. They contain *inter alia* specific information pertaining to such allegations. In the circumstances, it is

necessary to probe such allegations. While the Applications were being heard, on 7th February 2025 this Court made an order on the Director-General of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) to conduct investigations into the allegations of Bribery and Corruption. By his letter dated 16th May 2025, the Director General of the CIABOC sought time to conduct the investigation. Following the completion of the hearing, on 16th July 2025 the Court issued another directive to the Director General of the CIABOC to forward an Interim Report on investigations conducted. By his letter dated 18th July 2025, the Director General reported back to the Court informing this Court of the outcome of the investigation that is being conducted. The Interim Report received reveals that the CIABOC has commenced an investigation into the incident relating to MV X-Press Pearl environmental disaster. The said Interim Report does not contain any information at all pertaining to the allegation of Bribery or Corruption. Therefore, it is imperative that the entire matter referred to in the several speeches of the Members of Parliament referred to above should be investigated into by the said Commission afresh. Such investigation on the one hand will result in determining whether there have been instances of bribery and or corruption associated with any other the matters referred to by Mr. Senany Dayaratne. If so, through further investigations, investigational material could be gathered with the view to identifying perpetrators of offences and prosecuting them. If on the other hand investigations do not reveal that there has been any bribery or corruption, such investigational findings will result in those against whom allegations presently lie being cleared of the accusations against them. What is unhealthy and inappropriate is for the allegations to remain in limbo.

Filing of civil proceedings in Singapore

520. As Mr. Nilshantha Sirimanne who represented the office of the Archbishop of Colombo and the holder of that office His Eminence Cardinal Malcolm Ranjith (the two Petitioners in SC/FR 277/2021) submitted that both the Chairperson of the 1st Respondent - Marine

Environment Protection Authority (MEPA) [at the time she was represented in these proceedings by the Attorney General (AG)] and the 3rd Respondent - Director General of Merchant Shipping (also represented by the AG) have taken up the position that the prosecution of these Fundamental rights Applications would result in adverse consequences arising in so far as (a) the pending criminal proceedings in Sri Lanka filed against the local Agents of the X-Press Pearl vessel, and (b) the action filed in the Singapore International Commercial Court (SICC) against the owner of the vessel and its Operators claiming compensation. In fact, this Court recalls the nature of some of the pre-hearing submissions made by learned counsel representing the Attorney General, wherein he even took offence at this Court for having granted *Leave to Proceed* in these matters which he claimed would jeopardize the interests of the Government of Sri Lanka in its desire to successfully prosecute the case filed in the SICC claiming compensation for damages caused by the MV X-Press Pearl. He sought to 'caution' this Court that we should bear in mind that prior to arriving at any finding against a Respondent who is a State party, that the proposed finding would have an impact on the proceedings before SICC and its outcome. It is necessary for this Court to observe that the Attorney General's Department showed visible reluctance to present to this Court a complete picture of what had happened and tender to Court all the relevant material. To say the least, the Affidavits and documentary material filed by the Attorney General on behalf of the Respondent State parties were extremely limited. In fact, even the substantial Affidavit filed by the Attorney General on behalf of the Harbour Master was only partly tailored to respond to the averments contained in the several Petitions, and the substantial position of the Harbour Master was contained only in his Affidavit filed in the limitation proceedings in London. That Affidavit was presented as an attachment to the Harbour Master's Affidavit filed in this Court. Learned ASG for the Attorney General insisted that some material called for by this Court and submitted by the Attorney General can only be presented to this Court under 'confidential' cover. Later this Court noted that such material was highly relevant to the matters to be adjudicated upon, and

thus, the Court granted access to such material to the learned counsel for the Petitioners and counsel for the Non-State party Respondents.

521. What was astonishing is how during the latter part of the proceedings, the same ASG was seen so visibly to be relying on these proceedings and the material called for and received by this Court (as opposed to material the originally presented through the Affidavits of the Respondent State parties) for the purpose of establishing his own case and gaining relief to the State from this Court. A good example in that regard would be the transcript of the recording contained in the Voice Data Recorder (VDR) recovered from the MV X-Press Pearl, which was produced in these proceedings at the last minute, and that too in response to an order made by this Court. Later, it was apparent that the ASG representing the Attorney General was relying heavily on the said transcript tendered to this Court for the purpose of establishing his case against the X-Press Pearl group of companies.

522. Mr. Nilshantha Sirimanne submitted without contest from the other counsel, that the Owner and Operators of the MV X-Press Pearl had instituted *'limitation of liability proceedings'* in the Admiralty High Court of London for the purpose of obtaining a decree from that court on the maximum amount of compensation that a court may order to claimants in respect of the X-Press Pearl incident, that being SDR 19.5 million. Such proceedings had been filed after these Fundamental rights Applications were filed in late 2021. Mr. Sirimanne submitted further that, the Government of Sri Lanka (GOSL) had been belated in filing intervention papers in the Admiralty High Court of London for the purpose of resisting that action. He pointed out that there is no assurance at this stage as to whether the GOSL would be successful in having that ceiling on the maximum amount of compensation that may be awarded being lifted.

523. It is common ground that in April 2023, the Government of Sri Lanka filed a civil action bearing No. SIC/CA/17/2023 in the Singapore International Commercial Court (SICC) claiming damages in respect of

the losses suffered by Sri Lanka arising out of the maritime disaster associated with the incident involving the X-press Pearl. Mr. Sirimanne recalled (accurately) that in March 2025 during the final phase of the hearing of these matters, the learned ASG in response to a query posed to him by this Court, disclosed the fact that the case filed in the SICC had been 'laid by' till the completion of the proceedings before the Admiralty High Court in London. Learned ASG conceded that no timeline could be given as to when those proceedings would be concluded. In all these circumstances, Mr. Sirimanne submitted that, as at this moment, there is no basis to conclude as to who would be successful in the action filed in the SICC. He said that even if the GOSL (being the claimant in the SICC) is successful, there is the possibility that the decreed amount may be limited to SDR 19.5 million. Furthermore, even if the GOSL is successful in the limitation of liability proceedings and the ceiling on the maximum amount that may be decreed by the SICC being lifted, there is no guarantee that the GOSL will be successful in securing judgment in a sum of USD 6,483,416,430.49 (the figure computed by the expert committee which assessed the full damage to the environment). He further submitted that, particularly in view of the multiple Appeals that may be possible in respect of the judgments of the Admiralty High Court of London and the Singapore International Commercial Court, the outcome of those proceedings is uncertain and no reliance can be placed on those proceedings. He submitted that the cases filed in the Admiralty High Court of London and the Singapore International Commercial Court still pending in those courts should in no way affect this Court from independently and conclusively deciding these Fundamental rights Applications and granting relief to the affected parties.

524. Mr. Senany Dayaratne who represented Transparency International and its Executive Director in SC/FR 168/2021 submitted that several Members of Parliament including the chair of the Sectoral Oversight Committee of Parliament that probed into this matter Hon. Ajith Mannapperuma, MP, had expressed views critical of the decision by the Attorney General to institute civil proceedings claiming compensation in

the SICC. However, Hon. Arundika Fernando, MP, had explained to Parliament that though in his personal opinion it was desirable that the case be filed in a court in Sri Lanka, the Attorney General had pointed out that, as in the case of the action filed with regard to the harm caused by "*MT New Diamond*", if this case is also filed in a Sri Lankan court, there was the possibility of the Singapore based companies of X-Press Pearl not responding to summons and not participating in the case filed. Mr. Dayaratne pointed out that this argument is negated by the fact that the 11th to 13th Respondents (ESO RO PTE. LTD., X-Press Feeders, and Sea Consortium Lanka (Pvt.) Ltd.) had been represented before the Supreme Court by local Attorneys and had filed proxy and were being represented by local counsel in SC/FR 168/2021 and other matters. Learned counsel also quoted from the speech made in Parliament by Hon. Ajith Mannaperuma, MP that the Government of Sri Lanka had obtained a sum of Singapore Dollars 4.5 million as a loan for the purpose of filing the action in the SICC. Quoting from the speech of Hon. Anura Kumara Dissanayake, MP, learned counsel pointed out that there exists an allegation that the acceptance of a bribe and the institution of civil action were inter-connected and that the decision to file action in Singapore was devoid of reasoning, as such course of action had been taken knowing well that Singapore is a Party to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC). He submitted that it would be inappropriate to presume in advance that the Singapore based companies would not participate in legal proceedings, if the action was filed in a Sri Lankan court. Mr. Dayaratne submitted that a further point which weighed against filing the action filed in Singapore was that the cost of litigation in Singapore was significantly higher than in Sri Lanka. Quoting from the "Report of the Sectoral Oversight Committee of Parliament on Environment, Natural Resources and Sustainable Development" regarding the X-Press Pearl disaster of July 2023, learned counsel submitted that the said Committee had expressed strong reservations regarding the choice of the forum (Singapore) to file the main action claiming damages. The Committee had also expressed concern regarding the delay in the filing of the action. Furthermore, up

to the time the Committee engaged in its deliberations, no 'letter of demand' had been forwarded to the London P&I Club (the insurer of the X-Press Pearl vessel). Meanwhile the three-member expert legal team appointed by MEPA (Chaired by Mr. Ronald Perera, PC) had expressed the view that action for damages should be filed in the Admiralty High Court of Colombo. Furthermore, in any event, the ultimate authority that would be obliged to pay compensation for the disaster would be the London based P&I Club, which had provided insurance coverage to the vessel. Therefore, there is no logic he submitted in having selected the Singapore based SICC. Mr. Dayaratne also quoted from the following excerpt of the Report of the Sectoral Oversight Committee.

> *"It is learnt that the Attorney-General has already selected a Singapore based law firm known as Sparke Helmore to represent the Government of Sri Lanka with an initial appearance fee of approximately USD 4.5 million, and has sought approval from MEPA to agree on a Litigation Funding Agency out of a list of 7 possible institutions named by the Singapore based law firm. There exists a clear doubt as to how the said law firm was selected by the Attorney-General, and further on what basis and based on whose approval he obtained the approval of MEPA to agree to a litigation funding agency without observing the National Procurement Guidelines. … If Sri Lanka is selected as the best / appropriate forum to litigate this matter, there would not incur a huge amount of legal fees as compared to the said law firm, as the matter would have been handled by the Attorney-General's Department itself. Further, no extra fares … such as airfares, internal travel costs, allowances, food and accommodation, other logistics costs, … for government officials as well as for the witnesses who are expected to be present before the court in Singapore for an un-pre-determined period."*

525. The essence of Mr. Dayaratne's submission was that the filing of action in the Singapore International Commercial Court was highly inappropriate, not in the best interests of Sri Lanka, and may have been founded upon corrupt motives or due to corruption.

526. Dr. Dan Malika Gunasekera who appeared for the 6th Respondent in SC/FR 277/2021 [the then Chairperson of the Marine Environment Protection Authority (MEPA)] – Dharshani Lahandapura, submitted that it was in December 2022 at a meeting presided over by the Minister of Justice and the State Minister for Coast Conservation, that the Attorney General informed MEPA that proceedings for the recovery of compensation will be instituted in a court in Singapore. The then Acting Minister of Justice had presented a Paper to the Cabinet of Ministers seeking approval for the payment of USD 4.5 million as the legal fees for that case. When MEPA received that Paper for its observations, MEPA raised objections to the proposed course of action. Dr. Gunasekera submitted that during the tenure of office of his client as the Chairperson of MEPA, the consistent position of the MEPA was that legal action should be instituted in a Sri Lankan court, which is the forum *conveniens*, and Singapore constituted a forum *inconveniens*. MEPA's view was that invoking the local jurisdiction was more appropriate due to proximity, evidence and national interests.

527. Responding to these submissions, learned ASG making a disclosure as regards the action filed in the SICC, submitted that, on 15th April 2023, the Government of Sri Lanka instituted an action for compensation in the General Division of the High Court of Singapore. The Originating Claim was filed on 25th April 2023 against (i) Sea Consortium Limited (trading as X-Press Feeders), (ii) X-Press Container Line (UK) Ltd., (iii) X-Press Container Liner (Singapore) PTE LTD, (iv) EOS RO PTE LTD, (v) Killiney Shipping PTE LTD, and (vi) Eastway Ship Management PTE LTD. On 29th January 2024, the Statement of Claim of the Originating Claim was thereafter filed by the GOSL in the Singapore International Commercial Court (SICC). The Statement of Claim had been filed without quantifying the damages claimed, and that the decision to follow this course of action was taken in view of the fact that the damage resulting from the incident is ongoing and therefore a final computation of damages was not possible. On 1st July 2024, the Defendants filed the Statement of Defence and their Counter Claim. The Counter-Reply of the GOSL was due on 5th

August 2024. On 24th July 2024, the GOSL sought an extension of time. On 9th September 2024, the GOSL filed its Reply and the Defence to the Counter Claim. In view of the limitation proceedings in London, on 15th November 2024, the parties agreed to have the case laid by (stayed) for the time being.

528. He also submitted that the Report of the three-member expert Committee that considered the matter was only an 'Interim Report', which was founded upon limited material available to it and prepared on an urgent basis. The Committee had not considered certain matters such as enforceability of the final decree of court and the parties to the case had agreed to the jurisdiction of the SICC. Learned ASG submitted that the decision to institute proceedings in Singapore was based on legal advice received, and founded upon the enforceability of a judgment rendered in Singapore as opposed to a judgment rendered in Sri Lanka. Furthermore, citing several provisions of the Marine Pollution Prevention Act (MPP Act) of Sri Lanka, Prevention of Pollution of the Sea Act of 1990 of Singapore and certain judicial precedent that, he submitted that based on the doctrine of double actionability, the SICC would have jurisdiction to adjudicate upon the claim of the Government of Sri Lanka relating to the X-Press Pearl disaster.

529. Learned ASG pointed out that, the three-member expert committee had not considered whether a judgment rendered by the High Court of Sri Lanka would be enforceable with respect to the recovery of damages, given the fact that the owner / operator of the vessel X-Press Pearl was based in Singapore, and therefore all the assets of the owner / operator are based in Singapore. During the hearing, learned ASG submitted that at the end of litigation in Sri Lanka, the Attorney General did not want to be left with a 'paper decree' which could not be enforced with regard to the two Singapore based companies. In the circumstances, he submitted that the SICC was chosen as the appropriate forum to ensure there was a realistic possibility of recovering compensation. Nevertheless, as a true officer of Court, learned ASG having considered the provisions of several

laws of Sri Lanka and Singapore conceded that, there is clear legal provision for the enforcement of Judgments of the High Court of Sri Lanka, Court of Appeal and the Supreme Court, rendered after 1st March 2023. However, he submitted that certain restrictions would apply with regard to the type of judgments that may be enforced. He submitted that, even if the GOSL received judgment in its favour from the Admiralty High Court of Colombo, still at the stage of enforcement, it would face the difficulty as Singapore is bound by the Convention on Limitation of Liability for Maritime Claims (LLMC).

530. Concluding his submissions in respect of this matter, learned ASG submitted that, the decision to institute action in Singapore was taken in view of the fact that the vessel was registered in Singapore and the polluters responsible for the vessel have their places of business and assets in Singapore, and accordingly such assets are accessible to obtain satisfaction of the claim in Singapore.

Analysis

531. This Court notes that, particularly due to the controversy surrounding the intention (at that time) of the Attorney General to institute civil legal action in the Singapore International Commercial Court (SICC) instead of filing action before a competent court in Sri Lanka (which intention the Attorney General had given effect to notwithstanding the opposition to it from multiple sources), the MEPA had constituted an expert panel comprising of three eminent legal experts, namely Mr. Ronald Perera, PC, Mr. Chandaka Jayasundere, PC and Dr. Dan Malika Gunasekara, AAL, to study the matter and submit a Report expressing the opinion of such experts. Sequel to a direction issued by this Court on 8th November 2024, the Attorney-General by Motion dated 20th November 2024 submitted to this Court a copy of the Report of the expert panel, which Report has been titled *'Report of the Committee appointed by the Marine Environment Protection Authority to advise on the institution of action in relation to the Claims arising out of the Damage incurred by the State of Sri*

Lanka due to the fire on board and the resultant sinking of the M.V. X-Press Pearl and the legal aspects relating thereto' and is dated 27th March 2023.

532. It is important to observe that learned counsel representing the Attorney General (ASG Nerin Pulle, PC) did not impugn the expertise of these eminent gentlemen or complain of any lack of objectivity in their approach. In other words, the State did not impugn the expertise or the *bona fides* of these three eminent experts. He also did not criticize the findings contained in the report. The only reservation Mr. Pulle had was that the Report of the experts was an 'interim' report. However, the Court notes that the contents of the Report are so evidently definite and firm, and that, should members of the committee been given more time for further consideration, the outcome would have been even more detailed, strengthened and supplemented with supporting material, and examples. That the report was an 'interim' report, in our view does not make the findings contained therein provisional. It is clear from the Report that the three legal experts had no doubt regarding their findings and were confident that their opinion was correct and was indeed in the best interests of Sri Lanka.

533. As regards the selection of the judicial forum in which litigation should take place and the legal basis for the claim, the principal observations, findings and opinion contained in the Report of the three legal experts, can be summarised in the following manner:

(a) Although the Marine Pollution Prevention Act (MPP Act) does not provide for the institution of legal action seeking compensation in any particular court in Sri Lanka, the Admiralty Jurisdiction Act provides for jurisdiction being vested in the High Court of the Republic of Sri Lanka to hear and determine any claim in respect of liability incurred under the MPP Act as well as to hear and determine any question or claim in respect of any claim for damages caused by a ship.

(b) The provisions of the Admiralty Jurisdiction Act [section 2(1)(e)] read with the MPP Act [sections 34 and 35] can be availed of to

present an action *in personam* in the High Court of Sri Lanka to claim compensation from all parties connected with the incident.

(c) Other than the fact that the X-Press Pearl vessel's Owner and Operators are situated in Singapore, there are no grounds on which a claim under the MPP Act can be sustained within the jurisdiction of Singapore. This is mainly because the claim is not commercial, but a statutory claim arising under and in terms of the provisions of the MPP Act.

(d) The jurisdiction of the SICC is limited to hear and try an action, if the claim in the action is of an international and commercial nature, the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement, and the parties to the action do not seek any relief in the form of or connected with a prerogative order.

(e) As Sri Lanka's marine environment has not suffered due to oil pollution (as a result of the X-Press Pearl marine disaster), the limitation of civil liability set out in the Civil Liability Convention (which is tied to section 35 of the MPP Act) shall not apply.

(f) In all the circumstances of the marine disaster resulting from the X-Press Pearl fire and the ensuing sinking of the vessel, the Committee recommends that a claim under section 34 of the MPP Act together with applicable international (treaty based) law be instituted against all parties responsible including the Owner, Operators, and the London P&I Club in the High Court of the Republic of Sri Lanka (exercising Admiralty jurisdiction) as an action *in personam*. In such circumstances, compensation can be claimed by the State under and in terms of the MPP Act of Sri Lanka, even for violations under the provisions of the applicable international law regime [specifically the provisions of the International Convention for the Prevention of Pollution from Ships (MARPOL) – Annexures II and III].

534. The learned ASG did not complain of any inadequacy in either the substantive or procedural laws of Sri Lanka to successfully prosecute a civil claim against the X-Press Pearl group, seeking compensation for the maritime pollution caused and associated harm and losses. Furthermore,

should the action have been filed in the High Court of the Republic of Sri Lanka (exercising Admiralty jurisdiction, holden in Colombo), the learned ASG did not submit that there would be any limitation that would apply as regards the quantum of compensation that could be obtained. On the other hand, learned ASG did not make any submission with regard to the distinct possibility of a ceiling of SDR 19.5 million (far less than the amount the GOSL is required to claim) that would be imposed on the SICC, should the London P&I Club be successful in their application filed in the London Admiralty Court. Given the fact that both the United Kingdom and Singapore were parties to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) and the 1996 Protocol thereto, the action being filed in the SICC is likely to result in a ceiling on the maximum of compensation receivable to SDR 19.5 million. Mr. Pulle made no reference in his submissions as to how he intended to get over that limitation becoming applicable to the SICC.

535. Mr. Pulle provided no explanation regarding the GOSL / Attorney General's Department (on behalf of the Government of Sri Lanka) having waited till the last few days prior to the claim becoming prescribed, to institute civil action in the SICC. Particularly given the fact that the initial Claim filed in the Singapore Court not having contained the exact amount of money being claimed as compensation, this Court fails to understand why the Attorney General waited till the last moment and till queries were raised in Parliament to file action in the Singapore Court, if in fact it was genuinely based on pre-determined grounds of expediency.

536. Furthermore, learned ASG made no submissions in respect of the obvious strategic and practical advantages the GOSL would have by filing action in Sri Lanka and how the citing of the local Agent (Sea Consortium (Lanka) Ltd) as a Defendant in an action filed in the Admiralty High Court of Colombo is likely to give rise to a significant advantage. In such an event, this Court notes that should the GOSL become successful in establishing its claim in the Admiralty High Court

of Colombo, the Plaintiff (GOSL) would have at least one Defendant in Sri Lanka against whom the decree could be enforced.

537. Mr. Pulle's main argument in favour of the Attorney General's decision to institute criminal proceedings in the SICC was based on the possibility that should action have been filed in a Sri Lankan court, and the GOSL won the case, the Plaintiff (GOSL) would be left with only a 'piece of paper' (a reference to the decree / writ of execution) which could not be enforced against the owner and the Operators of X-Press Pearl, since they did not have any assets in Sri Lanka. What Mr. Pulle appears to have overlooked is the fact that, both the owner of X-Press Pearl and its Operators do have their assets (in the form of vessels) regularly calling over at the Port of Colombo, and the decree issued by the High Court of the Republic of Sri Lanka exercising admiralty jurisdiction can be enforced against such an asset. Furthermore, had the local Agent of X-Press Pearl been cited as a culpable defendant (on the footing of such Agent's actions and omissions also having contributed to the pollution), then, there was an additional reason for the Owner and the Operators of X-Press Pearl to satisfy the decree issued by a Sri Lankan court in favour of the GOSL.

538. Notwithstanding the afore-stated reasons including the opinion expressed by the three-member legal experts, Mr. Pulle was not willing to appreciate the strategic value and wisdom in instituting legal proceedings in Sri Lanka against the Owner, Operators, local Agent and the insurers of X-Press Pearl.

Conclusion

539. This Court appreciates the complexities of the decision the Attorney General was called upon to take with regard to the institution of civil legal action against the X-Press Pearl group of companies, which according to the State was responsible for the devastating pollution caused to the marine environment. Court notes that the learned ASG adduced only one factor in favour of the decision by the Attorney

General to file action in a Singapore court. That being, should action have been filed in a Sri Lankan court and should such Court award the decree in favour of the Plaintiff (Attorney General on behalf of the Government of Sri Lanka) challenges the State may encounter in enforcing the final decree against Singapore based companies. The rhetorical utterance of the learned ASG to describe this situation was *"we did not want to be left with a mere paper decree"*. On the other hand, this Court has noted the following overwhelming factors in favour of the proposition advanced by learned counsel for the several Petitioners and the Added Respondents, that civil action claiming compensation for damages suffered should have been filed in a competent Court in Sri Lanka:

i. That the three-member panel comprising of three eminent legal experts (whose expertise with regard to the matters in respect of which their opinion was sought, the objectivity with which they considered those matters and examined the law – both international and domestic, the independence they have displayed from the Marine Environment Protection Authority which sought their opinion, and their individual and composite integrity not having been impugned by the Attorney General) had expressed the view that legal action should be filed in the High Court of the Republic of Sri Lanka exercising Admiralty jurisdiction.

ii. That Sri Lankan lawyers (including officers of the Attorney General's Department) would be able to comprehend the applicable law, procedure and practices that would be applied by the High Court of Sri Lanka exercising Admiralty jurisdiction, as opposed to the law, procedure and practices applicable to the Singapore International Commercial Court which would be completely alien to Sri Lankan lawyers, thus being compelled to act on legal advice of foreign lawyers.

iii. The Parliamentary Sectoral Oversight Committee (a multi-party Committee of Parliament constituted to reflect and represent the composition of Parliament by the several political parties, and to adopt a bipartisan approach to its work) in its Report titled *"Environment, Natural Resources and Sustainable Development on the 'X-*

Press Pearl' Disaster and obtaining of Compensation" supports the position advanced by the committee of three legal experts and has recommended that legal proceedings be instituted in a competent court in Sri Lanka and has cited reasons in detail, as to why filing of legal action in Singapore is ill-advised.

iv. That the cost of litigation that would have to be expended by the Government of Sri Lanka as a result of the action being filed in the Singapore International Commercial Court being extremely high, adding to a further financial burden on the State, as opposed to the nominal costs associated with litigation in Sri Lanka handled by officers of the Attorney General's Department.

v. That there would be no limitation (ceiling) on the maximum amount that could be awarded as by a Sri Lankan court as compensation (since Sri Lanka is not a Party to the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol) as opposed to the SDR 19,500 million, which is likely to be the ceiling on the maximum amount which would apply to the Singapore International Commercial Court.

vi. That, if a decree is issued in favour of the Government of Sri Lanka by a Sri Lankan court, assets of the Singapore based X-Press Pearl group of companies will be regularly available in Sri Lanka (other vessels of the X-Press Pearl group of companies regularly calling over at the Colombo Port), which can be used for the satisfaction of the final decree.

vii. That it was possible that the X-Press group of companies being regular, well-known and experienced ship Owners, Operators and Agents of vessels, and their insurer London P&I Club are likely to participate in civil legal proceedings filed in Sri Lanka and are equally likely to respect the final decree issued by a Sri Lankan Court and comply with the decree / writ of execution.

viii. The possibility of seeking the enforcement of the final judgment / decree issued by the Sri Lankan court in Singapore on the X-Press Pearl group of companies under the provisions of the Reciprocal Enforcement of Foreign Judgments Act (1959) of Singapore, on the

basis of a guarantee of reciprocity that could have been extended to the Government of Singapore on behalf of the Government of Sri Lanka (pending the enactment of the Reciprocal Recognition, Registration and Enforcement of Foreign Judgments Act, No. 49 of 2024).

540. In view of the foregoing reasons, this Court is unable to agree with the decision of the Attorney General to institute civil legal action in the Singapore International Commercial Court. Given the two options, the view of this Court is that the interests of Sri Lanka could have been better served had legal proceedings been instituted in the High Court of the Republic of Sri Lanka exercising admiralty jurisdiction.

541. It is necessary to also point out that, given the accusations against the Attorney General regarding his decision to institute civil legal action in the Singapore International Commercial Court, it would have been in the best interests of the Attorney General to have presented to this Court documentary evidence regarding the internal decision-making procedure which culminated in the Attorney General having decided not to file action in a Sri Lankan court, and instead file action in the Singapore International Commercial Court. For best reasons known to the Attorney General, the learned ASG made no attempt to present such evidence to this Court. His response to the accusations was founded only upon the submissions he made to the Supreme Court, as opposed to making submissions based on contemporary records reflecting the internal decision-making process at the Attorney General's Department. Mr. Pulle ensured that the internal decision-making process of the Attorney General and his officers was completely opaque in the eyes of the Supreme Court.

542. However, due to the paucity of circumstantial evidence referred to by the Added Respondent (Transparency International) and by some of the Petitioners, this Court is unable to agree with the accusation made on behalf of certain Petitioners that the impugned decision of the Attorney

General to file action in the SICC was occasioned due to corruption or any other improper motive. On the other hand, due to the reasons cited above, this Court cannot conclude that the decision of the Attorney General was necessarily arrived at in good faith, with due diligence and on an objective consideration of all relevant facts. It was certainly not a rational decision, and the impugned decision was brimming with irrationality and arbitrariness.

543. In the circumstances, **this Court holds that the decision taken by the Attorney General to institute civil legal action against the X-Press Pearl group of companies in a Singapore court, as opposed to instituting action in the High Court of the Republic of Sri Lanka exercising Admiralty jurisdiction, was an infringement of the Fundamental rights of the Petitioners and the others whom the Petitioners represent guaranteed under Article 12(1) of the Constitution**.

544. The actual motivations based upon which the Attorney General arrived at the impugned decision to institute civil legal action in the Singapore International Commercial Court can be determined only upon a comprehensive and impartial investigation that could be conducted by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC).

Agreement entered into by the Attorney General in Singapore

545. During the course of the consolidated hearing, President's counsel Dr. Romesh De Silva, who represented all the Non-State parties (group of companies relating to the Express Pearl vessel) brought to the attention of this Court that the Attorney General acting through his Attorneys in Singapore had entered into an agreement with the Defendants in the case filed in Singapore had entered into an agreement entitled "Limitation of Jurisdiction Agreement". The essence of such Agreement (which was shown to this Court by Dr. De Silva, PC) while conferring exclusive jurisdiction to the Singapore court to determine all claims relating to the X-Press Pearl environmental disaster sought to agree between the parties

that the entirety of the claims relating to the harm caused by pollution and related losses will be determined exclusively in that case filed in Singapore and is to be heard and be determined by the Singapore International Commercial Court.

546. It remains not too clear to this Court as to why Dr. De Silva produced this agreement and what he sought to achieve on behalf of his clients by its production. Be that as it may, the existence of this agreement (which was not previously disclosed to this Court by the Attorney General) gave rise to considerable controversy and the learned counsel for the Petitioners criticised the Attorney General for having entered into such an agreement.

547. Dr. Dabare who appeared for the Petitioners in SC/FR 168/2021 (Centre for Environmental Justice (Guarantee) Ltd. and Others) submitted that this agreement by which exclusive jurisdiction had been vested and conceded in the Singapore International Commercial Court (SICC) constitutes a grave abdication of the Sri Lankan State's sovereign right to adjudicate the environmental damage that occurred within its own territorial waters. He further submitted that this agreement wholly favoured the defendants of the action filed in Singapore (some of whom are the Non-State parties in these Fundamental rights Applications) and severely restricts Sri Lanka's capacity to assert its sovereign legal rights. He also submitted that what was alarming was that the impugned agreement expressly preserves and safeguards the full range of defences, counterclaims, rights of limitation of liability, and set-offs in favour of the defendants, while offering no reciprocal protections to the Claimant party (being the Government of Sri Lanka). Dr. Dabare argued that the clauses barred the Republic of Sri Lanka from seeking redress in any forum other than the SICC, the defendants retained the latitude to pursue or rely upon claims or proceedings commenced elsewhere, thereby granting them a strategic advantage of forum control, which he said was inconsistent with principles of fairness and equality. He concluded by submitting that this agreement was fundamentally prejudicial to the

interests of the Republic of Sri Lanka and its citizens. He submitted that by conceding jurisdiction to the SICC, the Attorney General had waived sovereign legal authority to adjudicate a disaster which had occurred within the maritime territory of Sri Lanka, conceded to the imposition of a possible cap on compensation and defences of limitation, and agreed to clauses that were highly favourable to foreign parties and thereby inimical to the interests of the citizens of this country.

548. Dr. Dabare submitted that by entering into this agreement, the Attorney General had abdicated the sovereign rights of Sri Lanka and the Sri Lankan citizenry to enforce domestic environmental laws and to prosecute in respect of environmental harm that had been caused. The agreement he submitted had insulated the Defendants from domestic accountability, introduced procedural impediments to pursue justice and significantly weakened the State's legal standing. He submitted that the conduct of the Government of Sri Lanka acting through the Attorney General amounted to the betrayal of the legitimate expectations of the citizenry of this country and in particular those who suffered harm by the environmental disaster. Therefore, he submitted that the conduct of the Attorney General was an egregious breach of the Public Trust Doctrine and therefore an infringement of Article 12(1) of the Constitution.

549. Dr. Dabare urged this Court to hold that this agreement was *ab initio* void, and would have no consequential impact on the legitimate interests of the Government of Sri Lanka and other Sri Lankan parties. He submitted that the Court should conclude that the conduct of the Attorney General was *ultra vires* his powers and therefore unlawful. He also submitted that in any event, the Fundamental rights jurisdiction of the Supreme Court cannot be ousted by a purported agreement entered in by the Attorney General with certain Non-State parties.

550. Responding to these accusations, learned ASG Mr. Pulle submitted that this agreement was entered into for the purpose of facilitating the

progression of the case filed in the Singapore court and is to be heard in due course by the Singapore International Commercial Court. He submitted that it was a necessity.

551. Towards the end of the debate relating to that agreement, Dr. Romesh De Silva, PC submitted that he concedes that the entering into of that agreement in no way affects the Supreme Court of Sri Lanka continuing to hear these Applications and deciding upon them.

Analysis and conclusions of Court

552. This Court expresses regret at the approach adopted by the Attorney General with regard to the entering into and the existence of the afore-stated agreement. He chose to suppress that matter altogether from this Court, which is a matter the Attorney General should have disclosed. Had Dr. Romesh De Silva, PC not having disclosed its existence, this Court as well as the several counsel for the Petitioners would have been completely unaware of its existence.

553. Be that as it may, this Court does not have necessary awareness and understanding as to the need for the Attorney General to have entered into such an agreement and also determine its propriety and desirability in so far as the successful progression of the case filed in Singapore by the Attorney General and is to be heard by the Singapore International Commercial Court is concerned. Thus, this Court refrains from commenting and concluding upon it.

554. However, it is necessary to express the view that, by the entering into of such an agreement, it is not possible for the Attorney General to bind over the citizenry of this country. He may, if he is so instructed and advised, decide to bind over the Executive arm of the State of the Democratic Socialist Republic of Sri Lanka. He (the Attorney General) cannot decide and enter into agreements with any party within or outside Sri Lanka, representing or on behalf of the citizenry of this country. Furthermore, by entering into an agreement of that nature, the Attorney

General is not entitled to restrict or cause any adverse impact on any person in Sri Lanka exercising his Constitutional right to seek relief from the Supreme Court in respect of the infringement or imminent infringement of a fundamental right through executive or administrative action. Furthermore, this Court determines that the afore-stated agreement in no way affects this Court from exercising its Constitutionally vested jurisdiction conferred on it by Article 126 read with 17 of the Constitution. Thus, this Court concludes that the existence of the afore-stated agreement has no impact on the judicial adjudication of these Applications.

Jurisdiction of the Supreme Court in Fundamental rights Applications

555. During the hearing of these Applications, a key issue that arose for consideration relates to the jurisdiction of the Supreme Court under Article 126 read with Article 17 of the Constitution. Both Mr. Manohara De Silva, PC who appeared for the 2nd Respondent in SC/FR 184/2021 [the then Chairperson of the Marine Environment Protection Authority (MEPA) Dharshani Lahandapura] and Additional Solicitor General Mr. Nerin Pulle, PC who appeared for all State parties excluding the afore-stated Respondent, submitted that, in terms of the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution, in the exercise of its just and equitable jurisdiction, the Court was empowered to issue declarations, sanctions and directions against the Non-State party Respondents (in these Applications, such Respondents being the X-Press Pearl group of companies), and require them to provide compensation (in these Applications, for pollution caused by the fire on-board and the subsequent sinking of the MV X-Press Pearl vessel and for other losses suffered by several segments of the community including the fishermen). Both learned counsel submitted that such directives can be made instead of, without, or independent of holding that any of the State parties had by their executive or administrative action infringed the Fundamental rights of the Petitioners and others whom the Petitioners represent. Mr. Manohara De Silva, PC citing the situation contemplated in Article 12(3) of the Constitution (which captured a situation where even the

proprietors of shops, public restaurants, hotels, places of public entertainment and places of public worship can be held to have discriminated on the basis of race, religion, language, caste, or sex, and thereby infringed the Fundamental rights contained in Article 12(3) of the Constitution) submitted that, the Supreme Court can determine whether a private actor had infringed a Fundamental right.

556. Mr. Pulle submitted that, the right conferred on any person by Article 17 of the Constitution was limited to applying to the Supreme Court in respect of the infringement or imminent infringement of a Fundamental right to which such person was entitled to under Chapter III of the Constitution due to executive or administrative action. Similarly, they submitted that the jurisdiction of the Supreme Court conferred on it by Article 126 of the Constitution was solely and exclusively exercisable by the Supreme Court.

557. It must be noted that, none of the Petitioners sought any declaration from this Court that any of the Non-State party Respondents had infringed their Fundamental rights. At the core of the reliefs sought by the Petitioners were (a) declarations that the Respondents who were State actors had infringed Fundamental rights, (b) sanctions to be imposed on such State actors, and (c) sanctions and directives to be issued on the Non-State Respondents to provide reparation for harm and losses caused.

558. The position advanced by Mr. Manohara De Silva, PC was that, his client had been made a Respondent by the Petitioners on the mistaken belief by them that under the Fundamental rights jurisdiction of the Supreme Court, unless fault can be attributed to the State or any organ of the State, it would not be possible to obtain relief from non-State actors. He submitted further that the case of the Petitioners was that there was a violation of their Fundamental rights due to inaction by the State and its Agents, such as the MEPA. He also submitted that the issue to be determined by this Court was whether there was inaction by the State

agencies and the relevant Officials such as his client. He further submitted that based on the evidence presented by his client and his submissions, should this Court hold that there was no action or inaction by his client that can be identified as being 'arbitrary', then there cannot be any declaration that a Fundamental right had been infringed. However, notwithstanding the Court holding that there was no fault on the part of the State or by any agency of the State and thus no infringement of Fundamental rights, still relief can be granted against the perpetrator for a wrong which may result in a violation of a Fundamental right. Learned President's Counsel submitted that Article 126(4) is a *sui generis* provision, and the said Article can be made use of to grant relief against a private party. He emphasised that Article 126(4) empowers the Supreme Court to grant relief or make such directions as it may deem just and equitable in certain circumstances where wrongful action which constitutes an infringement of a Fundamental right has taken place by even a Non-State party. What he said is based on the principle that, if there is a right, there should be a remedy. Learned President's Counsel concluded his submissions by stating that the Supreme Court is vested with jurisdiction to award relief as it deems fit to the victims, while holding the guilty parties liable for their wrongdoing. To do so, he submitted that it would not be necessary to 'blame' the State or State agencies.

559. The submission of the learned ASG was that (i) the Owner of MV X-Press Pearl [EOS RO Pte. Ltd. (Singapore)], (ii) the Operators of the vessel [Sea Consortium (Singapore) also known as X-Press Feeders (Singapore) and Killiney Shipping (Singapore) being the bareboat charterer cum operator] and (iii) the Agent of the vessel [Sea Consortium (Sri Lanka) also known as Sea Consortium (Singapore) being the time charterer of the vessel] who presented their positions to the Supreme Court through the Managing Director of the Sea Consortium (Sri Lanka) Ltd, filed a common statement of objections and caused themselves to be represented in the Supreme Court by one Counsel (Dr. Romesh De Silva,

PC) were all jointly liable for the violation of the Fundamental rights of the People of Sri Lanka (including the Petitioners).

560. Mr. Pulle submitted that based on the evidence before this Court, it is clearly evident that the Owner, Operator and the Agent of X-Press Pearl through their rash, negligent and deceitful conduct had violated the Fundamental rights of the people of Sri Lanka by causing environmental pollution. He submitted that it is well within the jurisdiction of this Court to determine who the polluter is and to impose appropriate sanctions on such parties. He further submitted that holding private parties liable for violation of Fundamental rights, even in the absence of State liability is in line with the obligations placed upon this Court by Article 3 read with Article 4(d) of the Constitution.

561. Mr. Pulle while appreciating the limitation of the jurisdiction vested in the Supreme Court regarding the matters pertaining to alleged infringement of Fundamental rights, submitted that the requirement of establishing that such infringement was due to an executive or administrative action was a limited 'threshold requirement' to be established at the 'leave to proceed stage'. He further submitted that, though the Petitioners are required to at the outset establish on a *prima facie* footing that there has been an infringement or imminent infringement of a Fundamental right due to executive or administrative action, the sanctions and directives which the Supreme Court may impose on Non-State actor Respondents need not be conditioned upon a finding that there has in fact been an infringement or imminent infringement of Fundamental rights due to an executive or administrative action.

562. The position advanced by Dr. Romesh De Silva, PC who appeared for the Owner, Operator and Agent of X-Press Pearl, was that, though as a principle infringement of Fundamental rights guaranteed by the Constitution by private parties (Non-State actors) is justiciable by certain Courts (in particular the District Court) according to Article 17 and 126,

the jurisdiction of the Supreme Court is limited to the determination of infringements and imminent infringements resulting from executive and administrative action.

Analysis and conclusions

563. The essence of the submission made on behalf of the Attorney General is that, when an Application (by Petition) alleging an infringement or imminent infringement of a Fundamental right is preferred to the Supreme Court, the Court should initially consider whether the Petitioner has on a *prima facie* basis established that there has been either an infringement or imminent infringement of such Fundamental right occasioned due to executive or administrative action. Should the Court conclude in the affirmative, the Application should be proceeded with. If not, generally, the Application will stand dismissed. Following the grant of leave to proceed, the pleadings are tendered in the manner provided for in the applicable Rules of the Supreme Court, the Application is taken up for hearing. Following the hearing, the Court should consider and arrive at a finding on whether the allegation of infringement or imminent infringement of a Fundamental right has been established by the Petitioner on a balance of probability, and if so, whether such infringement or imminent infringement can be causatively attributed to executive or administrative action. None of the other counsel including Dr. Romesh De Silva, PC disagreed with this general approach of the Court. It was submitted by Mr. Pulle that should the Court agree with the allegation of the Petitioner that a Fundamental right has been infringed due to executive or administrative action, the Court shall arrive at findings against the State and grant relief to the Petitioner. Till this point, the views of this Court are not at variance with the submissions of ASG Pulle.

564. ASG Pulle submitted further, that the Supreme Court can also arrive at findings against Non-State actors (private parties) for having infringed Fundamental rights and such findings can be <u>in addition to or instead of</u> findings being reached against State actors responsible for the impugned

executive or administrative action. This is the submission which requires careful consideration by the Court. However, the need to consider the submission made by Mr. Pulle in this regard pertaining to arriving at findings against non-State actors 'instead of' arriving at findings against State actors would not be necessary in the circumstances of the findings contained in this Judgment. That is due to the reason that this Court has (as held elsewhere in this Judgment) reached certain findings that a Respondent who is a State-party has infringed the Fundamental rights of the Petitioners and those whom the Petitioners represent.

565. Therefore, the matters that require consideration and conclusion by this Court are as follows:

(a) Under what circumstances could the Supreme Court arrive at findings against non-State actors in addition to reaching findings against State actors responsible for the impugned executive or administrative action?

(b) *For the Supreme Court to arrive at findings against non-State actor Respondents, what should have been the relationship (causative or otherwise) between the impugned conduct of the non-State actor Respondents and the executive or administrative action found to have constituted an infringement or imminent infringement of a Fundamental right?*

566. As to (a) whether the Supreme Court has the jurisdiction to arrive at a finding that a Non-State actor has infringed a Fundamental right, or (b) while exonerating State actor Respondents in respect of the accusations against them, whether the Supreme Court can arrive at findings against Non-State actor Respondents and impose sanctions on them, is a matter that should be determined by this Court on a future occasion. That should be when the circumstances of the case, including the findings reached by this Court, gives rise to the need to answer those two important questions of law. For the moment, those two questions are purely academic, and thus, it would be unnecessary to answer them. However, to a discerning reader of this Judgment, the view of this Court

regarding those two issues can also be gleaned from the following paragraphs.

567. Be that as it may, a useful starting point in the analysis of the two questions that need to be answered by this Court, would be to examine the applicable provisions of the Constitution and appreciate their significance.

568. It is a trite Constitutional Fundamental relating to this country, that, as provided in Article 3 of the Constitution, **the sovereignty is in the People and is inalienable**. Such sovereignty includes the **power of government** (which is to be understood as meaning the composite of the powers of all three organs of the State), **Fundamental rights** and **franchise**. Article 4(c) prescribes that the **judicial component of the sovereignty of the People shall be exercised by Parliament through *inter alia* courts created and established or recognized by the Constitution or created and established by law**. The only two matters in respect of which the Parliament may exercise judicial power is referred to in Article 4(c) itself. Save those two limited situations, the Parliament shall not exercise any judicial power, nor shall Parliament superintend or interfere with the exercise of judicial power by Courts. However, it is well accepted that the Parliament may regulate the exercise of judicial power by Courts through substantive and procedural laws it may choose to enact.

569. Article 4(d) of the Constitution provides that **Fundamental rights** which are by the Constitution declared and recognized **shall be respected, secured and advanced by all the organs of the government** (the term 'government' in this instance is used as a synonym for the term 'State'), and **shall not be abridged, restricted or denied, save as in the manner and to the extent provided in the Constitution itself**. Article 118 which prescribes the 'general jurisdiction' of the Supreme Court stipulates that the Supreme Court shall be the highest and final superior Court of record and shall, subject to the Constitution, exercise *inter alia* jurisdiction for the **protection of Fundamental rights**. It is necessary to

note that the term 'protection' is used in Article 118 only with regard to the jurisdiction of the Supreme Court relating to Fundamental rights. This Court has previously too explained that, by the use of the term 'protection' in Article 118(b) and the Fundamental duty cast *inter alia* on the judiciary (as an organ of the State) by Article 4(d), to respect, secure and advance Fundamental rights, the jurisdiction vested in the Supreme Court relating to infringement and imminent infringement of Fundamental rights, **is not limited to the conventional function of judicial adjudication of disputes relating to Fundamental rights**. Certainly, inclusive of that conventional role, the Supreme Court in the course of (during) and when deciding an Application alleging infringement or imminent infringement of a Fundamental right, **is also required to respect, secure, advance and protect Fundamental rights**. Thus, as held by Sharvananda, J. (as His Lordship was then) in the very first Fundamental rights Application filed in the Supreme Court in ***Palihawadana v. Attorney General*** *[(1978) 1 Sri L.R. 65]* **the Supreme Court is the ultimate protector and guarantor of the Fundamental rights of the People.** This Court adds that the Supreme Court is the **upper guardian of such rights** of the People. Courts exercise that guardianship on behalf of all the organs of the State. That Constitutional duty should be performed by the Supreme Court in the discharge of the trust placed by the People on the Supreme Court under and by virtue of the Public Trust Doctrine and the jurisdiction of the Court.

570. It is the afore-stated extraordinary features of the Fundamental rights jurisdiction of the Supreme Court, that requires the Supreme Court to adopt a *sui generis* approach and procedure relating to Applications alleging the infringement or the imminent infringement of Fundamental rights, and also grant a wide variety of orders in its judgments. While some such orders will be punitive, others can be preventive and precautionary in nature. It is because of this extraordinary responsibility and related jurisdiction conferred on the Supreme Court by the Constitution, that in the interests of justice, the Court engages in the following:

(i) Entertains Applications filed by public spirited citizens and organizations (Public Interest Litigation).
(ii) Makes interim orders including orders for the maintenance of the *status quo* and orders to enable the Petitioner to gather further evidence.
(iii) Allows applications made in *good faith* seeking intervention.
(iv) Issues orders that certain parties (not cited by the Petitioner as a Respondent) be added as 'Added Respondents'.
(v) Receives and considers the evidence of any person who is not a party to an Application and/or considers the representations made on behalf of any party.
(vi) Calls for and considers additional material.
(vii) Engages in a deviation in the format of the hearing from the traditional 'adversarial' proceedings and instead adopts an 'inquisitorial' mode.
(viii) Makes orders different to or beyond what has been prayed for by the Petitioner.

571. Due to the compelling need for the Court to ascertain related facts to a high degree of accuracy and for the Court to properly comprehend and appreciate the situation that has arisen and be guided by scientific expertise, we cannot exclude the possibility of this Court in an appropriate Fundamental rights Application (a) undertaking the carrying out of a *'field visit'*, and (b) accepting *amicus briefs* from independent experts. All such measures are to be adopted in the interests of justice and for the purpose of respecting, securing, upholding, advancing and protecting the Fundamental rights of the People.

572. The Supreme Court is called upon to discharge this wide and crucial responsibility, when the jurisdiction of the Court is invoked by a person who has the right to do so, under Article 17 of the Constitution. Article 17 provides that "*every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a Fundamental right to*

which such person is entitled under the provisions of this Chapter" (which is a reference to Chapter III of the Constitution). Through the jurisprudence progressively developed by the Supreme Court, it is now well accepted that what is provided for in Article 17 is not a mere 'entitlement' which is conditioned upon the satisfaction of another condition or duty, but for all purposes a 'right' recognised by the Constitution itself. However, there are two conditions recognised by the Constitution itself enabling the exercise of that right. They being, that the Application shall be presented in terms of Article 126(2) and in compliance with the applicable Rules of the Supreme Court.

573. Article 17 makes it evidently clear that, the purpose for which the entitlement / right referred to in the said Article has been conferred upon the People of this country is for the vindication of a Fundamental right which is said to have been infringed or is being imminently infringed due to **executive** or **administrative** action. For such purpose, jurisdiction has been vested in the Supreme Court by Article 126 of the Constitution to entertain, hear and decide upon an Application submitted to Court by a person who exercises his entitlement / right recognized by Article 17. Therefore, it is important to note that the purpose of vesting jurisdiction in the Supreme Court to entertain Applications and determine disputes relating to the infringement or imminent infringement of a Fundamental right is to **protect the Fundamental rights of the People** of this country. That objective identified by Parliament and vested in the Supreme Court is sought to be achieved by the use of the judicial power conferred on the Supreme Court by the People channelled to the Supreme Court through the Constitution, to be exercised against possible **infringement of Fundamental rights occasioned due to unlawful executive or administrative action**.

574. Executive and administrative action is generally attributable to the functioning of the Executive arm of the State or a reasonable extension thereto including delegates and agents of the State and other public functionaries established by law. That may include statutorily created

bodies which are independent of the Executive (such as the Constitutional Council, the Election Commission, Public Service Commission, National Police Commission, etc.), and yet, is called upon to perform executive or administrative functions. And the furthest from the traditional Executive arm of the State would be State-owned enterprises, some of which being corporate in nature, established to perform certain functions (which may even include commercial activities) on behalf of the State.

575. The impugned action or omission should not amount to legislative, judicial or purely private exercise of rights or authority. Thus, the purpose of the mechanism contained in Articles 17 and 126 of the Constitution is to protect the Fundamental rights of the People against possible executive or administrative action which results in infringement or imminent infringement of Fundamental rights.

576. To the extent relevant to deciding the issue before this Court, Article 126 provides as follows:

> *"126. (1) The Supreme Court shall have* ***sole and exclusive jurisdiction*** *to* ***hear and determine any question relating to the infringement or imminent infringement by executive or administrative action*** *of any* ***Fundamental right or language right*** *declared and recognized by Chapter III or Chapter IV.*
>
> *(2) Where any person alleges that any such Fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney-at-Law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had*

and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.

(3) Where in the course of hearing …

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a Fundamental right or language right.

(5) The Supreme Court shall …"

577. It is clear that Article 126(1) vests jurisdiction (which may be referred to as the 'forum jurisdiction') on the Supreme Court, to hear and determine any question relating to the infringement and imminent infringement of a Fundamental or language right (recognized respectively by Chapters III and IV of the Constitution) by executive or administrative action. Through the use of the term 'sole' the Parliament has emphasised that the jurisdiction vested in the Supreme Court by Article 126(1) is to be exercised solely (only) for the purpose of determining disputes relating to Fundamental rights and language rights. By the use of the term 'exclusive' the Parliament has emphasised that this jurisdiction is vested only in the Supreme Court and in no other Court, and therefore, no other Court may exercise this jurisdiction. Therefore, no other Court may determine any matter relating to the infringement or imminent infringement of a Fundamental right by executive or administrative action. In fact, that is why in terms of Article 126(3), when a matter pertaining to infringement or imminent infringement of a Fundamental right of language right arises in the Court of Appeal during its exercise of jurisdiction vested in it by Article 140 of the Constitution, it is required to refer that matter to the Supreme Court for determination.

578. It is now necessary to consider the nature of the powers vested in the Supreme Court when its jurisdiction under Article 126(1) read with Article 17 has been invoked. For this purpose, examining Article 126(4) having dissected its components would be useful.

126(4) The Supreme Court shall have power to
grant such relief
or
make such directions as it may deem just and equitable in the circumstance
in respect of
any petition
or
reference referred to in paragraphs (2) and (3) of this Article
or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a Fundamental right or language right.

579. Therefore, it would be seen that, to the extent relevant to the matter under consideration, in instances where the jurisdiction of the Supreme Court has been invoked under Article 126(1) read with Article 17 of the Constitution (by preferring a Petition to the Supreme Court), the Court shall have power to (a) grant such relief, or (b) make such directions as it may deem just and equitable in the circumstance in respect of such petition. It has become the settled judicial practice of this Court to first determine as to whether or not there has been an infringement or imminent infringement of a Fundamental right and should the Court have concluded that there has in fact been an infringement or imminent infringement of a Fundamental right occasioned by executive or administrative action, make a declaration to that effect. Furthermore, when considering reliefs to be granted, the Court shall first refer to the reliefs sought by the Petitioner and determine whether such reliefs sought should be granted in the same (as prayed for) or in a modified

manner. In addition thereto or in the alternative, the Court shall consider whether any further reliefs or directives which the Court deems just and equitable should be granted. It is important to note that, both *ex-facie* and per its literal meaning, Article 126(4) has not limited the situations where the Supreme Court may grant such directions which the Court deems to be 'just and equitable' to situations where the Court has concluded that there has been either an infringement or imminent infringement of a Fundamental right occasioned due to executive or administrative action. Thus, in ***Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapitiya*** *[SC/FR 394/2015, SC Minutes of 24th June 2016]* the Court issued a direction, in a situation where the Court did not make a declaration on the merits of the case on whether or not the Petitioner's Fundamental rights had been infringed by executive or administrative action.

580. On a careful consideration of Article 126(4) and the submissions made by learned counsel, this Court concludes that the Parliament in its own wisdom has not imposed a restriction on the Supreme Court regarding situations when the Court may issue directives that are just and equitable, since the Parliament had been acutely conscious of the wide mandate conferred on the Supreme Court to exercise jurisdiction beyond the mere function of judicial adjudication of disputes, and perform the wider Constitutional role of upholding, respecting, securing, advancing and protecting Fundamental rights of the People. Thus, in the opinion of this Court, the power to issue directions which are just and equitable is to be exercised by this Court either in addition or in the alternative to granting such reliefs to Petitioners (who in most instances are victims themselves of infringement or imminent infringement of Fundamental rights). Such directives may be issued in the wider public interest of upholding, respecting, securing, advancing and protecting Fundamental rights of the People. For the purpose of securing those noble objectives, such directions the Court may grant need not necessarily be against the Executive arm of the State or in respect of executive or administrative

action. It may even be against Non-State actors, for the purpose of securing the afore-stated objectives.

581. In ***Mohamed Faiz v. Attorney General*** *[(1995) 1 Sri L.R. 372]*, Justice Mark Fernando has observed the following:

> *"Article 126, speaks of an infringement by executive or administrative action; it does not impose a further requirement that such action must be by an executive officer. It follows that the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done* ***with the authority of the executive****: such authority, transforms an otherwise purely private act into executive or administrative action; such authority may be express, or implied from prior or concurrent acts manifesting* ***approval, instigation, connivance, acquiescence, participation, and the like*** *(including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest* ***ratification or adoption****. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view* ***responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility****. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement. Conversely, when an infringement by an executive officer, by executive or administrative action, is* ***directly and effectively the consequence of the act of a private individual*** *(whether by reason of* ***instigation, connivance, participation or otherwise****) such individual is also responsible for the executive or administrative action and the infringement caused thereby.* ***In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim.****"* [Emphasis added.]

It would thus be seen that in ***Mohamed Faiz v. Attorney-General*** *(supra)* this Court had expressed the view that a just and equitable direction may be issued on a Non-State actor who has conspired with State actors, instigated, encouraged, abetted, contributed, caused or facilitated the infringement of Fundamental rights by executive or administrative action. Those are situations where there is an established causative or other rational link between the conduct or omission of non-State actors and the proven infringement or imminent infringement of Fundamental rights due to executive or administrative action.

582. On the other hand, it is the considered view of this Court that such just and equitable directions may also be issued against Non-State actors whose unlawful or illegal conduct or omission **is found to have been an impediment on the full enjoyment or exercise of Fundamental rights or resulted in an infringement of Fundamental rights**. In this regard, it is necessary to note that a purely private act can give rise to an infringement of a fundamental right. However, the jurisdictional mechanism contained in Article 126(1) read with Article 17 would restrict the exercise of that jurisdiction of the Supreme Court with regard to allegations of such infringement of Fundamental rights due to executive or administrative action. It appears to this Court that the Parliamentary Select Committee established in 1977 to undertake a revision of the 1977 Constitution (1st Republican Constitution of Sri Lanka) took a considered decision to limit the jurisdiction to be vested (at that time) on the Supreme Court to hear matters pertaining to infringement and imminent infringement of Fundamental rights due to 'executive' action. [It is the Report of this Select Committee that led to the drafting of the new Constitution.] Subsequently, when the draft Constitution (2nd Republican Constitution) was drafted and enacted, the Parliament had expanded this term to 'executive and administrative action'. Thus, the purpose of vesting this jurisdiction in the Supreme Court is to determine whether or not a fundamental right has been infringed or there is an imminency of such infringement due to executive or administrative action. Therefore,

it is not possible for a Petitioner who invokes the Fundamental rights jurisdiction of the Supreme Court to come to Court on the premise that his Fundamental rights have been infringed due to a private act of a Non-State party. Nor can this Court hold that a particular Non-State party has infringed the Fundamental rights of a person entitled to such fundamental right.

583. In view of the foregoing, the purpose of issuing a direction on such Non-State party (whose unlawful or illegal action or inaction is not causally linked to or rationally connected with an infringement of a fundamental right by executive or administrative action) is to **remove any impediment that may exist and or to secure respect, advancement and protection and the full enjoyment of the Fundamental rights of the People**.

584. In several seminal judgments of this Court including ***Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*** *[(2000) 3 Sri L.R. 243]*, ***Watte Gedera Wijebanda v. Conservator General of Forests and Others*** *[(2009) 1 Sri L.R. 337]*, ***Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and Other*** *[SC/FR 141/2015, SC Minutes of 4th April 2019]* and ***Sarath Fernando, Conservator General of Forests and Others v. P.B.S. Dissanayake and Others*** *[SC Appeal 137/2017, SC Minutes 8th October 2024]* this Court has observed the serious and far-reaching consequences arising out of environmental pollution.

585. In ***Sarath Fernando, Conservator General of Forests*** *(supra)* this Court has observed the following:

> *"The environment is an essential component of the planet earth on which the survival of human beings, other living animals, trees, plants and other vegetation are dependent upon. These living beings are also components of the environment. Contemporary science reveals that the environment the planet earth has been blessed with, is unique. The environment of planet earth is a seamless layer above, at and below*

ground level that serves as a shield protecting the entire globe, and is a blessing of the nature conferred on all living beings of planet earth. Thus, it is to be treated and used by all human beings with utmost care, with due regard to ecology, and subject to the duty of preservation, conservation and non-pollution.

Protection of the environment is not the responsibility of the People of any one country or a particular group of companies. Nor is it the responsibility of any one State. It is the responsibility of the entire human civilisation. I am reminded of the invaluable words of the world-renowned Naturalist, Sir Richard Attenborough in his documentary titled 'Life on Planet', where he states the following:

> *'… the fact is that no species has ever had such wholesale control over everything on Earth, living or dead, as we not have. That lays upon us, whether we like it or not, an awesome responsibility. In our hands now lies not only our own future, but that of all other living creatures with whom we share the earth.'*
>
> *…*
>
> *A consideration of evolving and developing internationally recognized legal norms and standards reveal the gradual emergence of the overarching legal duty for the protection of the environment as a peremptory norm of general international law (jus cogens). Thus, the emergence of a universal recognition that the long-term survival of the human race would be considerably dependent upon the protection of the environment. Moreover, international law has begun to recognize the interdependence and indivisibility of human dignity and environmental right. …"*

586. These Applications relating to the marine and coastal pollution occasioned due to the fire on board and the subsequent sinking of the X-Press Pearl vessel in 2021 serves as an important testament to the seriousness of environmental pollution which has been described by this

Court in the past. Elsewhere in this Judgment, this Court has dealt with in considerable detail the nature of the pollution caused by this incident and the consequences of such pollution. The Court has also extensively dealt with the responsibility on the part of the non-State actor Respondents (X-Press Pearl group of companies) for such pollution. Such liability of the polluter need not be necessarily confined or limited to conventional civil delictual liability or to statutorily imposed liability (as contained in section … of the Marine Environment Pollution Prevention Act. It can be liability *sui generis* under Public law for which both State and Non-State actors shall stand liable.

587. What is pertinent to observe at this juncture is that, the consequences of the pollution to the marine environment occasioned due to action as well as inaction (some of which in the context of the applicable domestic and international laws being 'unlawful' and in certain respects 'illegal' as well giving rise to criminal responsibility under domestic law) by the Non-State actor Respondents (X-Press Pearl group of companies) is not limited to the infringement of the Fundamental rights of fisherman guaranteed by Article 14(1)(g) of the Constitution to engage freely by themselves or in association with others in any lawful occupation, profession, trade, business or enterprise. As described in the earlier mentioned judgments, environmental pollution has wide and far-reaching consequences relating to the enjoyment and exercise of Fundamental rights by all human beings. Albeit briefly, this Court notes the following:

(a) The peaceful, comprehensive and unrestrictive enjoyment of Fundamental rights can only take place in a healthy and peaceful environment. There is a strong interdependence between Fundamental rights and a healthy environment. Human beings are inherently dependent on a healthy environment for their survival and well-being. A safe, clean, healthy and sustainable environment is crucial for the full enjoyment of the several Fundamental rights recognized by our Constitution including the right to life. When the

environment is degraded by pollution, it directly affects people's ability to live healthy and fulfilling lives, infringing upon the right to life.

(b) The long-term survival of the human civilization and the opportunity of human beings to live as opposed to merely exist, and to also reap the benefits of socio-cultural, political and economic development is founded upon the maintenance of the environment in its fullness of natural riches.

(c) The ultimate and most important Fundamental right, which is the right to life (which is the inalienable and composite of the Fundamental rights specifically recognized by the Constitution) can be exercised only in a peaceful and healthy environment.

(d) The long-term development of the human community both at national and international level is dependent upon sustainable development in all its forms and manifestations, which is necessarily conditioned upon optimal protection of the environment.

588. It would thus be seen that there exists a direct and tangible relationship (connection or link) between the need for the protection of the environment and the ability to enjoy and exercise Fundamental rights. The converse is that, environmental pollution is a major obstacle towards the full enjoyment of Fundamental rights. Thus, it would be seen that the relationship between environmental pollution and Fundamental rights is one of direct impact and interdependence. Environmental degradation, particularly as a result of pollution, can undermine Fundamental rights, which necessitates this Court to adopt a Fundamental rights-based approach to environmental protection, and to exercise the jurisdiction of this Court under Article 126 of the Constitution for the purpose of responding to serious environmental pollution.

589. In these circumstances, it is not only a component of its jurisdiction but also a Constitutional duty of the Supreme Court to in the exercise of its just and equitable jurisdiction contained in Article 126(4) of the Constitution, to issue directions on the polluter (who in this instance is a group of Non-State actors – the X-Press Pearl group of companies cited as Respondents in the several Applications) to provide reparations in respect of the marine pollution for which they are responsible.

Applicability of International law

590. According to the International Convention for the Prevention of Pollution from Ships (hereinafter referred to as MARPOL), which was adopted by the International Maritime Organisation (IMO), a report of the incident must be made without delay in accordance with Protocol 1 of MARPOL. Article 1 of Protocol 1 imposes a duty on the Master to report any incidents in relation to Article 2. Article 2 elaborates on the matter and states the instances on which these said reports should be made. When there is a discharge or a probable discharge of oil, noxious liquid substances or harmful substances in package form, the Master as mentioned above, must report to the relevant Ports Authority. The harmful substances mentioned above are those that are identified as marine pollutants in the IMDG code.

591. Article 3 specifies that the content of a report should include the identity of the ship, the time, type and location of the incident, the quantity and type of harmful substance involved, and any assistance or salvage measures undertaken. Article 4 requires that the pers on responsible for sending the report to supplement the initial report with further developments and comply fully with requests from affected States for additional information. Reporting procedure under Article 5 demands that reports be made by the fastest telecommunication channel available with the highest possible priority to the nearest coastal State. Additionally, Parties to the Convention are obligated to issue regulations

or instructions detailing the procedures to be followed when reporting incidents involving harmful substances.

592. Under the International Convention for the Safety of Life at Sea (herein after referred to as SOLAS), Chapter 1, Regulation 11, addresses the ongoing obligation to maintain the condition of the ship and its equipment following survey certification. This regulation stipulates that a ship and all its equipment must be maintained in a condition that ensures the vessel remains fit to proceed to sea without posing a danger either to itself or to persons on board. Should an accident occur to the ship, or should any defect be discovered which affects the safety of the vessel or the efficiency or completeness of its life-saving appliances or other equipment, the Master or Owner of the ship is obliged to report the matter at the earliest possible opportunity. Such reports must be made either to the flag State Administration, the nominated surveyor, or the recognised organisation responsible for issuing the relevant statutory certificates. An investigation shall then be initiated to determine whether a further survey, as required by Regulations 7, 8, 9, or 10, is necessary. Should the incident occur in a port under the jurisdiction of another Contracting Government, the Master or Owner must also report the matter immediately to the appropriate authorities of the port State, and the nominated surveyor or recognised organisation must ensure that such notification has been duly made.

593. Although Regulation 11 of Chapter I of SOLAS serves as a general safety provision and does not expressly refer to dangerous goods or incidents of pollution, a significant leak of dangerous cargo could nonetheless fall under its scope if it poses a threat to the safety of the vessel or its equipment, for instance, through fire or explosion risks. Notably, Regulation 11 exists independently of Chapter V. Regulation 11 addresses mandatory reporting systems.

594. Chapter V of SOLAS Regulation 11 explicitly recognises that ship reporting systems play a critical role in safeguarding life at sea,

promoting the safety and efficiency of navigation, and protecting the marine environment. Where adopted and implemented in accordance with the guidelines and criteria developed by the IMO, such systems must be used by all ships or, as applicable, by certain categories of ships or those carrying particular cargo as specified by each system. Although the primary responsibility for such systems rests with port States, this regulation reflects the internationally recognised principle that reporting serves as an essential precautionary measure.

595. Moreover, Regulation 34-1 of SOLAS enshrines the principle that no Owner, Charterer, Operating company, or any other person shall prevent or restrict the ship's Master from taking any action which, in the Master's professional judgement, is necessary for ensuring safety of life at sea or protecting the marine environment.

596. IMO Resolution MSC 43(64) provides a comprehensive framework for ship reporting systems. According to Section 2.1 of the Resolution, ship reporting systems should be considered for adoption by the IMO only where there is a clear and demonstrated need to enhance safety of life at sea, improve navigational safety and efficiency, or strengthen protection of the marine environment. Such systems may operate either independently or as part of a broader vessel traffic service. Communication between a shore-based authority and a participating ship should generally be confined to essential information, except where emergencies arise concerning the safety of life at sea or threats to the marine environment. In the event of such emergencies, shore-based authorities are authorised to request from the ship precise details of any hazardous cargo on board, including their specific locations.

597. Participating ships, where required by a reporting system, must transmit reports to the designated shore-based authority without delay upon entering, and where necessary upon leaving the reporting area established under the system. Furthermore, ships may be obliged to submit additional reports or updates to reflect changes in circumstances.

Importantly, failure of a ship's radio communication equipment is not regarded, in itself, as non-compliance with the system's rules. However, in such cases, the Master must endeavour to restore communications as promptly as possible and record the reasons for any failure to report in the ship's official log book.

598. Chapter VII of SOLAS is dedicated to the carriage of dangerous goods. Under Regulation 6 of this chapter, if an incident occurs that involves the loss or potential loss of dangerous goods in packaged form overboard into the sea, the Master or the person in charge of the ship must report the full particulars of such an incident without delay and to the maximum extent possible to the nearest coastal State. The format and content of such reports must adhere to the general principles and guidelines established by the IMO.

599. These principles are elaborated in IMO Resolution A.851(20), which articulates the general principles governing ship reporting systems, including specific reporting requirements and guidelines for incidents involving dangerous goods, harmful substances, and marine pollutants. Governments implementing ship reporting systems are obliged to inform mariners of all pertinent requirements and the detailed procedures to be followed. The overarching objective of these guidelines is to enable coastal States and other relevant stakeholders to receive timely information whenever an incident occurs involving the loss, or likely loss, overboard of packaged dangerous goods. Reports should be directed to the nearest coastal State or, where relevant, to a designated shore station operating within an established ship reporting system.

600. Section 3.1 of these Guidelines mandate that reports concerning dangerous goods must contain several specific details as outlined in the standard reporting format. Notably, item 'R' of the said Guidelines requires information to be included, covering the technical names of substances, relevant UN numbers, IMO hazard classes, manufacturer or consignor/consignee information, details of packaging and marking,

estimates of the condition of the packages, and data on whether the goods are floating or sinking, any continued loss, and the cause of the incident. Provision 3.1.2 requires further reporting, consistent with item R, where there is a risk of further loss of dangerous goods from the vessel. Provision 3.1.3 allows for supplementary messages if all requisite details cannot be supplied immediately.

601. Regarding harmful substances, Section 3.2 specifies that reports must address actual discharges, particularly of noxious liquid substances, and must contain items 'A' to 'X', with particular emphasis on items 'P', 'Q', 'R', 'T', and 'X'. These items collectively include the technical name of the substance, UN number, pollution category, manufacturer's details, quantities discharged, the condition of the ship and its capacity for transferring cargo, as well as particulars about the type and extent of discharge, whether the substance has floated or sunk, any ongoing release, the cause of the incident, the estimated area of pollution, and details of the shipowner and any response or salvage operations undertaken. Provision 3.2.2 encourages follow-up reports containing similarly detailed information, while Provision 3.2.3 obliges any assisting or salvaging vessels to submit reports as applicable, thereby ensuring that coastal States remain fully informed.

602. Section 3.3 of the Guidelines impose similar obligations regarding marine pollutants. Reports must include items 'A' to 'X', and, where a discharge is probable, item 'P' is particularly significant. The contents of these reports mirror those required for harmful substances, encompassing technical identification, the condition of the vessel, packaging details, and necessary contact information. Provisions 3.3.2 and 3.3.3 mandate prompt supplementary reports and comprehensive reporting obligations for assisting ships.

603. Section 3.4 establishes the criteria for determining whether a discharge is "probable" and therefore reportable. Relevant considerations include damage or malfunction of the ship or its equipment, as well as

environmental and navigational conditions such as prevailing winds, state of the sea, and traffic density. Provision 3.4.2 recognises the practical difficulty of providing precise definitions but instructs Masters to report incidents involving significant structural damage, such as fires, explosions, groundings, collisions, or equipment failures that affect critical navigation systems like steering gear or power supply.

604. The IMDG Code, supplemented by annexes and circulars such as MSC/Circ. 1025, offers detailed emergency response procedures for ships transporting dangerous goods, known collectively as the Emergency Schedules (EmS Guide). In particular, Section 12.11 of the EmS Guide emphasises the importance of recognising that any marine pollutant washed overboard constitutes a threat to the marine environment and therefore must be reported promptly in accordance with established procedures, using the fastest available telecommunication channel and with the highest possible priority, to the nearest coastal State.

605. Furthermore, guidance on the qualifications, training, and experience required for fulfilling the role of the Designated Person under the International Safety Management (ISM) Code underlines the crucial role that such individuals play in developing and implementing a shipping company's safety management system. The Designated Person is tasked with ensuring safety at sea, preventing human injury or loss of life, and safeguarding the environment, with particular emphasis on the marine environment and protection of property. This role demands a commitment to reasonableness, integrity, and good faith in all decisions and actions taken.

606. Under the United Nations Convention on the Law of the Sea (UNCLOS), Section 2 deals explicitly with global and regional cooperation. Article 197 imposes an obligation on States to cooperate, both globally and regionally, either directly or through competent international organisations, in the formulation and development of

international rules, standards, and recommended practices and procedures consistent with the Convention, to protect and preserve the marine environment, taking into account regional characteristics. Further, Article 198 provides that when a State becomes aware of circumstances in which the marine environment faces imminent danger of damage or has already been harmed due to pollution, it must promptly notify other States it considers likely to be affected, as well as the relevant international organisations.

607. Lastly, the IMDG Code, in Chapter 7.8 addresses specific requirements and precautions to be taken in the event of incidents and fires involving dangerous goods. Although the provisions in this chapter are not mandatory, Regulation 7.8.1.3 specifies that if a package containing dangerous goods is discovered to be leaking or damaged while the vessel is in port, the port authorities must be notified without delay, and all appropriate safety procedures must be followed to ensure that such incidents are managed effectively, thus mitigating any risks to human life and preventing harm to the marine environment.

608. On behalf of the X-Press Pearl group it has been submitted to this Court that the standard format of the Dangerous Goods Declaration does not provide a dedicated field for such disclosure. However, as explained in the foregoing analysis of applicable International law and standards (including best practices), it is the view of this Court that the duties imposed under International Law are not confined to the contents of a particular form of document. There exists a reasonable expectation that information regarding any emergency compromising the vessel's safety as well as possible threats to the marine environment be reported to the nearest coastal State or to the intended port of arrival. Therefore, the view of this Court is that the X-Press Pearl group cannot use possible limitations that may be contained in the Dangerous Goods Declaration form as a defence for not having provided adequate information regarding the compromised container containing leaking Nitric acid.

609. Indeed, the SOLAS Convention, which binds the vessel's flag State and by extension its Operators, contemplates circumstances where the Master is under a continuing duty to report any condition that may adversely affect the safety of the ship, persons on board, or the marine environment. The failure to disclose the leaking condition of the Nitric acid container, even assuming *arguendo* that the declaration form was inadequate, amounts to a dereliction of this duty. This position is further supported by the provisions of the MARPOL Convention and the IMDG Code, both of which require the immediate notification of relevant authorities where dangerous goods are damaged, leaking, or pose a risk of discharge.

610. It is also relevant to note that the obligation to report is not extinguished merely because a form is silent on a particular eventuality. International best practices, as evidenced by the EmS Guide and the operational expectations under the ISM Code requires that the Master or designated person ashore take timely steps to communicate hazards, particularly where those hazards are likely to escalate.

611. The IMO has recognised that the Designated Person ashore plays a central role in implementing the safety management system, particularly in ensuring the protection of life, property, and the marine environment. This responsibility carries a substantive duty to act reasonably and in good faith when risks to safety or the environment arise. If, as the evidence suggests, the Designated Person was aware that the container in question was dangerous, that it posed a risk if kept on board, and that it was intended for discharge at the next port, then as a reasonable man, he ought to have appreciated the need for prior notification to the port State. Such notice is not an administrative courtesy but a critical measure to enable the receiving State to prepare for potential contingencies. The failure to communicate that information, where time and opportunity existed to do so, cannot be reconciled with the obligations imposed under international law.

612. In the light of the operating obligations under the above-mentioned international instruments, it is clear to this Court that International Law advocates a framework mandating the Master of the vessel to notify the relevant authorities immediately upon discovering any deformity that compromises the safety of the vessel, its crew and the environment. In this regard and in the context of the MV X-Press Pearl vessel, it is important to note that by the use of the term 'relevant authorities' the reference being made is to *inter alia* Sri Lanka's competent authorities.

613. In contrast to these specific obligations, the conduct of the Master of the vessel and the X-Press Pearl group clearly falls short of the required international standards. Despite being aware of the leak of Nitric acid as early as 11th May 2021 which was over one week prior to the vessel having reached Sri Lanka's waters, no timely or proactive report was submitted to the Sri Lankan authorities. Certainly, the Master and the X-Press Pearl group were required to provide this notification as soon as it became apparent that the next and immediate port of call would be Colombo, Sri Lanka. This is even more important because, by that time, the situation on board and inside X-Press Pearl had deteriorated further.

614. The vessel entered the outer harbour at approximately 00:30 a.m. on 20 May 2021, yet made no disclosure regarding the hazardous leaking container onboard. Instead, the local Agent informed the Harbour Master about the leak via email at 10:19 a.m. that morning. That communication took place nearly 10 hours after arrival and just prior to the outbreak of the fire. The Master of the vessel did not issue a radio emergency notification to port control until 12:05 p.m. on the same day, when he finally reported a fire in the cargo hold.

615. This series of delayed disclosures shows that critical safety information was deliberately withheld until the last moment.

616. Such concealment constitutes a blatant and material breach of international maritime law, including the duty to report under Protocol

I of MARPOL, Regulations of SOLAS, and the requirements under the IMDG Code. These legal instruments impose positive and continuing obligations on the Master of the vessel and the vessel's Operators to report any condition that endangers the ship, human life, or the marine environment, regardless of documentary formalities. Procedural infirmities or the lack of formal mechanisms to make such reports do not absolve them from their reporting obligations.

617. By deliberately concealing the true condition of the damaged container and Cargo Hold No. 2, and by failing to provide adequate and timely notification, the Master, Operator(s) and the local Agent have undermined international reporting norms, deprived Sri Lankan authorities of critical response time, and exposed coastal communities and marine ecosystems to a disaster, which in the opinion of this Court was preventable. In the circumstances, a clear violation of Protocol I of MARPOL, the SOLAS Regulations, and the requirements under the IMDG Code by the Master, Operators and the local Agents of the vessel and the X-Press Pearl Group jointly and severally is established.

Compliance with Domestic law

Statutory obligations of the Ports Authority and the Harbour Master

618. The relevant provisions of the Sri Lanka Ports Authority Act (hereinafter referred to as the "SLPA Act") will be discussed under three headings. They are,
(i) regulation of navigation and anchoring,
(ii) emergency response and firefighting assistance, and
(iv) assistance in towing and salvage operations.

Regulation of navigation and anchoring

619. The Sri Lanka Ports Authority Act has empowered the SLPA and the Harbor Master under the following provisions. Section 6(1)(c) - to regulate and control navigation within the limits of and the approaches to the specified port, Section 84A(a) - to direct where any vessel shall be berthed or anchored and the method of anchoring within any specified port and approaches to such port, and Section 84A(b) - to direct the removal of any vessel from any berth, station or anchorage to another berth, station or anchorage and the time within which such removal is to be affected within any specified port and the approaches to such port.

620. The Petitioners alleged that the SLPA failed to act with due caution and diligence in relation to the MV X-Press Pearl, carrying dangerous goods, and was allowed to enter Sri Lankan waters, which was within close proximity to the coast.

621. Petitioners argue that this conduct amounts to a violation of Section 6(1)(c) of the SLPA Act, No. 51 of 1979, which provides that "*Subject to the provisions of this Act it shall be the duty of the Ports Authority: to regulate and control navigation within the limits of, and the approaches to the specified ports;*". This primary responsibility of the SLPA is exercised through the Harbour Master.

622. The law governing entry into the Port is provided in the SLPA Act and its accompanying regulations. Such a law, *inter alia*, provides that vessels should make mandatory disclosures regarding the cargo they are carrying.

623. Under Section 67(1) of the SLPA Act, the Minister is empowered to make regulations regarding;

> "*the information to be supplied by the masters, owners or other person in charge of vessels, and of goods loaded or discharged at the wharfs and premises of the Ports Authority…*" [Section

67(1)(h)], and
"the regulation of the mode of stowing and keeping dangerous goods on board vessels…" [Section 67(1)(n)].

Accordingly, Dangerous Goods Regulation 7(1)(a) provides that;

> *"The owner, agent or master of every vessel... carrying dangerous goods where they are packaged, shall be at least forty-eight hours prior to such arrival... give written notice thereof to the Harbour Master... together with a declaration substantially in Form A1 ..."*

624. It is not in dispute that the X-Press Pearl was a vessel carrying dangerous goods, which included a container of Nitric acid, which was found to be leaking. It is also not disputed that the Dangerous Goods Declaration relating to the vessel was submitted by the local Agent at 16:45 hrs on 19th May 2021, whereas the vessel entered Sri Lankan waters at 00:24 hrs on 20th May 2021 (soon after midnight of the 19th of May 2021). This falls short of the 48-hour requirement stipulated under Regulation 7(1)(a).

625. It was argued on behalf of the Harbor Master that he acted within his lawful discretion in permitting the vessel to anchor within the port limit despite the delay in submitting the DG declaration. It was also submitted that, as an industry practice, a vessel is allowed to enter the Port if it submits the DG declaration at some point before its entry.

626. Under regulation 27, failure to comply with regulation 7 constitutes an offence. However, it does not amount to an automatic rejection of entry to the Port. Schedule II of the Regulations of the Code of Practice provides that;

> *"Entry may be refused if conditions of entry are not satisfied and if documentation is not in order."*

627. Accordingly, the Harbor Master is vested with the discretion to determine whether a vessel carrying dangerous goods should be permitted to enter the Port limits. It was further argued that in this case, such discretion was exercised based on the declaration submitted by the Local Agent of the Vessel.

628. The Declaration was formally completed and certified by the local Agent of the vessel as properly packed and safe for transit. The container carrying Nitric acid was listed as "in-transit cargo," not for discharge. In any case, at the point of receiving the Dangerous Goods Declaration, the Sri Lanka Ports Authority was not aware of any defect, damage, or leakage involving the Nitric acid container, nor was it informed of any imminent risk of fire on board the vessel. Accordingly, permission was granted to enter the outer anchorage as per the standard practice.

629. In the Affidavit of the Harbor Master Marked "Y1" he has stated as follows:

> *"20. All goods coming into Sri Lanka are subject to inspection by Sri Lankan Customs, including dangerous goods. Practically, it is not possible to board every vessel that enters a port in Sri Lanka and inspect whether the cargo onboard the vessel has been duly labelled, packed and stowed. It is therefore usual practice, if there is nothing blatantly erroneous in the dangerous goods list or otherwise disclosed by the shipping agent, for the SLPA to rely on the declarations given by the shipping agent as a true statement.*
>
> *21. Generally, an irregularity in the packing and storage of the containers or cargo for example a leaking container would be disclosed in or accompany the declaration by the shipping agent of the vessel. This being standard international practice. This is especially true in relation to dangerous cargo."*

Analysis and conclusions

630. On material placed before this Court, it is evident that the Harbor Master and the SLPA have acted according to law and industry practices in granting anchorage to the ship. Sri Lankan authorities had not been informed through the DG declaration in question or through any other form of communication that the ship was carrying a damaged Nitric acid container, which required urgent attention. In the absence of such disclosure, the decision to allow the ship to enter the Port cannot be considered as a failure to regulate navigation within the meaning of section 6(1)(c).

631. Harbor Master's authority to determine the berthing and anchoring of vessels within the port is derived from section 84A(a) and (b) of the SLPA Act. This section provides that;
"Harbor Master may direct where any vessel shall be berthed or anchored and the method of anchoring within any specified port and approaches to such port." and "direct the removal of any vessel from any berth, station or anchorage to another, birth, station or anchorage and the time within which such removal is to be effected within any specified port"

632. The position of the Harbor Master is that the vessel did not indicate any urgency to berth upon its arrival. However, a contrary position has been taken by the X-Press Pearl group. According to their version, first, the vessel requested emergency berthing on the 20th May 2021 at around 01:25 hours. This position has also been reflected in the MTS report as follows:

> *"1.1.8.16 At about that time, according to the crew, the smell emanating from container FSCU7712264 worsened (toxic fumes) and the Master was informed. The Master instructed the crew on deck to return and remain in the accommodation with all weathertight doors closed. The Master added, considering the extent of leak and smoke, he requested Colombo Port Control for an urgent and immediate berthing. Port Control in response,*

advised the Master to monitor the temperatures in cargo holds #1 to #3."

"2.7.1.1 The VDR could have provided the investigation team better insights into the communication between XP and the shore personnel as the emergency was unfolding. As the VDR data was not available to the investigation team, despite repeated requests made to the Coastal State, XP's crew accounts could not be corroborated. Based on XP's crew accounts, the Master and A-CO had made multiple calls to Colombo Port Control requesting for urgent berthing when the smoke alarm was triggered. However, there was no response or advice on whether XP could be berthed earlier."

633. In response to this, the Harbor Master, in paragraphs 41 - 42 of his Affidavit stated as follows:

"I have read the Final Report of the Transport Safety Investigation Bureau Ministry of Transport Singapore (MTS Report) and note that it states at paragraph 1.1.8.16 that the master of the XPP requested Colombo Port Control for an urgent and immediate berthing (at about 0125 hours on 20 May). However, to my knowledge, no such request was received by Port Control from XPP on 20 May 2021.

The only request received was to permit the reworking of the leaking container upon scheduled berthing, which was originally planned to take place at 0100 hours on 21 May 2021 at CICT. I have also conferred with the berth planners of SAGT and CICT, and they have confirmed that they did not receive any request from the agent for urgent berthing of the XPP.

The only request received was to permit the reworking of the leaking container upon scheduled berthing, which was originally planned to take place at 0100 hours on 21 May 2021 at CICT. I have also conferred with the berth planners of SAGT and CICT,

and they have confirmed that they did not receive any request from the agent for urgent berthing of the XPP.

The MTS Report further states at paragraph 2.7.1.1 that "…the master and A-CO of the CPP made multiple calls to Colombo Port Control requesting urgent berthing when the smoke alarm was triggered. However, there was no response or advice on whether the XP could be berthed earlier. I a.m. not aware of any such requests being made by the master or the A-CO of the XPP for urgent berthing"

634. The X-Press Pearl group contends that, had the permission to berth and rework the compromised container been granted, this catastrophe would not have taken place.

635. However, even assuming that such requests were in fact made, the Harbour Master was not under a legal obligation to permit immediate berthing and discharging / re-working of the compromised container. The decision to berth a vessel is a discretionary power conferred to the Harbour Master under the Sri Lanka Ports Authority Act and its Regulations.

636. Such a decision may be guided by considerations of safety of personnel of the port, the safety of other vessels, and the potential risk to infrastructure. In this case, as discussed before, there was a lack of accurate and timely information from the vessel regarding the circumstances of the situation. In such a context, this discretion had to be exercised cautiously. Thus, this Court accepts the position taken up by the Harbour Master as being reasonable.

637. Berthing permission for X-Press Pearl was revoked by the Harbour Master between 18:30 hrs and 19:00 hrs. In his Affidavit, the Harbour Master had explained that in such instances, there is no written protocol to guide his decision-making process and it should be guided by his professional experience. As per his Affidavit, the Harbour Master is a

professional with over 39 years of experience in the maritime industry and therefore, due recognition must be given to his subjective judgement on this matter.

638. In this regard, he had further stated that:

> *"Hypothetically, even if I have allowed the XPP to berth, the problem was no longer contained to just one container, as the whole of the cargo hold no. 2 was full of smoke and fumes, and the fire was spreading. It is far more difficult (and dangerous) to manage a cargo hold fire than a single container. I needed to be absolutely certain that the Port could rectify the problem onboard the XPP, and ensure the protection of crew and port personnel first and foremost."* (para 55 of Y1)

639. Being informed about the situation on board, the sequence of events leading to the decision to cancel birthing has been placed before the court in his Affidavit tendered to court.

640. According to the Harbor Master, he was first notified of the fire at 12:05 hours via VHF on 20th May 2021. Followed by information received at 13:00 hours that the fire was under control and boundary cooling was in progress.

641. Around 13:50 hours, the ship obtained clearance for a London P&I Club appointed surveyor to board the vessel and assess the situation on board. However, the Harbour Master in his Affidavit states that a surveyor did not embark the vessel on the same day or thereafter. At 14:10 hrs, the Ship Captain had informed the Harbour Master of depleted CO2 on the vessel, rising temperature, and requested urgent fire fighting assistance. At 15:05 hrs, a team composed of the Deputy Chief Fire Officer was dispatched, and at 16:55 hrs, the Chief Fire Officer was dispatched. Both teams disembarked the vessel at 18:00 hrs and 18:30 hrs, reporting that there was a thick orange colour chemical smoke emanating from cargo

hold No.2 along with a strong chemical smell. The fire officer had specifically noted that there were toxic fumes that prevented the team from approaching and inspecting the affected area.

642. According to the Affidavit submitted by the Harbour Master, it is stated that the boarding team returned at approximately 18:30 hrs. and informed the Harbour Master that the situation on board was uncertain. Relying on his expertise and the information relayed to him, the Harbour Master had decided to cancel the berthing permission that had previously been granted.

643. However, learned President's Counsel who represented the X-Press Pearl group contended that this account is contradictory and further asserted that, according to the Harbour Master's Affidavit dated 3rd September 2024, tug "Megha" returned to port at 19:50 hrs and "Pilot 14" returned at 19:55 hrs. It was also alleged that the Harbour Master's decision was made without any factual basis, since he arrived at the decision prior to the return of the boarding team.

644. Nevertheless, on behalf of the Harbour Master it was submitted that continuous communication was maintained between the boarding team and the Harbour Master via radio communication. Accordingly, although the boats in which the boarding team travelled returned to the Port at a later time, adequate information had been conveyed in real time to the Harbour Master, enabling him to take a timely decision based upon the ground situation. Though there was an absence of visible flames, due to the presence of thick chemical smoke and toxic fumes on the deck and inside Cargo Hold 2 and due to the uncertainty which prevailed, understandably a full inspection could not be carried out by the boarding team. In accordance with his statutory powers under Section 84B of the Sri Lanka Ports Authority Act, the Harbour Master acted reasonably and within his mandate to protect the safety of the port, personnel, and the marine environment.

645. The Harbour Master's Affidavit records that by the time the inspections were completed, it had become apparent that the situation on board MV X-Press Pearl was unclear and remained potentially hazardous. In the absence of a report from MV X-Press Pearl, the Harbor Master concluded the following:

(a) The vessel presented a serious fire risk, and in the absence of full clarity regarding the condition on board, it would be unsafe to permit the vessel to enter port.

(b) Allowing berthing would have endangered the port personnel, infrastructure, and adjacent vessels.

(c) As per the report of the boarding team, the fire had spread beyond a single container, and the thick smoke emerging from the Cargo Hold No. 2 indicated that the fire had likely spread within the hold.

646. Therefore, this Court holds that the Harbour Master's decision to deny berthing and permit only the continuation of the anchorage was a lawful and reasonable exercise of the discretion conferred on him by the SLPA Act and its Regulations. This Court further holds that, the decision of the Harbour Master referred to above was in fact in the best interests of the Colombo Port, and did not violate any obligation cast on Sri Lanka and its competent authorities towards MV X-Press Pearl.

Emergency response and firefighting assistance

647. The legal obligations imposed on the SLPA and the Harbour Master in relation to emergency response measures during a fire incident are set out across several provisions of the SLPA Act. In particular Section 7(1)(q), which grants the SLPA the power to *"provide such fire services both within any specified port and on the high seas, as may be deemed necessary by the Authority for the purpose of extinguishing fires on land, on sea or afloat and of preserving life and property"*.

648. Further, Section 84B(1) provides that *"In the event of fire breaking out on board any vessel in any specified port, the Harbour Master may proceed on board the vessel with such assistance and persons as to him seem fit, and may give such orders as seem to him necessary for scuttling the vessel or for removing the vessel or any other vessel to such place as to him seems proper to prevent in either case danger to other vessels and for the taking of any other measures that appear to him expedient for the protection of life or property".*

649. In addition, Section 84B(2) stipulates that *"If such orders are not forthwith carried out by the master of such vessel, the Harbour Master may himself proceed to carry them into effect".*

650. Section 44 authorises officers of the Ports Authority to board and inspect vessels for safety purposes, including fire prevention, and provides that *"An officer of the Ports Authority authorized by the Authority may, on producing, if so required, his authority, enter and inspect a vessel within the limits of any specified port or the approaches thereto to ascertain the charges payable on or in respect of the vessel or in respect of the goods carried therein, to obtain any other information required for, or in connexion with, the assessment and collection of charges and the loading and unloading of cargo from such vessel or to prevent or extinguish a fire".*

651. The Harbour Master's narration on the firefighting efforts is as follows:

(a) In the morning of 20th May 2021, at approximately 10:19 hrs, the Harbour Master received a written communication from the Local Agent of MV X-Press Pearl, operated by Sea Consortium Lanka (Pvt) Ltd, seeking permission to discharge and rework the container. This correspondence marked the first formal intimation to Sri Lankan authorities of a hazardous situation onboard the vessel.

(b) At approximately 01:00 hrs, a General Emergency Alarm was sounded onboard the vessel, and a fire was formally reported by the Master of the Ship to Port Control at 12:05 hrs, citing Cargo Hold no. 2 as the source and requested firefighting

assistance. This was the first definitive report of a fire to Sri Lankan authorities.

(c) By 13:00 hrs, the Master of the Ship indicated that the fire was "under control" and that CO_2 was used to suppress the fire and that boundary cooling was in progress. At 13:50 hrs, the Local Agent of the Vessel requested permission to deploy a surveyor appointed by the London Protection & Indemnity (P&I) Club to assess the damage and the hazardous cargo onboard. This request was approved at 13:56 hrs. At 14:05 hrs, the Harbour Master requested the bay plan of the vessel to determine the location of hazardous containers onboard.

(d) At 14:10 hrs, the situation escalated significantly on board, and the Master of the Ship informed Port Control that CO_2 supplies had been exhausted, temperatures were rising, and urgent firefighting assistance was required. This marked the first official request to Sri Lankan authorities for active intervention in the firefighting efforts.

(e) In response, the Maritime Rescue Coordinating Centre (MRCC) operated by the Sri Lanka Navy was activated. By 15:05 hrs, a joint team of officers from the Sri Lanka Ports Authority (SLPA), including the Deputy Chief Fire Officer and the Navy, boarded the vessel for an initial inspection. For further inspections, a team led by the Chief Fire Officer launched Pilot 14 and tug "Megha" at 16:55 hrs. At this time, direct access to the affected cargo hold was not possible due to dense smoke and chemical fumes.

(f) Later that night at 23:00 hrs, the Master issued a request for urgent shore-side firefighting assistance due to a deck fire. Firefighting efforts commenced by 01:20 hrs on 21st May and continued until 09:47 hrs, at which point additional tugs were deployed. The Sri Lanka Air Force (SLAF) was also mobilized with a Bell-212 helicopter to drop dry chemical suppressants on the vessel.

(g) At 09:47 hrs on the same day, the Harbour Master, Chairperson of MEPA, Commander (Western Naval Area) of the Sri Lanka Navy, and the Government Ship Surveyor was at the location of the vessel to examine the situation on board.

(h) At 15:03 hrs, the vessel's representatives confirmed to the Director General of Merchant Shipping that a professional salvage team had been engaged by them. The first of these, tug 'Posh Teal', arrived by 16:00 hrs, with the remainder of the team due on the next day.

(i) On 25 May 2021 at 04:15 hrs, Port Control was notified that the crew intended to abandon ship and between 05:15 and 05:30 hrs, they were successfully rescued by tug Hercules. Firefighting operations continued with the help of the SL Navy and Indian Coast Guard from 25.05.2021 until the fire was doused on 31.05.2021.

652. From the above sequence of events as narrated by the Harbour Master which is accepted by this Court, it is the view of this Court that at all times, necessary firefighting assistance had been rendered using all available material resources at the disposal of the Harbour Master, and that he had engaged in obtaining external firefighting assistance too. Thus, this Court is unable to agree with the submission made in this regard by the learned President's Counsel for the X-Press Pearl group, that there was inappropriate decision making, inaction and delay on the part of the Harbour Master that contributed towards the marine environmental pollution that was caused and the ultimate sinking of MV X-Press Pearl. In the circumstances, the action taken cannot be said to have fallen short of the Harbour Master's statutory obligations (in particular section 84A of the SLPA Act) as well as Sri Lanka's obligations under applicable international norms and standards.

Assistance in towing and salvage

653. Section 7(p) of the SLPA Act provides as follows:

> *"Subject to this Act, the Ports Authority may exercise all or any of the following powers;*
>
> *(p) to provide and use, within the territorial waters of Sri Lanka or otherwise, vessels and appliances for the purpose of protecting, guiding and communicating with vessels or towing and rendering assistance to any vessel or for recovering any property lost, sunk or stranded."*

This Court notes that the Sri Lanka Ports Authority rendered assistance as requested and as statutorily required, deploying vessels and appliances for the protection of the vessel in accordance with the law. In response to requests for firefighting assistance, the SLPA deployed several tugs equipped with firefighting capabilities, including the dedicated fire tug "Megha" and the Vessel "Pilot 14", both dispatched on 20th May 2021.

654. The Port was equipped with one dedicated fire tug and three berthing tugs with FIFI-1 firefighting capability. Additional resources, including the tugs "Bluster" and "Maha Oya", were later brought in under the operational command of SMIT Salvage who was engaged by the Owners of MV X-Press Pearl under Lloyds Open Forum of Salvage. The SLPA thereby fulfilled its statutory duty to provide assistance using vessels and equipment within its control.

655. While Section 7(p) permits the provision of towing assistance, it does not confer authority on the SLPA to decide whether, or when, a vessel should be towed. That decision was made under the direction of MEPA, in consultation with SMIT Salvage and the Sri Lanka Navy. Accordingly, SLPA's role in relation to towing was limited to emergency support rather than command or strategic decision-making.

Liability under the Marine Pollution Prevention Act

656. The Marine Pollution Prevention Act, No. 35 of 2008 (hereinafter referred to as the "MPPA") sets out the statutory framework governing the prevention, control, and response to marine pollution in Sri Lanka. Obligations under this Act are imposed both on the Marine Environment Protection Authority, as the regulatory body, and other relevant parties, as potential polluters.

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657. In terms of Section 3 of the said Act, the administration, management, and control of the Authority are vested in a Board of Directors. The Board comprises a total of ten (10) members, categorized as follows.

658. Three members are appointed by the Minister in charge of the subject of Environment. These individuals must, in the Minister's opinion, possess experience and demonstrated capacity in one or more of the areas of Shipping, Port operations, or Marine pollution prevention.

659. Seven members serve on the Board by virtue of the public offices they hold, or through their nominated representatives. These include;

I. Secretary to the Ministry in charge of Environment
II. Secretary to the Ministry in charge of Foreign Affairs
III. Secretary to the Ministry in charge of Finance
IV. Secretary to the Ministry in charge of Fisheries
V. Director of Merchant Shipping
VI. Commander of the Sri Lanka Navy and
VII. General Manager of the Marine Environment Protection Authority.

660. Section 6 of the Act lays down MEPA's statutory functions, which include, *inter alia*;

(a) to effectively and efficiently administer and implement the provisions of the Act and regulations made thereunder [s. 6(a)];

(b) to formulate and execute a scheme of work for the prevention, reduction, control and management of pollution from maritime sources [s. 6(b)];
(c) to take measures to manage, safeguard and preserve the territorial waters and coastal zones from pollution by oil or other harmful substances [s. 6(d)];
(d) to formulate and implement the National Oil Pollution Contingency Plan [s. 6(g)]; and,
(e) to take any action necessary to discharge these responsibilities [s. 6(j)].

661. In furtherance of these functions, MEPA is also vested with powers under Section 7 of the Act. These include *inter alia* powers of investigation, inquiring and institution of legal action in relation to pollution threats.

662. MEPA is also vested with powers under Section 9, to carry out any inspection and surveys. Such powers *inter alia* include;
(a) the power to board and inspect any vessel or offshore installation within Sri Lankan maritime zones, in consultation with the Director of Merchant Shipping [s. 9(2)];
(b) the authority to demand detailed information from the vessel's Owners, Agents, or Operators regarding ship condition, machinery, cargo, and fuel [s. 9(5)(a)];
(c) the right to inspect cargo records and order copies, or to verify compliance through onboard inspections [s. 9(5)(b),(c)];
(d) the power to order the removal or redirection of a ship suspected of contravening the Act or posing an imminent pollution threat [s. 9(5)(e)]; and
(e) the authority to order urgent pollution control or cleanup measures where actual or imminent discharge of harmful substances is detected [s. 9(8)].

663. Section 24 of the Act is particularly relevant to the matter at hand, as it sets out the powers that may be exercised by MEPA during a maritime casualty.

Under Section 24(1),
Where pollution is caused or there is an imminent threat of pollution, the Authority may give directions to the owner, operator, salvor or master of the ship, or any other person as appear to the Authority to be appropriate, to take such **urgent and immediate measures** in respect of the ship or its cargo prevent, mitigate, or eliminate pollution or the threat of pollution.

Such directions may require;

(a) The ship to be moved or removed from the area [24(2)(a)]
(b) The ship to be not moved from a specific area [24(2)(a)]
(c) That specific salvage measures are to be or are not to be taken [24(2)(c)]

664. If the directions issued under this section are proved to be ineffective or inadequate for preventing or mitigating the pollution or threat of pollution, the authority may;

(a) Undertake operations for sinking or destruction of the ship or any part of it [24(3)(a)]
(b) Undertake operations which may involve taking control of the ship [24(3)(b)]
(c) Undertake operations which may involve the loading unloading and discharge of oil [24(3)(c)]

665. Having discussed the statutory powers conferred by the MPPA upon MEPA, it is now necessary to assess whether these powers were exercised in accordance with the object and purpose of the Act. The conduct of the relevant parties will be examined under the following heads.

Duties of public authorities and State officials

666. The Court will consider whether MEPA and other public authorities carried out their responsibilities under the Act with appropriate care, timeliness, and authority. In particular;
    i. Whether the institutional arrangements in place were sufficient to support timely and effective decision-making.
    ii. Whether the directives issued under the Act were adequate and enforceable.

667. In order to fully evaluate the nature of MEPA's response, the Court considers it necessary to set out in brief the sequence of actions taken by MEPA during the relevant period. This chronology has been mainly drawn from the document "2A16" annexed to the Affidavit of the Former Chairperson of MEPA dated 14.06.2024, and other pleadings before Court.

20th May 2021

668. MEPA received information from the Sri Lanka Navy regarding a fire onboard the MV X-Press Pearl, located 9.5 Nautical miles from the Colombo lighthouse. At 4:00 p.m., all officers of MEPA were informed via its official WhatsApp group. MEPA took the decision to activate Phase I of the National Oil Spill Contingency Plan (NOSCOP). The Incident Management Team (IMT) was instructed to stand by for any oil or hazardous spill response. A Zoom meeting was held at 6:00 p.m. to share the available data and discuss next steps.

21st May 2021

669. At 09:47 hrs, The Government Ship Surveyor boarded the vessel along with the Harbor Master, Chairman of MEPA, and Commander (West) of the Sri Lanka Navy along with MEPA officers. The MEPA team collected water samples, investigated, and photographed the affected areas. MEPA informed authorities including the ship's owner and London P&I Club to submit the progress of the actions taken in relation to the incident.

670. By 2:00 p.m. MEPA issued its first directive to the Master / Owner / Agent under Section 24 of the MPPA, to take urgent action to control or extinguish fire on board, avert any potential chemical and bunker oil spill, obtain assistance of foreign experts if it is evident that the capacity of the local stakeholders is not sufficient to manage the situation, make necessary contingency arrangements to respond to chemical or oil spills, to tow away the vessel if the situation got out of control.

22nd May 2021

671. At 8.30 a.m., the WRS Team visited the accident area to collect water samples for testing by ITI. At 10.00 a.m., MEPA held an IMT meeting where it was decided to involve NARA, use NARA's historical data, and prepare to deploy SLPA booms in case of emergency. It was also suggested that the ship be towed out of Sri Lankan waters if the fire escalated. A meeting was held at 4.00 p.m. with SL Navy, MET Dept, NARA, and DMC to finalize a suitable location of refuge for the ship. Letters were sent to the ship Agent urging urgent fire control measures.

23rd May 2021

672. At 12.05 p.m., a police complaint was filed to initiate legal action against the Captain and other responsible parties under Section 25.

24th May 2021

673. At 8.00 a.m., a meeting of the IMT was held followed by a 9.00 a.m. internal planning session to define technical responsibilities. MEPA finalized the action plan via Zoom.

25th May 2021

674. Between 7.00 – 8.00 a.m., a blast occurred onboard the vessel, reigniting the fire. IMT was notified, and a discussion was held to determine further action.

675. The Second Directive was issued to the vessel which, in addition to the directions contained in the First Directive, included instructions to tow the vessel seaward, perpendicular to the coastline, up to a distance of 50 Nautical miles from its current location if the situation could not be managed from that position. If the situation escalated beyond the control of those in charge, the vessel was to be towed out of Sri Lankan waters.

676. At 11.00 a.m., further letters were sent to the DMC and Fisheries Department to warn the fishing community. The Chairperson also held a meeting with SL Navy and informed SACEP, requesting member state assistance. Harbor police were requested to record statements from the ship crew.

26th May 2021

677. A beach survey was conducted from Poruthota to Uswetakeiyawa. The Chairperson sent a letter to the Director General of the Disaster Management Centre (DMC) requesting safety awareness programmes for the community in response to the X-Press Pearl incident. A cleanup at Kepungoda beach followed at 10.00 a.m. A beach survey from Negombo to Uswetakeiyawa identified 10 heavily polluted sites. A requirement plan was submitted to DMC and IMT. Sri Lankan Coast Guards (SLCG) conducted beach cleanups in the Ma-Oya mouth area.

27th May 2021

678. Shoreline assessments and beach cleanups began at six sites with support from the Air Force, Navy, and Army. A team was deployed to clean 12 selected sites. A high-level meeting with the Minister and government officers resulted in the formation of a High-Level Committee. Simultaneous cleanup operations continued, using three containment booms from SLCG, SLTA, and MEPA. A 40x10 ft container was placed in Sarakkuwa for logistics, and a regional office was set up in Poruthota/Sarakkuwa. At 2.45 p.m., another meeting with ITOPF was held.

28th May 2021

679. Operations were reviewed, and supplies were distributed to all sites. Site coordinators reported to 9 locations by 8.30 a.m.. By 10.00 a.m, MEPA coordinated with CEA to ensure 20 waste containers were delivered to M & Y Company to dispose of waste. Containers were reported to have fallen into the sea and reached Kalutara and Moratuwa beaches. MEPA instructed local police and Divisional Secretaries to secure the debris for later retrieval. Online forms were created to streamline site needs, and a WhatsApp group was set up for coordinators. Cleanup teams of 40 from the Coast Guard and 30 from the Navy were deployed to various coastal sites from Dehiwala to Galle Face. Waste disposal arrangements were coordinated with the SLGC. At 1.40 p.m., a boom was placed at Negombo mouth. An expert committee meeting was held at 8.30 p.m..

29th May 2021

680. At 5.30 a.m., the Navy was contacted for updates; MEPA sent a voyage report to the Chairperson. The Chairperson of MEPA invited ITOF for technical advice in all aspects of pollution responses. IMT was asked to carry out sea and air surveys. MEPA contacted Dockyard for 500 jumbo bags for cleanup purposes. An expert committee meeting was held again at 8.30 p.m..

30th May 2021

681. At 8.00 a.m., cleanup operations began in 21 sites. 30 Army personnel were redirected to more affected areas such as the Negombo Lagoon. Municipal tractors were deployed at Beach Park and Poruthota, where multiple containers were actively being filled with collected waste, including at the fish market and Dungalpitiya.

682. MEPA requested a beach cleaning machine for Kepungoda, and the CEA was informed to assist. Cleanups continued in Midigama and Siriwardenapura, where 30 Army personnel were engaged. At 11.00 a.m., the Chairperson informed the Inspector General of Police (IGP) about

MEPA's authority under Sections 7(B) and 7(N) of the MEPA Act. The Chairperson requested assistance from the Attorney General to initiate legal action. A meeting was held at the Attorney General's Department with relevant stakeholders. By 4.00 p.m., the Attorney General instructed the IGP to proceed with investigations into the X-Press Pearl incident based on MEPA's findings.

31st May 2021

683. MEPA coordinated with the CEA for further beach clean-up.

684. At 9.12 a.m., the Chairperson formally declared that the MV X-Press Pearl had polluted Sri Lankan waters with harmful substances, under Section 49 of the MEPA Act. Killiney Shipping (Pvt.) Ltd. was officially notified. The Merchant Shipping Secretariat instructed the ship be towed to a safe location outside Sri Lankan waters.

685. The Chairperson requested support for scientific research and damage assessments from the DG of Wildlife Conservation, the Departments of Meteorology and Fisheries, the Ministry of Health, CEA, NBRO (National Building Research Organization), and NARA.

686. A meeting was held with CEA directors on waste management. Simultaneously, the Navy submitted a cost report for fire suppression to the Attorney General and MEPA.

687. MEPA reviewed financial and operational progress related to pollution prevention. MEPA also requested the Coast Guard to open the boom across the Negombo estuary bridge to allow fishing boats to pass following the lifting of a temporary ban.

1st June 2021

688. At 6.30 a.m., MEPA contacted the Navy to ascertain the status of the vessel. By 8.00 a.m., communication was established with Contact

Management to obtain quota approvals for security forces' participation in operations.

689. A meeting chaired by the then President of the Republic was held with the then Minister of Ports and Shipping, Minister of Fisheries, the Honourable Attorney General, Secretary to the President, Defence Secretary, officials of the SLPA, the Chairperson of MEPA and several other officials participating. The President instructed to immediately tow the vessel into the deep waters away from the coasts of Sri Lanka.

690. Consequent to that meeting, MEPA issued the 3rd directive under Section 24 to the Salvage Master to move the vessel 50 Nautical miles away from the Sri Lankan coast.

691. At 11.00 a.m. CID recorded statements from the MEPA Chairperson and Deputy General Manager. By 4.30 p.m., the Navy's Director General Operations reported the ship was sinking, with water entering the engine room. No active oil spill was observed, and although the fire was controlled, smoke persisted. Air force patrolled the coastal line from Puttalam to Kalutara and observed an oil spill. At 5.30 p.m. it was informed that water started filling the engine room.

2nd June 2021

692. An internal meeting at 8.00 a.m. focused on oil spill response, followed by an IMT meeting. During this session, the Chairperson submitted MEPA's interim claim for damages from 20th May to 1st June, to the Attorney General.

693. MEPA issued the 4th directive under Section 24 to the Salvage Master to take immediate and urgent steps to evaluate the risk and take appropriate steps to avoid further damages to the marine environment and coastal areas.

694. At 10.40 a.m., Navy Command confirmed that the ship had grounded and there was an oil spill around it. By 10.48 a.m., MEPA was exploring the use of dispersants and advised to deploy booms. At 10.55 a.m., DGM highlighted the need for two vessels, and the Navy was asked to encircle the vessel with booms.

695. At 11.35 a.m., the ship was reportedly being towed. MEPA's financial cost estimate was reported at around USD 4 million. By 1.35 p.m., the IMT team was briefed on precautionary measures for oil spill response.

696. At 4.33 p.m., CPSTL (Ceylon Petroleum Storage Terminals Ltd.) was asked to remain ready. By 5.00 p.m., the CPC's offshore boom was returned due to rough seas. Letters were sent to CPSTL requesting more boom equipment. At 5.25 p.m., the Ministerial Secretary instructed MEPA to prepare all available booms for use. An Expert Committee meeting was held again at 8.30 p.m. to evaluate the situation and response.

Marine Environmental Council

697. Through the *Gazette Extraordinary* dated 09.08.2020, the State Minister of Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness has been vested with the authority to assist in the formulation of policies relating to Urban Development, Coast Conservation, Waste Disposal, and Community Cleanliness, with the stated objective of creating "Modern Cities and a Clean Country." This role is to be carried out under the direction and guidance of the Minister of Urban Development and Housing, in conformity with the applicable Laws, Acts, and Ordinances. The Minister has also been entrusted with the implementation, monitoring, and evaluation of projects and functions under the National Budget, State Investment, and National Development Programme, including oversight over several Departments, State Corporations, and Statutory Organizations. Among the institutions placed within the scope of the Minister's duties is the Marine Environment Protection Authority (MEPA). According to

available material, at the time of the MV X-Press Pearl incident, the State Minister (who functioned as the Minister) for Urban Development, Coast Conservation, Waste Disposal, and Community Cleanliness was, Dr. Nalaka Godahewa, MP.

698. Section 14(1) of the Marine Pollution Prevention Act, No. 35 of 2008 imposes a Statutory obligation to establish an advisory body titled the Marine Environmental Council. The operative language of the Section reads that "*There shall be established a Council which shall be called the Marine Environmental Council…*". The use of the mandatory term "shall" in the context of institutional creation leaves no room for discretion.

699. The composition of the Council is likewise prescribed by law as follows;

Ex Officio Members (or their representatives):

(a) Secretary, to the Ministry in charge of the subject of Planning
(b) Secretary, to the Ministry in charge of the subject of Industries
(c) Secretary, to the Ministry in charge of the subject of Tourism
(d) Secretary, to the Ministry in charge of the subject of Foreign Affairs
(e) Secretary, to the Ministry in charge of the subject of Ports
(f) Secretary, to the Ministry in charge of the subject of Shipping
(g) Secretary, to the Ministry in charge of the subject of Petroleum and Petroleum Resources Development
(h) Director, Coast Conservation Department
(i) Chairman, Central Environmental Authority
(j) Chairman, Ceylon Petroleum Corporation
(k) Director-General, Department of Fisheries

(l) Director-General, Department of Wildlife Conservation
(m) Director-General, Disaster Management Centre

Nominated Members:

(a) Two academics from higher educational institutions specializing in environmental protection or marine pollution, nominated by the Chairman of the University Grants Commission.
(b) A senior officer of the Ceylon Association of Ships Agents, nominated by its chairman.
(c) Two members from registered environmental NGOs, nominated by the Minister.

Chairperson of the Council (Section 14(2)):

- The Minister shall appoint one of the members of the Council to serve as the Chairman.

Functions of the Council (Section 14(3)):

- The Council is an advisory body to the Marine Environment Protection

Authority (MEPA):

(a) To advise the Authority on matters relating to its powers, duties, and functions.
(b) To advise the Authority on any matters referred to it by the Authority.

700. The prevention and response to marine pollution involves scientific, technical, legal, and socio-economic considerations that no single authority, including MEPA, can address in isolation. Parliament has accordingly provided for a multi-sectoral and expert-based mechanism to support MEPA in discharging its Statutory functions.

701. Due to the absence of the Marine Environmental Council during the MV X-Press Pearl disaster MEPA could not obtain the cross-sectoral advice that Parliament had originally intended through the statute. While MEPA did convene an expert committee after the disaster, it lacked a legal mandate, and had no established protocols of conduct. As provided in page 43 of 'The Select Committee of Parliament to investigate into and make suitable recommendations relating to the disasters caused by 'New Diamond' and 'X-Press Pearl' vessels in the maritime zone of Sri Lanka', the said Expert Committee consisted of the following members:

1. Prof. Ajith de Alwis, Dean, Faculty of Graduate Studies, University of Moratuwa
2. Prof. Prasanthi Gunawardena, Department of Forestry and Environmental Sciences, University of Sri Jayawardanepura
3. Prof. Ruchira Cumaranathunga, Emeritus Professor, University of Ruhuna
4. Mr. H.D.S. Premasiri, Director, National Building Research Organization
5. Dr. Palitha Kithsiri, Director General, NARA
6. Dr. Menuka Udugama, Senior Lecturer, Department of Agribusiness Management, University of Waya.m.ba
7. Dr. Shyamalee Weerasekara, Head, Environmental Studies Division, NARA
8. Mr. Upul Liyanage, Senior Scientist, NARA

702. It should be noted that, while the Committee consisted of renowned academics of the field, it did not consist of the statutorily identified officials and therefore lacked the institutional coordination that the Act intended the Council to provide.

703. The findings of the Parliamentary Select Committee referred to above, contains a reference to the following shortcoming. That being, the

handling of the incident lacked institutional structure and went on to note that the Council, which was required under Section 14, had not been established at the time.

704. In assessing the legal significance of this omission, it is necessary to recall that Statutory duties imposed for the protection of the environment and public health must be treated with seriousness. The failure to comply with Section 14 deprived the State of an instrument designed to enhance both readiness and response capacity in the face of marine environmental emergencies.

705. In addition to the duties relating to the establishment of the Marine Environmental Council, the Minister's supervisory responsibilities under the Marine Pollution Prevention Act are set out in Section 52 of the Statute. This provision empowers the Minister to issue general or special directions to the Authority in writing, for the purpose of giving effect to the principles and provisions of the Act. The Authority is required to comply with such Directions. Further, Section 52(2) allows the Minister to call for periodic returns, accounts, and other information regarding the property and operations of the Authority, while Section 52(3) permits the Minister to initiate inquiries into the Authority's activities through a designated person.

706. In circumstances involving a marine pollution emergency of the magnitude of the MV X-Press Pearl disaster, it is noted that there is an absence of any such directions or orders from the Minister under Section 52. There is no material before the Court to indicate that the Minister issued any written directions to MEPA in the lead-up to, or during, the incident. Nor is there any record of an inquiry being commissioned under subsection (3), despite the scale of the damage and public interest involved.

707. The public consequences of this omission are also manifest. The damage to Sri Lanka's coastal waters and marine ecosystems arising from the X-

Press Pearl disaster was substantial. Communities dependent on fisheries suffered loss of livelihood; environmental contamination disrupted ecosystems and affected public health. Therefore, the failure to establish the Council is a lapse that materially impaired the State's capacity to mitigate such harm.

708. In this context, the omission to invoke the statutory supervisory mechanisms under Section 52, read in conjunction with the failure to establish the Marine Environmental Council under Section 14, has led to a breach of the statutory duty vested in the State Minister.

Adequacy and enforceability of directives

709. The MPP Act empowers the MEPA to issue directives in the event of a maritime casualty that causes or is likely to cause pollution. Section 24(1) of the Act allows MEPA to direct the ship's Owner, Master, Salvors, or other responsible parties to take "urgent and immediate measures" necessary to prevent or mitigate pollution.

710. It is important to note that the law requires that these directives be specific. Section 24(2) provides that directions "may require" actions be taken such as moving the ship to a specified place (or out of a specified area), prohibiting movement in a certain area or route, handling cargo in a specified manner, or taking "specified salvage measures". The emphasis on the directions being "specified" indicates that any directive under this section should clearly state what must (or must not) be done. In other words, the directives should be detailed,clear and unambiguous.

711. In this case, MEPA has issued a series of directives under Section 24(2). According to the Affidavit of the former MEPA Chairperson, a total of 14 directives were issued under the Act, 10 of which were directed at the ship Owners and related parties. This Court notes that, between the commencement of the incident on 20th May 2021 and the vessel's sinking on 2nd June 2021, only three written directives were issued. The content of these initial directives can be summarised as follows:

First Directive issued on 21/05/2021 (marked "6R10"):

(a) Take urgent action to control/extinguish fire on board to avert toxic air emission.

(b) Take all necessary actions in order to avert any potential, chemical and bunker oil spill/ leakage in our waters.

(c) Obtaining the assistance of foreign experts, it is evidence that the capacity of the local stakeholders is not sufficient to manage the situation.

(d) It is the advice of this Authority to tow away the vessel away from Sri Lanka waters, if the situation gives beyond out of control, which might pose a severe threat to the environment, port operations, human health and socioeconomic activities of the country at large, after having taken all the appropriate measures as mentioned above.

Second Directive issued on 25/05/2021 (marked "6R10"):

(a) Take urgent action to control/extinguish fire on board to avert toxic air emission.

(b) Take all necessary actions in order to avert any potential chemical and bunker oil spill/leakage in our waters.

(c) Obtain the assistance of foreign experts, if it is evident that the capacity of the local stakeholders is not sufficient to manage the situation.

(d) Make necessary contingency arrangements to respond to any possible chemical or oil spill.

(e) If the situation cannot be handled in the current location, tow it towards the sea perpendicular to the land from the present location up to 50 nautical miles.

(f) It is the advice of this authority to tow away the vessel away from Sri Lanka waters, if the situation goes beyond out of control, which might pose a severe threat to the environment, port operations, human health and socioeconomic activities of the country at large, after having taken all the appropriate measures as mentioned above.

Third Directive issued on 01/06/2021 (marked "6R13b"):

> *In terms of the power vested in me under section 24 of the Marine Pollution Prevention Act No.35 of 2008, I direct you Capt. Jan William Duit, Senior Salvage Master of SMIT salvage b.v.o move to remove the ship to a location 50 nautical miles western from the present location. This has to be done immediately without any further delay.*

712. MEPA did exercise its statutory powers by issuing these three directives prior to the ultimate sinking of MV X-Press Pearl. However, what this Court needs to examine is whether such directives were appropriate in the circumstances, specific and sought to be enforced as required by the Act.

713. The first two directives (21st May and 25th May) have been framed in broad and general terms and not using detailed language. Though the phrasing suggests a sense of urgency by the use of terms such as "take urgent action" to fight the fire and "take all necessary actions" to prevent spills, the directives stop short of identifying any specific measures. As a result, the determination of what amounts to "urgent" or "necessary" action was left entirely to the discretion of the vessel's Operator and the Master and the rest of the crew.

714. The same observation applies to the recommendation that "foreign experts" be engaged if local capacity was found to be insufficient. This, too, was conditional and indeterminate. It did not specify any timeframe within which such an assessment was to be carried out. Nor did it identify which aspects of local capacity were to be evaluated for adequacy.

715. When viewed in the context of a rapidly escalating emergency, the adequacy of these directives, both in terms of timeliness and content, becomes a matter of concern. This Court notes that between 20th May, when the fire began, and 25th May, only two directives were issued, neither of which contained firm instructions. The first decisive directive

ordering the ship to be moved 50 Nautical miles off shore "immediately" was only issued almost twelve (12) days after the fire had broken out, on 1st June. However, the 1st June directive is not an independent decision of the Authority but was issued pursuant to a direction given by His Excellency the President. By that stage, the condition of the vessel had deteriorated to such an extent that its fate was, for all practical purposes, already determined.

716. By that time, the engine room of the ship was flooded, and its stability had been compromised, which ultimately caused the towing attempt to fail and the ship sinking. While the decision to tow the vessel will be addressed in detail at a later point in this Judgment, it is sufficient for present purposes to observe that MEPA did not appear to have imposed any specific preventative measures prior to that point. Nor did it initiate relocation of the vessel, while such an action could still have been effective.

717. Section 25(2)(a) of the Marine Pollution Prevention Act imposes criminal liability for failure to comply with any direction issued under Section 24. In such circumstances, it is incumbent upon the Authority to ensure that any directive issued is framed with a degree of clarity and specificity sufficient to support such action and determine the scope of the obligations.

718. This Court is mindful that legal responsibility for non-compliance must be established on the evidence. However, the legal standard applicable to directives with penal consequences requires that such documents should set out what is required of the recipient with sufficient precision.

719. As recognized in ***Miller-Mead v. Ministry of Housing and Local Government [1963] 2 QB 196***, (A UK case on an enforcement notice), "*This is a most important document, and the subject, who is being told he is doing something contrary to planning permission and that he must remedy it, is entitled to say that he must find out from within the four corners of the document*

exactly what he is required to do or abstain from doing. For this is the prelude to a possible penal procedure. It is comparable to the grant of an injunction and it is perfectly plain that someone against whom an injunction is granted is entitled to look only to the precise words of the injunction to interpret his duty".

720. The former Chairperson of MEPA, who issued these directives has taken up the position that, had the Owner or Operators of the vessel intended to comply with the Directive in a meaningful way, they ought to have arranged for a qualified ship surveyor to assess the vessel's structural condition before any towing commenced. This, it was said, was a necessary step given the compromised state of the ship, which MEPA claims was already unseaworthy upon entering Sri Lankan territorial waters.

721. It is evident from MEPA's own submissions that the vessel was in a compromised condition and that no qualified surveyor had examined its structural integrity prior to the commencement of towing operations. If the Authority was aware of these deficiencies at the time, it is difficult to accept that its only course was to observe these shortcomings in hindsight.

722. The Authority had statutory powers at its disposal which could have been invoked to address these risks proactively. Among these is the power conferred by Section 24(3) of the Marine Pollution Prevention Act, which permits the Authority to undertake necessary operations where, in its opinion, the directions issued under this section are ineffective or inadequate for preventing, mitigating, or eliminating pollution or the threat of pollution. These operations may include taking over control of the ship or, where warranted, measures resulting in its sinking or destruction.

723. In addressing this issue, the former Chairperson of MEPA submitted that Section 24(3) can be only invoked if, in the opinion of the Authority, the directions given under section 24(2) are 'proved' to be ineffective or

inadequate. Therefore, until it could be 'proved' that the directions were not complied with by the officers of the vessel, MEPA could not have taken action by themselves. Submissions made on her behalf further stated. that the Authority has instituted actions against the officers of the vessel for not complying with the directives.

724. However, this Court is not of the view that the power under Section 24(3) is contingent upon proof of non-compliance. The statutory composition does not require a formal finding or an evidentiary threshold. It is sufficient proof if, in the opinion of the Authority, the directions issued are not achieving their intended result. The provision is framed to permit regulatory intervention based on practical ineffectiveness, not legal default. In other words, even if the vessel had taken steps in compliance with the directives, the Authority was nonetheless empowered to act where those steps were, in its judgment, inadequate to prevent or contain pollution.

725. The framers of the Statute appear to have recognised that during maritime emergencies, conditions may deteriorate rapidly, and the effectiveness of earlier directions may diminish with time or changing circumstances. In such situations, the Authority is expected to reassess its approach and take direct control where needed to avert environmental harm.

726. The disaster on board MV X-Press Pearl developed over a period of time, during which the condition of the vessel progressively deteriorated. By the time decisive action was taken, the ship had already sustained extensive damage.

727. The power under Section 24(3) was crafted to fill precisely such gaps in regulatory response. It was to ensure that the failure of prior directions, whether due to insufficiency or other practical limitations, does not leave the Authority without recourse, in circumstances such as those presented

in this case, where time is of the essence and indecision may result in irreversible harm.

728. On a consideration of the material before Court, there is no indication that the Authority considered invoking its power under Section 24(3), despite its assessment that the ship posed a serious and ongoing threat to the marine environment. No explanation has been provided to suggest that the Authority assessed the effectiveness of its directions in light of the vessel's deteriorating condition or that it considered invoking the powers expressly granted for that eventuality.

729. During submissions, it was also stated that had the Authority directed a single course of action and had such an operation resulted in an explosion or any adverse outcome, the shipowner might have relied on that directive as a basis to absolve themselves of liability. For this reason, it was argued that the burden of selecting the appropriate course of action was left to the discretion of the shipowner.

730. This Court is of the view that such an approach cannot be accepted as a justification for the failure to make firm decisions where the statute expressly requires the authority to act proactively. The decisions of a regulatory authority in the context of an environmental emergency should prioritize public safety and environmental protection. They cannot abdicate their Statutory mandate based on what a polluter may later argue in its defense.

731. A failure to exercise statutory power based on extraneous considerations is not a proper exercise of its discretion and undermines the object and purpose of the statute.

732. Section 24(2) contemplates that directions issued by the Authority will be specific and as an administrative decision, such directives are expected to be clear, enforceable, and proportionate to the seriousness and urgency of the situation. The discretion conferred by the Statute must

be exercised in furtherance of its object and purpose. On the evidence presently before the Court, it appears that MEPA did not discharge this duty in a manner consistent with its Statutory obligations.

733. It is also relevant to consider the substance and progression of the directives issued by the Authority. The first two written directives, dated 21st May and 25th May, are substantively similar in both tone and content. Both contain general instructions to extinguish the fire, take steps to control pollution, engage foreign experts, and if the situation becomes unmanageable, to tow the vessel away from Sri Lankan waters. While the second directive includes a more explicit instruction to relocate the vessel 50 Nautical miles perpendicular to the shore, this addition does not materially alter the overall nature of the instructions, nor do they indicate a shift in strategic approach considering the evolving crisis.

734. From 25th May onwards, no further written directives appear to have been issued until 1st of June. Such a directive instructed the salvors to tow the vessel 50 Nautical miles westward and was issued following a direction from His Excellency, the President.

735. The timeline suggests that the Authority, despite being Statutorily empowered to monitor and respond to such incidents, did not evolve its instructions to meet the changing circumstances. There is no material before this Court to indicate that MEPA assessed the efficacy of its earlier directives or made any timely effort to revise or supplement them as the risks intensified.

736. In the context of a developing maritime emergency, the failure to adjust directives in real time is a matter of concern. The Marine Pollution Prevention Act imposes on MEPA a continuing duty to prevent, mitigate, or eliminate marine pollution. This responsibility is not discharged by issuing a general directive at the outset of an incident and thereafter remaining passive. Rather, the scheme of the Act contemplates an active and adaptive regulatory role, with decisions being made in response to

the factual and technical developments on the ground. The absence of such adaptation during a period of clear escalation is a failure to discharge the duties entrusted to the Authority.

Liability of the Chairperson of MEPA

737. The former Chairperson of MEPA served as the statutory head of the Authority during the relevant period and was responsible for directing its response to the X-Press Pearl disaster. As the person presiding over a multi-member body vested with powers under the Marine Pollution Prevention Act, the Chairperson was expected to lead the Authority in accordance with the institutional structure established by statute. Even though the Covid-19 pandemic which prevailed at the time of this incident and the ensuing lockdown imposed to curtail the spread of the pandemic is likely to have served as an impediment towards mobilisation of the personnel of MEPA and its functions, this Court is mindful that the Chairperson of MEPA had secured the opportunity of visiting the Colombo Port and had also participated in the site inspection visit to the vessel which took place in the evening of the 21st May 2021. Thus, it is the view of this Court that the prevalence of the pandemic does not appear to have caused a significant obstacle towards the discharge of the functions of the Chairperson of MEPA. Furthermore, what this Court is examining is not her operational activities, but the discharge of the statutory functions imposed on MEPA by the Marine Pollution Prevention Act. This Court also notes that while it is evident that she was proactive in issuing directives, the question before this Court is not whether she issued such directives, but performed her duties in the manner the law required.

738. The statute confers decision-making power on the Authority as a body, not on its chairperson acting alone. The composition of MEPA's Board includes ex-officio members from ministries with subject expertise in environment, defence, finance, foreign affairs, fisheries, disaster management, and coastal conservation. These appointments are deliberate, and they reflect a legislative understanding that decisions

made in environmental emergencies require input from multiple agencies.

739. In her Affidavit, the Chairperson stated that "based on my authority under the Marine Pollution Prevention Act (MPPA), and without waiting for external advice, I had previously issued two directives". This admission is significant. While intended to convey urgency, it instead illustrates a clear departure from the collective decision-making structure that the statute requires.

740. As discussed in the preceding analysis, Section 24(3) of the MPPA, allows the Authority to take over control of a vessel or initiate more drastic measures if earlier directives prove to be ineffective. That power can only be exercised if, in the opinion of the Authority, prior directives are not achieving their intended result. However, there is no evidence that the Authority met to consider this possibility. The Chairperson did not bring this matter before the Board, nor did she call for a reassessment of the Authority's approach, despite being able to do so.

741. The submission made by the Attorney General, that the Board ratified her actions subsequently does not cure this failure. There is no prohibition against ratification under the statute. However, timing in matters of this nature is important. The powers under Section 24(3) are designed to be used in response to a changing situation where prior steps are no longer adequate. The judgment required by law is one that must be made in real time. A subsequent ratification cannot replace a statutory opinion that was never formed when it was necessary.

742. The failure to activate the Board also deprived the Authority of the benefit of informed institutional deliberation. The urgency of the situation is not in dispute; decisions made during a crisis must still be grounded in due process. In fact, the greater the potential consequences, the more important it is that such decisions are carefully assessed and lawfully authorized in keeping with the required statutory provisions.

743. In assessing the responsibility of the former Chairperson of MEPA, it is important to recognize that statutory duties imposed on public authorities are not optional, and failure to discharge such obligations invites consequences both institutional and individual. In ***Dr. B.L. Wadehra v. Union of India***, the Supreme Court of India held that;

> *"We have no hesitation in observing that the MCD and the NDMC have been wholly remiss in the performance of their statutory duties. Apart from the rights guaranteed under the Constitution the residents of Delhi have a statutory right to live in a clean city. The courts are justified in directing the MCD and NDMC to perform their duties under the law. Non-availability of funds, inadequacy or inefficiency of the staff, insufficiency of machinery etc. cannot be pleaded as grounds for non-performance of their statutory obligations"* (***Dr. B.L. Wadehra v. Union of India, (1996) 2 SCC 594, at 598).***

744. In supporting this decision, the Court in Dr. B.L. Wadehra cited with approval ***Municipal Council, Ratlam v. Vardhichand***, wherein it was observed that the;

> *"…officers in charge and even the elected representatives will have to face the penalty of the law if what the Constitution and follow-up legislation direct them to do are defied or denied wrongfully. The wages of violation is punishment, corporate and personal"* (***Municipal Council, Ratlam v. Vardhichand, (1980) 4 SCC 162, at 174***).

745. **This Court finds that the Chairperson failed to convene the Board of Directors of the Authority when it was required, failed to obtain the views of the members specifically appointed to guide such decisions, and failed to assess the effectiveness of the measures already taken in light of the worsening emergency.** These omissions prevented the Authority from taking a more decisive and legally grounded course of action.

Decision to tow the vessel

746. It has been submitted by MEPA that the decision not to immediately tow the X-Press Pearl was influenced by concerns regarding the vessel's structural integrity, the volatile nature of the hazardous cargo onboard, and the potential risk of explosion during any towage attempt. The State emphasized that directing relocation without extinguishing the fire or assessing the ship's seaworthiness could have resulted in more widespread pollution or further catastrophe.

747. The Court also takes note of the MEPA Chairperson's Affidavit dated 1st November 2022, which clarifies that the question of a place of refuge was considered by the relevant authorities. According to paragraph 15.2 of the Affidavit, at a special meeting convened on 22nd May 2021 with participation from MEPA, the Sri Lanka Ports Authority, Navy, Department of Fisheries, and other stakeholders, a specific offshore location was mutually agreed upon as a potential place of refuge. This site was approximately 50 Nautical miles westward from the vessel's then position and was identified as posing the least environmental and navigational risk.

748. As a preliminary matter, the Court acknowledges that the IMO Guidelines on Places of Refuge for Ships in Need of Assistance (Resolution A.949(23)) do not create binding legal obligations on coastal States. Nonetheless, they can be considered as a reflection of international best practices in decision-making. Accordingly, the Court will refer to these Guidelines as a relevant benchmark to assess the procedural sufficiency and reasonableness of the State's conduct. Specifically, the following.

749. Paragraph 3.4 urges coastal States to establish procedures to receive and act on refuge requests "with a view to authorizing, where appropriate, the use of a suitable place of refuge."

750. Paragraph 3.5 calls for an "objective analysis" of the relative risks of permitting or refusing access to refuge.

751. Paragraph 3.11 requires a comparative evaluation between leaving the vessel at sea and moving it closer to shore.

752. Paragraph 3.12 reiterates that, while there is no absolute obligation to grant refuge, authorities "should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible."

753. Appendix 2.2.2 further instructs States to consider meteorological and oceanographic conditions, including whether the proposed refuge offers protection from heavy winds and rough seas.

754. The question before this court is not whether the authorities were under a strict duty to permit refuge, but whether their actions were guided by a risk-informed, structured, and timely decision-making. The Court notes that no supporting technical assessment has been produced to demonstrate the basis on which this location was selected over other potential sites away from the adverse monsoon weather conditions that prevailed. In this regard, the Court further observes that no evidence has been placed before court regarding comparative risk analysis informing the selection of the 50-nautical-mile location. The record does not reflect any documentation from MEPA, the Ports Authority, or the Navy assessing the relative risks associated with remaining at the initial site versus relocating to other potential refuges. The omission of such analysis raises concern as to whether the choice of the place of refuge was a result of risk-informed deliberation or merely an administrative consensus reached in principle.

755. It is relevant to note that although a meeting was held on 22nd May, the directive concerning the 50-nautical-mile tow was not issued until 25th May. Even then, the instructions were given in conditional and somewhat discretionary terms. The sequence of events presented before

the Court indicates that, had the authorities acted with greater urgency in giving directions to move the vessel to the designated offshore location, it could have been possible that the conditions for firefighting and salvage would have been significantly improved, potentially reducing cargo loss and mitigating the risk of marine pollution. While definitive causation cannot be established, the lack of a prompt and proactive response in the face of an escalating crisis undermines the reasonableness of the conduct of MEPA.

756. As discussed before, the ultimate directive to tow the vessel was delivered on the 1st of June, following the recommendations of His Excellency the President. However, at that point, the ship was not in a position to be moved. The ultimate consequence of MEPA's failure to act decisively with respect to the towing of the MV X-Press Pearl is stark. Despite repeated internal acknowledgments of the vessel's danger and the formal identification of a refuge point at sea, the ship was never relocated in time. It sank within Sri Lankan territorial waters. Any earlier justifications for delay no longer matter. In the end, the risk that towing might worsen the situation came to pass anyway, not because the ship was moved, but because it was left in place.

757. This Court observes that the law clearly empowered MEPA to act. It did not need to wait for instructions. The Marine Pollution Prevention Act does not assign MEPA a passive role. It places on the Authority the responsibility to act urgently and immediately when there is a threat to the marine environment. By the time MEPA issued an enforceable directive, the matter had moved beyond human control. The issue here is not simply about delay. It is about the outcome when an agency acts in the face of a clear legal duty. When the law requires timely and specific action to prevent environmental damage, failure to act, whether due to caution, indecision, or deference, must be recognized as what it is a breach of duty. **For the foregoing reasons, the Marine Environment Protection Authority and its Chairperson (6th Respondent in SC FR 277/2021) are held to be jointly and severally liable for the non-**

compliance with their statutory obligations in the manner they were required to fulfil such obligations in relation to the incident surrounding MV X-Press Pearl.

Role of International Tanker Owners' Pollution Federation

758. The material placed before this Court indicates that the International Tanker Owners Pollution Federation (ITOPF) was engaged in the response to the MV X-Press Pearl incident at an early stage. This engagement appears to have been initiated by both the Sri Lankan authorities and the vessel Owners. According to the Affidavit of the then Chairperson of MEPA, ITOPF's involvement was prompted by an official of the International Maritime Organization (IMO), in response to a request for technical assistance made during the MT New Diamond incident. Pursuant to this advice, MEPA sought and obtained the requisite approval of His Excellency the President on 26th May 2021 (document marked 6R-7(b)). Thereafter, on 29th May 2021, the Chairperson issued formal authorization permitting ITOPF's representatives to enter Sri Lanka (document marked 6R-7(c).)

759. The evidence tendered on behalf of the shipowner indicates that the Owners, acting through Killiney Shipping, proceeded to formally engage ITOPF as part of their emergency response initiative. In his Affidavit, Lim Kin Seng affirms that this decision was taken upon the guidance of the vessel's insurer, the London P&I Club, and that in addition to ITOPF, Oil Spill Response Limited (OSRL) was similarly engaged. The Owners specifically describe ITOPF as a non-profit organization possessing recognized expertise in responding to oil and chemical spills in marine environments.

760. It is further evident that ITOPF undertook a range of technical and coordination tasks in support of the incident response. According to the Affidavit of the MEPA Chairperson, ITOPF's technical competence was utilized for the purposes of oil spill trajectory modelling and risk assessment. She avers that Environmental Sensitivity Index (ESI) maps of the coastline were transmitted to Mr. Campion of ITOPF to facilitate

the identification of high-risk areas, using advanced modeling tools. With ITOPF's assistance, MEPA proceeded to conduct predictive modelling concerning the potential dispersion of bunker oil and to identify environmentally sensitive coastal zones. This exercise materially contributed to the mobilization of appropriate mitigation measures.

761. According to the Affidavit of Lim Kin Seng, the Owners intended ITOPF to act as "independent marine pollution technical advisors," with the mandate to advise both the Owners and the Government of Sri Lanka in relation to the response operation, including the monitoring of shoreline clean-up activities. As set out in his Affidavit, the scope of ITOPF's engagement included a range of functions which included *inter alia*, oil spill response planning, monitoring, and modelling of oil and chemical drift, contingency planning, guidance on shoreline clean-up operations, and the provision of technical input in respect of claims analysis and environmental damage assessment.

762. It is further stated that ITOPF provided expert advice on the deployment and supervision of beach clean-up crews and continued to provide logistical and technical support throughout the period of response. In the early stages of the operation, ITOPF coordinated with other entities. To this end, a memorandum dated 7th June 2021 (marked R-7), issued by ITOPF, was placed before the Court. In conjunction with a report submitted by Global Salvage Consultancy (marked R-9), these documents assessed the risk of an oil spill from the submerged wreck. Both entities concurred in the view that the majority of the vessel's fuel cargo had been consumed during the onboard fire, thereby diminishing the likelihood of a significant bunker oil discharge.

763. As the emergency response progressed into a recovery phase, the role of ITOPF shifted towards coordination and advisory functions concerning clean-up operations and compensation claims. ITOPF participated in high-level consultations with government stakeholders and, in October 2022, recommended a transition to a model involving the

engagement of an independent, contractor-led shoreline clean-up projects. This recommendation was based on established international best practices for addressing marine pollution incidents involving plastic pellets (commonly referred to as "nurdles"). Pursuant to this recommendation, the Owners proposed the engagement of a foreign contractor to undertake the clean-up work under the regulatory supervision of MEPA. MEPA, agreed to this arrangement subject to conditions, including cost recovery and transparency in operational procedures.

764. Notwithstanding the above, the State, in its written submissions, has drawn attention to what it characterizes as a convergence of interests between ITOPF and the vessel Owners and their insurers. As per paragraph 61(h) of the Affidavit of Lim Kin Seng, wherein it is stated that "*the Owners have … appointed and mobilized*" ITOPF for the purposes of pollution response. On the basis of this statement, the State contends that ITOPF, though introduced into the response framework through MEPA's facilitation, ultimately acted as an Agent of the ship's insurer, rather than as an independent technical advisor. In support of this contention, the State refers to a report subsequently produced by ITOPF (marked "Y7" and annexed to the Affidavit of Lim), which contains a critique of the Government's Second Interim Damage Assessment Report in relation to compensation.

765. This Court has been directed to the profile of the ITOPF, as given in its own documentation annexed as a report marked "Y7". In that report, ITOPF acknowledges that its services are rendered primarily to its members, namely, tanker owners or associates comprising other shipowners and their pollution insurers, while noting that it also offers assistance to governments and international organizations upon request.

766. In the written submissions tendered by the State, it is submitted that ITOPF was, in the present instance, appointed by the Owners of the vessel with the objective of safeguarding their own commercial and legal

interests. It is further asserted that the Sri Lankan authorities, including MEPA, did not at any point formally engage ITOPF to undertake an environmental damage assessment on their behalf, nor did they commission ITOPF to evaluate or review the reports produced by MEPA. Rather, their assistance was required to ensure claims conformed to international standards.

767. The State further raises concerns regarding the scope of ITOPF's technical expertise, drawing attention to the fact that the X-Press Pearl incident involved unique environmental impacts not limited to oil pollution. Specifically, the incident encompassed the burning and spillage of plastic resin pellets, as well as the release of hazardous chemical cargo. The State submits that ITOPF's core area of competence lies in the field of oil pollution, and that no material has been placed before this Court to demonstrate any specialization or established expertise on the part of ITOPF in the assessment of chemical or plastic pollution-related damage.

768. Upon careful consideration of the Affidavits, documentary material, and submissions advanced by the parties, this Court is required to determine whether ITOPF acted independently in relation to the X-Press Pearl incident. On a balance of evidence, it is not possible to sustain such a characterization. While it is accepted that ITOPF contributed technical input and operational assistance of a meaningful nature, it is also apparent that ITOPF functioned as a part of the response mechanism adopted by the vessel Owners and their insurers. ITOPF's own publications confirm that its primary mandate is to serve the interests of shipowners and their P&I Clubs, and in this instance, its involvement was initiated and directed by the Owners through their insurer.

769. The Court finds it necessary to give weight to the State's caution that a consultant funded by the liable insurer is not a free Agent. This is not to impugn ITOPF's technical integrity, but rather to recognize a potential conflict of interest inherent in its position. The material before Court

shows no suggestion that ITOPF acted in bad faith. Yet, when evaluating ITOPF's assessments on matters like quantum of damage or sufficiency of cleanup, the Court must view them in light of ITOPF's role as an adjunct of the shipowner/insurer's response team. On that basis, the Court finds that ITOPF cannot be deemed an independent actor in the legal sense relevant to this incident.

Role and Responsibilities of the Director General of Merchant Shipping

770. The Director-General of Merchant Shipping (DGMS) is the chief regulatory authority for shipping under the Merchant Shipping Act, No. 52 of 1971, charged with ensuring maritime safety, marine environmental protection, and compliance with international obligations. He is vested with specific Statutory responsibilities under the Merchant Shipping Act, No. 52 of 1971, which reinforce his role in ensuring maritime safety and the orderly regulation of shipping operations.

771. Under the relevant provisions of the Act, the Director General of Merchant Shipping (DGMS) is entrusted with significant powers and responsibilities to ensure maritime safety, protect the marine environment, and uphold international maritime obligations. Specifically, under Section 20, the DGMS has the authority to order the diversion of ships whenever it is deemed necessary in the public interest, to avoid maritime hazards, to respond to emergencies, to comply with international obligations, or to mitigate threats to the maritime environment. This provision reflects the proactive role the DGMS must play in safeguarding both human life and ecological systems from maritime risks.

772. Further, Section 208 of the Act empowers the DGMS to detain ships that are considered unsafe. This process requires the DGMS to appoint a qualified surveyor to conduct a thorough inspection of the ship, after which a decision is made to either detain or release the vessel, depending on the findings. This safeguard ensures that vessels posing a danger to

navigation, crew, passengers, or the environment are swiftly dealt with, thus minimizing risks associated with maritime operations.

773. Additionally, under Section 232, there is a mandatory duty for any ship in distress to be reported to the DGMS, and in instances where casualties occur due to loss of life or significant damage, a formal investigation must be conducted by the DGMS to ascertain the causes and prevent similar incidents in the future. This reflects the importance placed on accountability, transparency, and continuous improvement in maritime safety practices.

774. In the case of the MV X-Press Pearl disaster, the DGMS's actions must be assessed against the above Statutory responsibilities.

775. When the MV X-Press Pearl entered Sri Lankan waters in May 2021, neither the DGMS nor any local authority was aware that the vessel was carrying a leaking container of hazardous nitric acid. It was only on the morning of 20 May 2021, after the ship had already arrived at Colombo's outer harbour, that the local Agent emailed the Harbour Master at 10:19 hours to report the acid leak. By that time, the ship was within port limits (having anchored at Colombo at around 03:00 hrs on 20th May). The DGMS could not have invoked Section 20 to divert the vessel beforehand, as no information about the vessel in distress was available to any Sri Lankan authority upon its entry.

776. Once the emergency became known, the Director General of Merchant Shipping (DGMS) became part of the coordinated national response. A Marine Rescue Coordination Centre (MRCC) was already established in pursuant to Sri Lanka's obligations under the SOLAS Convention, and the DGMS had delegated operational control of marine search and rescue to the Sri Lanka Navy. This arrangement enabled the Navy and the Sri Lanka Ports Authority (SLPA) to jointly respond as events unfolded, including in respect of firefighting efforts.

777. One issue raised in the present proceedings relates to the timing of the DGMS's response to the proposal to tow the vessel and his requirement of a financial guarantee. On 25th May 2021, during ongoing firefighting efforts, the Owners and salvors of the vessel had reportedly indicated to the Chairperson of MEPA that towing the vessel was not a viable option at that time. It was only on 29th May 2021 that the Owners contacted the DGMS proposing to tow the wreck to deeper waters off the east coast of Sri Lanka, or alternatively, to bring it to the Colombo Port, as the salvors preferred.

778. The DGMS responded on 31st May 2021, requesting (a) a comprehensive salvage plan, including a structural assessment to determine whether the vessel could be safely towed, and (b) a financial security (guarantee) to cover wreck removal. This request is consistent with Section 244, which provides as follows.

779. Section 244 of the Merchant Shipping Act goes on to make provision for the breaking and removal of wrecks as follows:

> *(1) "If any person, being the owner of any vessel or any wrecked, submerged, sunken or stranded vessel or the agent or wrecks servant of such owner, wishes to break up such vessel prior to the removal thereof from Sri Lanka, such person shall before commencing salvage or breaking up operations, obtain the written permission of a receiver of wrecks.*
>
> *(2) On receiving any application for permission for the breaking up of any vessel under this section, a receiver of wrecks shall, in his discretion, be entitled*
>
> *a) to grant such permission; and*
>
> *b) to require security in such a reasonable amount as he may consider necessary to ensure the effective removal of the vessel, or any portion thereof, from Sri Lanka.*
>
> *(3) Any person who, without the previous written permission of a receiver of wrecks, does or causes to be done any salvage or breaking up operations on any vessel or any wrecked, submerged, sunken or*

stranded vessel lying within Sri Lanka shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding one thousand rupees, or to imprisonment of either description for a term not exceeding six months, or to both such fine and imprisonment."

780. The requirement of financial security in this context was not discretionary but formed part of the Statutory safeguards to ensure that the State would not bear the burden of incomplete or abandoned wreck removal operations.

781. In addressing this issue on behalf of the DGMS, it was submitted that an immediate response was not possible as he had to obtain the necessary information and assess the situation. It was also submitted that the fire on board the vessel was only fully extinguished on 31st May 2021, and on the same day, the DGMS replied. Given the condition of the vessel and the continuing need for cooling and safety assessments, the timing of the DGMS's response does not appear to have materially contributed to any further deterioration in the situation. By that time, the hull had already sustained significant damage, and the vessel was no longer viable for safe movement.

782. Accordingly, the time taken to consider the proposal for towage, the request for further assessment, and a financial guarantee cannot be considered unreasonable in the circumstances and was made within the DGMS's statutory remit.

783. Following the incident, the DGMS undertook further actions relevant to his functions under the Merchant Shipping Act. On 21st May 2021, he formally notified the flag state (Singapore) of the incident, in accordance with standard international practice. On 1st June 2021, he also gave a formal statement to the Criminal Investigation Department (CID) in connection with the ongoing criminal investigation.

784. In the months following the incident, the DGMS was involved in overseeing aspects of the salvage and wreck removal process, as well as coordinating with other State institutions regarding compensation efforts. He provided status updates to the Court regarding interim payments made by the vessel's insurer (the P&I Club) and outlined operational restrictions imposed in the vicinity of the wreck for safety purposes. These steps, as documented in the record, are indicative of his continued involvement in post-incident management.

785. Having regard to the material placed before the Court, there is no evidence that the DGMS failed to discharge his statutory duties or acted ultra vires. The record indicates that the DGMS acted in accordance with the powers and responsibilities vested in him under the Merchant Shipping Act and relevant international obligations.

The Polluter Pays Principle

786. As held elsewhere in this Judgment this Court is of the firm opinion that a Non-State party Respondent can be held liable to be the sole polluter for the pollution caused and therefore can be held liable to pay compensation for damages caused. Such a directive can be issued under the just and equitable powers vested in the Supreme Court by Article 126(4) of the Constitution. In this matter, such reference to Non-State party Respondent(s) will be the X-Press Pearl group. That is a reference to the Owner, Operators and the local Agent of MV X-Press Pearl.

787. The question of law in this instance is whether, this Court in the exercise of its jurisdiction under and in terms of Article 126, could hold a Non-State actor to be responsible by the application of the polluter pays principles (referred to as "PPP") and be made liable for the pollution caused. This issue will be dealt with in the following manner. The Court will first address the evolution of the PPP, the legal instruments that provide for it and then, look into how it has been applied in Sri Lankan case law. The Court will then address and assess the arguments raised with regards to the PPP by the learned counsel at the hearing and by

written submissions to conclude on whether or not the Non-State Respondents (X-Press Pearl group) in the instant Application could be held liable under the PPP.

Jurisdiction of this Court

788. *Viz-à-viz* the question whether this Court has the jurisdiction to invoke the PPP with regard to the instant Applications and do so against Non-State actors, it ought to be noted that Article 27(14) of the Constitution of Sri Lanka provides that "*The State shall protect, preserve and improve the environment for the benefit of the community*". Thus, it is the Constitutional duty of the State (which would include the judiciary) to protect, preserve and improve the environment. Thus, the Court has the duty in appropriate instances to make orders to provide for the protection, preservation and the improvement of the environment, which includes the marine and coastal environments. Thus, requiring the polluter to pay for the restoration, future preservation, and the improvement of the environment is well within the duty and ensuing powers of the Supreme Court.

789. This position was affirmed in the case of ***Centre for Environmental Justice (Guarantee) Ltd v. Anura Satharasinghe, Conservator General and 8 Others*** *[CA Writ 291/15, CA Minutes 16.11.2020]* where it was held that "*… In any event, the judiciary is part of the State (Center for Policy Alternatives v Dayananda Dissanayake (2003) 1SLR 277 at 292) and is bound to protect, preserve and improve the environment for the benefit of the community as directed by Article 27 (14) of the Constitution*".

790. Further, the Fundamental rights jurisdiction of the Supreme Court, under Article 126 of the Constitution of Sri Lanka, is *sui generis* in nature and this position was upheld in the case of ***Saman v. Leeladasa*** *[(1989) 1 Sri L.R. 01].*

791. The more contentious position in this matter is the possibility of holding a Non-State actor liable for environmental pollution that had been

caused. In this regard, the following ought to be noted. In the cases of ***Sugathapala Mendis v. Chandrika Kumaratunga* (*Waters Edge Case*)** *[(2002) 2 Sri L.R. 339]* and ***Kariyawasam v. Central Environment Authority and Others* (*Chunnakam Case*)** *[SC FR No. 141/2015, SC Minutes of 04.04.2019]* private actors were held liable for the payment of compensation for the violation of Fundamental rights, including the causation of pollution *inter alia* in instances where there is a distinct causative relationship between the infringement of Fundamental rights and the unlawful conduct of Non-State actors.

792. Therefore, owing to the jurisdiction conferred on the Supreme Court by way of Article 126 read with Article 17 of the Constitution, the Directive Principle contained in Article 27(14), and the development of judicial precedent, it is the view of this Court that the Supreme Court has the jurisdiction to decide on the question of whether a Non-State entity could be held liable for environmental harm caused by them.

793. The Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment, 1972), which Sri Lanka ratified on 22nd December 2005 lays the groundwork to recognize the Polluter Pays Principal (PPP) by emphasizing the significance of environmental quality. Here, Principle 1 provides the following:

> "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.*"

794. Further, Principle 7 of the Declaration looks at the prevention of pollution:

> *"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."*

795. The PPP itself was originally recommended by the Council of the Organisation for Economic Cooperation and Development (OECD) in May 1972. The definition of the principle in the 1972 OECD Guiding Principles Concerning the International Economic Aspects of Environmental Policies, is that the polluter should bear the expenses of carrying out measures deemed necessary by public authorities to protect the environment in "an acceptable state" or "in other words, the cost of these measures should be reflected in the costs of goods and services which cause pollution in production and/or in consumption. Such measures should not be accompanied by subsidies causing significant distortions in international trade and investment".

796. Later, in 1974, the European Economic Community adopted an Environmental Action Programme which endorsed the PPP as well. The 1986 Single European Act, through Article 25 provides as follows:

> *"Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

797. According to Hon. Justice Brian J. Preston in ***"The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" [2005, Asia Pacific Journal of Environmental Law, Vol 9, Issues 2 & 3]***, "*The polluter pays principle is an economic rule of cost allocation. The source of the principle is in the economic theory of externalities*." He then refers to De Sadeleer's explanation of the function of the PPP, that "*It (the*

Polluter Pays Principle) requires the polluter to take responsibility for the external costs arising from his pollution. Internalization is complete when the polluter takes responsibility for all the costs arising from pollution; it is incomplete when part of the cost is shifted to the community as a whole".

798. The 1992 UNCED (Earth Summit) – the Rio Declaration (that Sri Lanka is party to), looked into the PPP and the subsequent internationalization of environmental costs being fully embraced. Principle 16 of the Rio Declaration provides as follows:

> "*National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*"

799. It has since been enforced in many countries across the world including (but not limited to) Sri Lanka, India, Australia, and the United Kingdom. For instance, in ***Vellore Citizens Welfare Forum v. Union of India*** *[AIR 1996 SUPREME COURT 2715]*, the Supreme Court of India, in a judgment delivered by Kuldip Singh J., referred to the Supreme Court's decision in ***Indian Council for Enviro-Legal Action v. Union of India*** *[AIR 1996 SUPREME COURT 1446]* and held that the polluter pays principle had been accepted as part of the environmental law of that country. In ***Vellore Citizens Welfare Forum v. Union of India*** *[AIR 1996 SUPREME COURT 2715]* the PPP alongside the Precautionary Principal were identified as customary international law which further establishes the significance and the broadened authority of the PPP.

Judicial Interpretation of PPP in foreign jurisdictions

800. The Indian Courts have interpreted and developed the operation of PPP in a number of cases, some of which will be considered to examine the nature in which PPP has been applied and broadened over the years.

Vellore Citizens Welfare Forum v. Union of India *[AIR 1996 SUPREME COURT 2715]* interprets PPP in the following manner:

> *"The Polluter Pays principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such, the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."*

801. In the case of ***Indian Council for Enviro-Legal Action v. Union of India and Others*** *[AIR 1996 SUPREME COURT 1446]* PPP was interpreted in the following manner:

> "*The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of the government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The 'polluter pays' principle was promoted by the Organization for Economic Co-operation and Development [OECD] during the 1970s when there was great public interest in environmental issues.*
>
> *During this time there were demands on the government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialized society.*
>
> *Since then, there has been considerable discussion on the nature of the polluter pays principle, but the precise scope of the principle and its*

implications for those involved in past, or potentially polluting activities have never been satisfactory agreed upon.

Despite the difficulties inherent in defining the principle, the European Community accepted it as a Fundamental part of its strategy on environmental matters, and it has been one of the underlying principles of the four Community Action Programmes on the Environment."

802. In the case of ***M.C. Mehta v. Kamal Nath and Others*** *[AIR 1996 SUPREME COURT 711]* the following was stated:

"The Polluter Pays" principle has been held to be a sound principle by this Court in Indian Council for Enviro-Legal Action v. Union of India JT 1996 (2) 196. The Court observed, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtained in this country". The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on".

Consequently, the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of the reversing the damaged ecology. The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts."

803. This position was affirmed in the case of ***S. Jagannath v. Union of India and Others*** *[AIR 1997 SUPREME COURT 811].*

804. Recently, in the case of ***Vedanta Limited v. State of Tamil Nadu*** *[2024 INSC 175]*, the following was mentioned:

> *"While these aspects have undoubted relevance, the Court has to be mindful of other well-settled principles including the principles of sustainable development, the polluter pays principle, and the public trust doctrine. The polluter pays principle, a widely accepted norm in international and domestic environmental law, asserts that those who pollute or degrade the environment should bear the costs of mitigation and restoration. This principle serves as a reminder that economic activities should not come at the expense of environmental degradation or the health of the population."*

805. The need to act with a sense of urgency towards the environment given the status quo, is reflected in the dissenting opinion of Justice C.G. Weeramantry in the International Court of Justice's advisory opinion on the ***Legality of the Threat or the Use of Nuclear Weapons*** in July of 1996, reads as follows:

> *"At one time it was thought that the atmosphere, the seas and the land surface of the planet were vast enough to absorb any degree of pollution and yet rehabilitate themselves. The law was consequently very lax in its attitude towards pollution. However, with the realization that a limit situation would soon be reached, beyond which the environment could absorb no further pollution without danger of collapse, the law found itself compelled to re-orientate its attitude towards the environment."*

806. He goes on to make reference to the PPP as follows:

> *"(f) The prohibition against environmental damage*
>
> *The environment, the common habitat of all Member States of the United Nations, cannot be damaged by any one or more members to the detriment of al1 others. Reference has already been made, in the context*

of dictates of public conscience (Section 111.6 above), to the fact that the principles of environmental protection have become "so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law". The International Law Commission has indeed classified massive pollution of the atmosphere or of the seas as an international crime. These aspects have been referred to earlier.

Environmental law incorporates a number of principles which are violated by nuclear weapons. The principle of intergenerational equity and the common heritage principle have already been discussed. Other principles of environmental law, which this request enables the Court to recognize and use in reaching its conclusions, are the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and the "polluter pays principle", placing on the author of environmental damage the burden of making adequate reparation to those affected'. There have been juristic efforts in recent times to formulate what have been described as "principles of ecological security" - a process of norm creation and codification of environmental law which has developed under the stress of the need to protect human civilization from the threat of self-destruction."

Application of the Polluter Pays Principle by Sri Lankan Courts

807. Prior to this discussion, this Court must note that the cases considered here are those that have applied the Polluter Pays Principle (PPP) in cases falling under the Fundamental rights jurisdiction of Sri Lanka.

808. In the case of ***Bulankulama and Others v. Secretary, Ministry of Industrial Development And Others (Eppawela Case)*** reference was made to the Rio Declaration at page 274:

"Undoubtedly, the State has the right to exploit its own resources, pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N. Stockholm Declaration (1972) and

Principle 2 of the U.N. Rio De Janeiro Declaration (1992). Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration). Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). ***In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka****. Moreover, they would, in my view, be binding if they have been either expressly enacted…"*

[emphasis added.]

809. The judgment went on to make reference to the Polluter Pays Principle. At page 305, the Court has noted the following:

"… Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g. see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The costs of environmental damage should, in my view, 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 of a project. This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

810. In the case of ***Centre for Environmental Justice v. Conservator General of Forests*** *[CA Writ 291/15, CA Minutes of 16th November 2020]* the above position has been affirmed.

811. In the case of ***Wijebandara v. Conservator-General of Forests*** *[(2009) 1 SLR 337 at page 362]*, the following has been said:

> *"… 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."*

812. In the case of ***Ravindra Gunawardena Kariyawasam v. Central Environment Authority and Others*** *[SC FR Application No. 141/2015 S.C. Minutes of 4th April 2019]*, this Court has observed as follows:

> *"It is an oft-cited and applied principle of environmental law that the "Polluter Pays". This is reflected in Principle 16 of the Rio Declaration, which states "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."*
>
> *[…]*
>
> *This is an appropriate case to apply the "Polluter Pays" principle. I direct the 8th respondent to pay compensation in a sum of Rs. 20 million to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area by the contamination of groundwater in the Chunnakam area and of soil in the vicinity of the 8th respondent's thermal power station. Article 126 (4) of the Constitution vests ample jurisdiction in this Court to make the aforesaid Order, which is just and equitable in the circumstances of this case."*

813. Having looked at the evolution of the PPP and the manner in which both foreign and local courts have applied it, this Court is now tasked with examining whether the Non-State Respondents (X-Press Pearl group) having been identified jointly and unequivocally as the polluter, are in fact liable to pay compensation on the basis of the aforementioned PPP, particularly given the application of the PPP in Sri Lanka's administration of justice system. This Judgment will now proceed to consider arguments raised in this regard both at the hearing and by way of post-hearing written submissions.

814. At the hearing, Dr. Romesh De Silva, PC for the Non-State Respondents (X-Press Pearl group) raised the following argument in favour of his clients. It was his contention that the PPP as per the Rio Declaration merely pushes for the 'internalisation of environment costs' and that the application is limited to the imposition of costs in the form of subsidies, and production costs as such. On this basis he further argued that the PPP in the case of ***Ravindra Gunawardena Kariyawasam v. Central Environment Authority and Others*** *[SC FR Application No. 141/2015 S.C. Minutes of 4th April 2019]* was wrongly applied. It was his position that while the PPP is in fact an accepted legal principle, when it comes to matters of this sort, its source of authority is common law and not the Rio Declaration.

815. In response to this proposition, it was submitted by learned counsel representing the Petitioners, that while PPP was first introduced as a component of international soft law, through sustained judicial application over the years, PPP has now become a binding norm and a normative principle within the body of the Sri Lanka's law and is applied in the system of administration of justice.

816. Having considered both positions, this Court has formed the opinion that the PPP is now evolved to a point of domestic application quite independent of its prevalence in the Rio Declaration. Through its application over a significant period of time, it has become a principle of

the common law of Sri Lanka that may be summarised in the following manner:

> ***The Polluter Pays Principle, simply mandates and requires that a party, whether it be a State party or a non-State (private) party, who has polluted the environment should be made to compensate for the pollution caused, to the victims of such pollution and for restoration of the polluted environment, and shall also be held liable for the payment of reparation for anything else for which they are legally responsible and therefore liable. Accordingly, in appropriate judicial proceedings, a directive requiring the polluter to pay compensation and provide other reparation in respect of the harm and losses caused may be made and the polluter shall be required to comply with such order.***

Due to the foregoing legal reasoning, the Non-State Respondents (X-Press Pearl group) who have been found as being responsible for the marine and coastal pollution that has been caused, and they being the Owner, Operator(s) and the local Agent of MV X-Press Pearl are required to jointly provide compensation for the marine and coastal environmental harm caused, losses suffered and for restoration of the polluted environment.

817. Learned President's Counsel for the Non-State party Respondents (X-Press Pearl group) further contended that the Rio Declaration does not apply to the matter at hand given the following reasons. He contended that the PPP applies to situations where there is no domestic legislation covering the area. He argued that the PPP was applied in cases such as ***Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (Eppawela Case)***, as there was no domestic law pertaining to the matter. In this regard, he argued that owing to the provisions of Section 34 of the Marine Pollution Prevention Act, No. 35 of 2008 mandating that the polluter pays, the Supreme Court does not

have the jurisdiction to decide on this matter as there is already domestic legislation pertaining to pollution of marine waters.

818. Responding to that argument, learned counsel representing the Petitioners had two main arguments. Firstly, it was contended that the jurisdiction of the Supreme Court regarding Fundamental rights could not be limited in such a manner given the power conferred by Articles 17 and 126 of the Constitution of Sri Lanka. Secondly, it was argued that the jurisdiction granted by the aforementioned Marine Pollution Prevention Act, No. 35 of 2008 could only be invoked by the Marine Environment Protection Authority, whereas in the matter at hand, the interests of the Petitioners acting in public interest ought to be given the due consideration.

819. On careful consideration of the opposing arguments, this Court wishes to express its disagreement with the submission of learned President's Counsel for the Non-State Respondents (X-Press Pearl group). That is due to the following reasons. First, the PPP is now a legal principle that is engrained in the legal system of Sri Lanka whereby it operates independent of the Rio Declaration, and thus, the norms contained in the Rio Declaration merely support the position contained in Sri Lanka's unwritten law. Second, in examining the developing jurisprudence of the Supreme Court in this area, it is seen that there have been instances where Non-State actors have been held liable under the Polluter Pays Principle even where there is domestic legislation covering that particular area. In ***Edirisinghe Muhandiram Appuhamilage Tharanga and Another v. Geological Survey and Mines Bureau and Others*** *[SC/FR 413/2021 – SC Minutes of 5th April 2021],* a private license holder was held liable for their violation of Article 12 (1) of the Constitution under the Polluter Pays Principle albeit there being domestic legislation already covering the area. The case concerned gravel mining and the subsequent pollution caused to groundwater in the area, the judgment notes several sections of the National Environmental Act, No. 47 of 1980 as amended by the National Environmental (Amendment) Act, No. 56 of 1988 which

outlaws *inter alia* the pollution of groundwater. Yet the 12th Respondent in that matter (a Non-State actor) was held liable by applying the PPP on the basis of him being the polluter and the requirement of the polluter being held responsible for the infringement of Article 12 (1) of the Constitution.

820. Further, this Court finds itself to be in agreement with the position of the Petitioners that in light of the public interest of the Petitioner's claim, any limitation of civil jurisdiction by the MPP Act, is incompatible with the duty imposed on the Supreme Court with regards to the protection of Fundamental rights.

821. Thereby the argument of the learned Presidents' Counsel who represented the X-Press Pearl group is rejected on three grounds, and they being (i) the PPP now operates in Sri Lanka independent of the Rio Declaration, (ii) given judicial precedent of this Court having applied the PPP *albeit* there being domestic legislation covering the area concerned, and (iii) the jurisdiction invokable by the Marine Pollution Prevention Act being limited and is in conflict with public interest whereby incompatible with the Court's duty towards the public.

Standard of liability

822. Having established that the PPP is part of the common law jurisprudence of Sri Lanka, this Court will now address how a polluter is to be held accountable in the circumstances of these Applications.

823. It was the position of the Petitioners that the dicta in ***Rylands v. Fletcher (1868)*** *[LR 3 HL 330]* must apply in this matter, whereby strict liability ought to be imposed allowing for liability even in the absence of the proof of negligence. In response, the Non-State Respondents (X-Press Pearl group) presented the following arguments:

i. That there is no strict liability in matters of this sort in either domestic or international law.

ii. The application of ***Rylands v. Fletcher*** is in situations where there is a dangerous substance brought into the land, the bringing of such substance is a non-natural use of the land, and that the escape of the dangerous substance must cause damage to the neighbouring land.

Learned President's Counsel for the X-Press Pearl group of companies advanced the position that in the matter at hand, there is no use of land at all, that the bringing of the substance was not "non-natural", and that the pollution was not caused by the escape of Nitric acid from the ship to a neighbouring land or sea, but by the fire on board of the ship. Whereby concluding that ***Rylands v. Fletcher*** must not apply to this matter in any circumstances.

824. Having considered the positions advanced on behalf of all parties, this Judgment will turn to jurisprudence on the matter. When faced with the question of applicability of ***Rylands v. Fletcher*** in the case of ***Sameed v. Segutamby*** *[25 NLR 481],* it was observed as follows:

> *"…It appears, therefore, that applying the principles of our own law, it is necessary to consider in the present case whether the defendant was guilty of negligence."*

825. In the case of ***M.C. Mehta v. Union of India And Shiram Foods and Fertilizer Industries (Oleum Gas Leak Case)*** *[1987 AIR SC 1086 at 1098-99]* where oleum gas had leaked from a food and fertilizer manufacturing plant in India, this issue was considered at considerable length. Chief Justice P.N. Bhagwati, presiding over a Divisional Bench of the Supreme Court of India, has expressed the following with which this Court finds itself in complete agreement:

> *"We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous*

industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, he is prima facie liable for the damage which is the natural consequence of its escape. ***The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence.*** *…*

Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. ***We need not feel inhibited by this rule which was evolved in the context of a totally different kind of economy****. …*

As new situations arise the law has to be evolved in order to meet the challenge of such new situations. …

We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter that in any other foreign country. We no longer need the crutches of a foreign legal order*.*

We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done.

We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen *and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy,* ***there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.***

Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous

preparation of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resources to discover and guard against hazards or dangers and to provide warning against potential hazards.

We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident *and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher (supra). We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-related to the magnitude and capacity of the enterprise because such compensation must have a different effect…"* (Emphasis added.)

826. As regards the Applications before this Court, we appreciate that shipping in general may not be classified as a hazardous or inherently dangerous activity. However, we note that, based on the nature of the Cargo that is being carried by a vessel, the industry of shipping can be

recognised as being hazardous or inherently dangerous. An example would be a vessel carrying explosives or radioactive material. We appreciate that MV X-Press Pearl did not fall into that category. However, particularly given the fact that MV X-Press Pearl was carrying several categories of dangerous goods and given the internal developments within and onboard the vessel at the time it arrived in Sri Lankan waters (as explained in detail elsewhere in this Judgment), this Court is firmly of the view that, the carriage of the vessel into Sri Lankan waters and it remaining within the outer harbour area of the Colombo Port, amounted to a hazardous or inherently dangerous situation. Thus, the said situation comes well within the situation referred to in the afore-stated judgment.

827. In these circumstances, this Court agrees with the views of the Supreme Court of India. The extent of industrial development, contemporary forms of carriage of goods, categories of goods that are transported by air and sea *viz-à-viz* the distinct possibility of associated environmental pollution and its impact on planet earth cannot be taken lightly. Furthermore, the law and its application must take account of and address such situations from contemporary standards and address such situations proactively. Thus, in the view of this Court, both the law and its application in the administration of justice need to be sufficiently progressive for the purpose of addressing contemporary concerns. It is necessary to stress that, this Court in particular must be sensitive to and empathetic towards the plight of those who fall victim due to the unlawful actions and inactions of commercial organisations acting without due care to the environment and non-performance of other duties towards the Nation and the public at large. This Court appreciates that they are understandably governed by their eternal ethos – commercial expediency and profitability, through the maximisation of revenue and minimisation of expenditure. While the Court appreciates that private enterprise is founded upon that policy, the Court must insist upon compliance with the law including legal duties, even in instances

where such compliance may be at variance with commercial objectives and expected outcomes of such commercial organisations.

828. Thus, in confirming the standard of liability in a matter concerning PPP, this Court is of the opinion that it would be an absolute and non-negotiable duty and mere evidence of non-negligence should not be recognised as a defence in a matter of this sort.

829. Therefore, this Court has sufficient reasons to hold that the Non-State Respondents (X-Press Pearl group) should be held accountable and liable under the Polluter Pays Principle for the pollution caused by the MV X-Press Pearl vessel. Thereby, the standard of liability herein is absolute, is founded upon the circumstances that prevailed and is non-negotiable.

Accordingly, this Court holds that the Owner, Operators and the local Agent of MV X-Press Pearl (who are Respondents to the several Applications and is referred to in this Judgment as being the 'X-Press Pearl group') are jointly and severally liable for the payment of compensation.

Assessment of Compensation for Damages

830. Following this Court's finding that the Non-State party Respondents (X-Press Pearl group) should be held jointly liable as the sole polluter which resulted in the marine and coastal pollution referred to in this Judgment, this Court is now tasked with deciding on the payment of compensation.

Based on the multitude of evidence presented to this Court regarding (a) the direct harm caused to the marine and coastal environment, (b) secondary losses suffered by the fisherfolk owing to lost income (as explained in detail elsewhere in this Judgment), and (c) expenses incurred with regard to the clearing and restoration activities, notwithstanding the plea of the majority of the Petitioners that the compensation to be ordered against the polluter should not be less than

USD 6.483 billion and the pleading of the Petitioner in SC FR 184/2021 that the actual loss suffered would amount to USD 9 billion and therefore that full amount should be recovered, it is the view of this Court that the polluter (MV X-Press Pearl group of companies who have been cited as the Non-State party Respondents in the several Applications) must be required to jointly pay **an initial** (minimum) **amount of compensation** as provided in this Judgment. Thereafter, **as and when the actual amount of compensation payable is computed**, the polluter (referred to herein) will be required to make **such other and further payments**. In this regard, this Court notes that, although the Petitioners have brought to this Court claims of compensation, such claims seem to be widely disputed across the parties and therefore not definitive.

This Court recalls the forceful submissions made by Mr. Chrishmal Warnasuriya regarding the need to require the full amount of compensation (which according to his client is USD 9 billion) to be paid by the polluter. This Court agrees with that submission.

The Court also recalls the detailed submissions initially made by Ms. Himalee Kularathna that the victimised fisherman should have priority in receiving compensation rightfully due to them. Given their plight, this Court agrees with that submission as well.

However, this Court is not satisfied that the claims presented by the Petitioners have been calculated accurately. In the circumstances, it is the view of this Court that in the said circumstances, it would be unjust to require the polluter to pay the full amounts so claimed, unless the relevant claims are independently verified and are found to be accurate.

Be that as it may, **this Court in principle is in agreement with the Petitioners claim that the X-Press Pearl group who are Respondents to the several Applications, should be required to fully compensate for all direct and indirect harm caused and losses suffered, and make**

necessary payments for the restoration of the polluted environment. Necessary orders in that respect shall be made in this Judgment.

831. On a detailed consideration of the pollution caused and the several claims presented by the Petitioners, it is the view of this Court that the first requirement to be imposed on the Non-State party Respondents (MV X-Press Pearl group of companies who have been cited as Respondents to the several Applications) is for the payment of an initial sum of **USD 1 billion** (approximately **Rs. 297,980,000,000.00**, as per the exchange rate of the Central Bank of Sri Lanka prevalent on 22nd July 2025 which is Rs. 297.98 per 1 United States Dollar). This Court has arrived at this figure on a detailed consideration of the multitude of factors contained in the several Reports presented to this Court regarding the harm caused to the marine and coastal environment, and the significant losses suffered by persons who were dependent on fishing and the fishing industry and by other indirect victims. This Court also notes that while the Non-State party Respondents have conceded that the events relating to MV X-Press Pearl resulted in significant environmental harm and the incident resulted in certain losses to the fishing communities, they did not present their own quantification of the loss caused in financial terms. What the learned President's Counsel for the X-Press Pearl group of Respondents did was to merely engage in a critiquing of the several claims presented by the Petitioners. Furthermore, even such critiquing was not founded upon counter expert opinion. In the circumstances, this Court is of the view that, requiring the polluter to pay in the first instance approximately one sixth the amount claimed by a majority of the Petitioners is just and equitable.

Furthermore, this Court takes into consideration the fact that the X-Press Pearl group of companies has already paid some amount to the Government of Sri Lanka to be used for payment of compensation to the affected parties and for expenses incurred due to the pollution, and that during the hearing of these Applications learned President's Counsel representing the said Respondent indicated his clients wish to settle the

claims by making a further payment. However, we note that there is no consensus or firm evidence regarding the exact amount paid by the X-Press Pearl group of companies or by their insurers (London P & I Club). This Court notes that the '*ex-gratia*' payments made stems ostensibly not from a policy of philanthropy, charity or corporate social responsibility, but from the appreciation by the Non-State party Respondents of their liability to provide compensation for the harm caused by them and to provide for compensation and reimbursement of costs incurred.

832. In these circumstances, given the fact that there is a compelling need to independently, credibly and afresh compute and determine -

(a) the actual harm caused to the marine and coastal environment,

(b) the losses suffered by individuals and organisations, and amounts of money already paid to such victims,

(c) the amounts of money to be paid to all direct and indirect victims of the afore-stated marine and coastal environmental disaster in respect of financial losses suffered by them,

(d) the amounts to be paid for expenses incurred in relation to the clearing up and the restoration of the affected environment and related other costs,

(e) the sum of money required for the restoration and future protection of the affected marine and coastal environment, and

(f) to determine whether any sum of money in excess of USD 1 billion should be charged and collected from the polluter (X-Press Pearl group of companies).

This Court is of the opinion that an order in the nature of a ***Writ of Mandamus*** which has continuing effect (which may be referred to as a '***Continuing Mandamus'***), should be issued, by way of establishing a post-judgment mechanism (as provided hereinafter) under the superintendency of this Court. This Court observes that the Petitioners have also prayed for the establishment of such a mechanism on a direction of this Court.

833. Owing to the gravity and complexity of this matter, the Court is of the opinion that in the interests of justice, an order in the nature of a '*continuing mandamus*' is required to be issued by way of the establishment of post-judgment mechanisms for the purposes mentioned above. In the circumstances, this Court shall not become *functus* upon the delivery of this Judgment. The jurisdiction of this Court invoked by the Petitioners shall in the interests of justice remain operational, notwithstanding the delivery of this Judgment till the completion of the mandate entrusted to the post-judgment mechanisms established by this Judgment.

834. It is noted that a judicial order in the nature of a '*continuing mandamus*' is no stranger to the territory of environmental law cases. Courts have ordered them for purposes of assisting in the administration of justice, to ensure accuracy and accountability and to ensure effective implementation of orders made by this Court. This approach is strikingly existent particularly in Judgments of Indian superior courts. In the case of ***Bandhua Mukti Morcha v. Union of India & Others*** *[(1984) AIR 802]*, the following was stated with regards to the Supreme Court's inherent power to order the establishment of such a post-judgment mechanism:

> "*The power to appoint a commission or an investigating body for making enquiries in terms of directions given by the Court must be considered to be implied and inherent in the power that the Court has under Art. 32 for enforcement of the fundamental rights guaranteed under the Constitution*"

835. Directing the establishment of such post-judgment mechanism(s) is also well within the jurisdiction of the Supreme Court of Sri Lanka under Article 126 of the Constitution. As explained previously in this Judgment, Article 126 (4) empowers this court with 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 or reference referred to in paragraphs (2) and (3) of this Article".

836. In the past, the Supreme Court has directed the establishment of such post-judgment mechanisms in cases such as ***Janath S. Vidanage v. Pujith Jayasundera and Others (Easter Sunday Case)*** *[S.C. (FR) 163/2013, S.C. Minutes of 12th January 2023]* and ***Sugathapala Mendis v Chandrika Kumaratunga (Waters Edge Case)*** *[(2002) 2 Sri L.R. 339]*.

Post Judgment mechanisms (Commission and Committee)

837. For the purposes stated in the preceding paragraphs, this Court through this Judgment hereby establishes a **Commission** and a **Committee** as described below, vested with the mandates specified herein.

838. Owing to the vast extent and nature of pollution, harm, losses and damage caused at the hands of the Non-State party Respondents (X-Press Pearl group), it is necessary that a well-rounded, transparent mechanism be established for the computation of compensation payable. For this primary purpose, the Court is of the opinion that the creation of a **Commission** with necessary personnel is befitting.

839. Such a Commission would need to be constituted with persons of competence and unimpeachable reputation, also with persons possessing necessary expertise from multiple disciplines participating. Having considered similar mechanisms adopted in foreign jurisdictions and distinctive concerns of the matter at hand as depicted in the reports submitted to this Court, the Court is of the opinion that the following personnel would ideally need to be included in the constitution of such Commission for the purposes noted herein.

840. The Commission will comprise of a Chairman appointed by this Court, certain public officials participating *ex-officio* and the remainder of the personnel being independent experts appointed by Court following the

Court calling for and considering nominations submitted by the stakeholders (being the parties to the several Applications).

841. To quantify damages to ecosystems, species losses, habitat degradation, and to track toxins/plastics that may be remaining in the affected environment, it is required that experts from the environmental sciences and ecology sectors are included. This would ideally include marine biologists (specialists in coral reefs, fisheries, turtles, marine mammals and marine plants), coastal ecologists (for mangroves, beaches, intertidal zones), pollution experts (chemical oceanographers, microplastics researchers), and climate scientists (for long-term ecosystem impact modelling).

842. To assess loss of income of fishermen and others providing goods and services associated with the fishing industry, the impact on fish stocks, spawning grounds and the duration of recovery of affected fisheries, it is necessary that fisheries and livelihood experts are included. That would ideally involve fisheries economists and marine resource managers.

843. Legal experts would need to be included for advice on legal matters such as the determination of relevant considerations, compliance with treaties and conventions, and to ensure that valuation is in line with international standards. This would likely include legal experts in environmental law, insurance and maritime lawyers, and experts in damage claims in cases concerning pollution.

844. For the purposes of assessing costs for restoration in terms of removing debris, remediating contaminated waters and sand, the expertise of engineering and technical specialists would be required. This would ideally include marine engineers, waste management and hazardous material experts and coastal engineers.

845. It is then necessary to ensure that the considered concerns reflect grassroot realities and that the needs of the communities most affected

are incorporated. For the purposes of which, representatives from the fishing communities, local environmental civil society organisations and turtle conservation groups would need to be consulted by the mechanism established by this Judgment.

846. Once ecological costs, social losses, and restoration and protection costs, *inter alia* are assessed and determined, it is necessary to translate those amounts into credible monetary values by creating cost-benefit analyses for restoration and protection, by justifying compensation demands. This task requires economists and accountants and more particularly for the purposes of this matter, environmental economists, restoration cost estimators, and forensic accountants.

847. Once compensation is assessed, the quantification of amounts to be paid to each victim and other affected parties would have to be determined and for such tasks the services of accountants would be necessary.

848. To ensure neutrality, credibility and transparency in this process, the Court is of the view that officers of the Auditor General's Department would have to audit the entire process.

849. It is the view of this Court that the participation of government officials would be necessary, and therefore, officials from the Marine Environment Protection Authority (MEPA), Coast Conservation Authority (CCA), National Aquatic and Resources Agency (NARA), Ministry of Environment, Department of Fisheries, and other officials of related government institutions would have to provide services to the two mechanisms.

850. It must be noted that these are recommendations for what an ideal Commission and Committee for this situation would look like, and thereby it is only a non-exhaustive, not conclusive list. If the Chairman or members of the Commission or the Committee are of the view that more officials and or experts are needed, such recommendations can be

made to the Court, and the Court shall consider making appropriate orders in that regard.

851. Furthermore, the Commission may not include experts representing all the afore-stated areas. Their opinion may be obtained as and when it is necessary.

852. It is to be noted that the afore-stated composition, as mentioned earlier is reflective of similar foreign mechanisms, particularly the Natural Resource Damage Assessment Handbook of the USA, the Oil Pollution Act of 1990 (USA), the Exxon Valdez Oil Spill Trustee Council Charter and MOA (1991), Prestige IOPC Funds claim reports, Erika Oil Spill France IOPC Funds claim reports, and Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (India).

853. This Court notes that in view of the serious damage and harm that has been caused to the marine and coastal environments, and the need to provide for the restoration and future protection of the affected marine and coastal environment, it would be necessary to establish another mechanism in the nature of a **Committee** as specified in this Judgment. Its mandate would be to determine restoration and protection activities, cause the conduct of such activities and manage the process of restoration and the future protection of the affected marine and coastal environment.

854. In view of the foregoing requirements, this Court through this Judgment establishes a **Commission** and a **Committee** entrusted with the following mandates:

(a) A **Commission** named the "**MV X-Press Pearl Compensation Commission**" shall be empowered to examine, assess, determine, quantify and compute the;

(i) harm caused to the marine and coastal environment,

(ii) compensation payable for such harm,

(iii) compensation payable to those affected directly and indirectly (victims),
(iv) reimbursement to be provided for expenses incurred in relation to cleaning and restoration activities, and
(v) costs incurred by the Marine Environment Protection Authority (MEPA) for the establishment, maintenance and functioning of the Commission and the Committee,
and to require and direct the Secretary to the Treasury to make payment of such compensation and other payments determined by the Commission referred to above.

(b) A **Committee** to be named "**MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Committee**" for the restoration and protection of the affected marine and coastal environment.

855. The initial funds required for the establishment of these two mechanisms (Commission and Committee) and the provision of secretarial and logistical assistance would have to be borne by the Marine Environmental Protection Authority (MEPA). Both the Commission and the Committee shall function from the premises of the MEPA or other premises provided by MEPA. However, the sums of money expended by MEPA for the establishment, maintenance and the operation of these two mechanisms shall be reimbursable from the polluter (X-Press Pearl group) by way of monies paid by such Respondents to the Secretary to the Treasury.

856. The final assessment of compensation to be paid by the Commission is to be completed ideally within a year of its appointment. However, this Court appreciates that the actual period required by the Commission may be in excess of one year. Therefore, should the need arise, the Commission may apply to this Court for an extension of the period.

857. For clarity, it is stated that the terms of reference and the primary functions of the **Commission** shall be as follows:

(a) Following a detailed consideration of the expert reports already available, any further study the Commission shall undertake by itself or cause the commissioning of (with the sanction of the Supreme Court) and Reports which the Commission may call for from the several parties to these Applications, determine;

i. the actual harm caused to the marine and coastal environment due to the incident involving MV X-Press Pearl,
ii. identify the victims of incident (those who have suffered financial loss) and quantify their losses, and
iii. determine monies payable (if any) to those who have expended monies relating to the cleaning and restoration of the affected marine and coastal environment.

(b) Following a consideration of the actual losses suffered and the reparation already provided (if any) and claims (both fisheries and non-fisheries) settled, determine both claims of individual victims and organisational claims, and make compensation payments and other payments within the mandate of the Commission through the Secretary to the Treasury.

(c) Direct the Secretary to the Treasury to make payments determined by the Commission.

(d) Till the completion of the tasks entrusted to the Commission, on a bimonthly basis, provide Interim Reports to the Supreme Court on the implementation of this directive, functioning of the Commission, and comply with any further directives the Supreme Court makes.

(e) Following the completion of the tasks entrusted to the Commission, submit to the Supreme Court a Final Report setting out details relating to the execution of the mandate conferred on the Commission.

(f) Seek and obtain from the Supreme Court any ancillary mandate to be conferred on the Commission which would be necessary to achieve the overall objectives contained in this Judgment.

(g) Seek and obtain from the Supreme Court any further order that would be necessary for the Commission to efficaciously execute its mandate.

Composition and Mandate of the Commission

858. The Commission shall comprise of the following:

i. Chairman of the Commission appointed by and in terms of this Judgment.
ii. Director General / Chief Executive Officer of the Marine Environment Protection Authority (MEPA), who shall serve as the Secretary to the Commission.
iii. Chief Executive Officer of the Coast Conservation Authority.
iv. An officer (each) representing the Secretary to the Ministry of Environment and the Secretary to the Ministry of Fisheries.
v. An officer representing the Attorney-General (who has so far not been involved in the provision of professional services in any matter relating to the MV X-Press Pearl marine and coastal environment disaster).
vi. Five independent experts in the fields of (i) marine environment, (ii) coastal environment, (iii) fisheries, (iv) marine biology, and (v) environmental law. These experts

shall be appointed to the Commission by the Supreme Court. This Court shall call for nominations from the parties to these Applications, and take decisions regarding the appointment of such experts.

859. As the Commission attempts the assessment of harm, damages and compensation, the Court is of the opinion that the following among other considerations may be prioritised and implemented. The Commission should treat the following as simply a set of non-exhaustive list of guidelines and should not feel bound to adopt the approach contained below.

860. The Commission shall be entitled to direct the Secretary to the Treasury to make payments specified by the Commission utilising the finds contained in the "**MV X-Press Pearl Compensation Fund**" (established in the manner contained in this Judgment).

Composition and Mandate of the Committee

861. For the purposes referred to in the preceding paragraphs, there shall be a Committee named the **MV X-Press Pearl** M**arine and Coastal Environment Restoration and Protection Committee.** It shall comprise of the following:

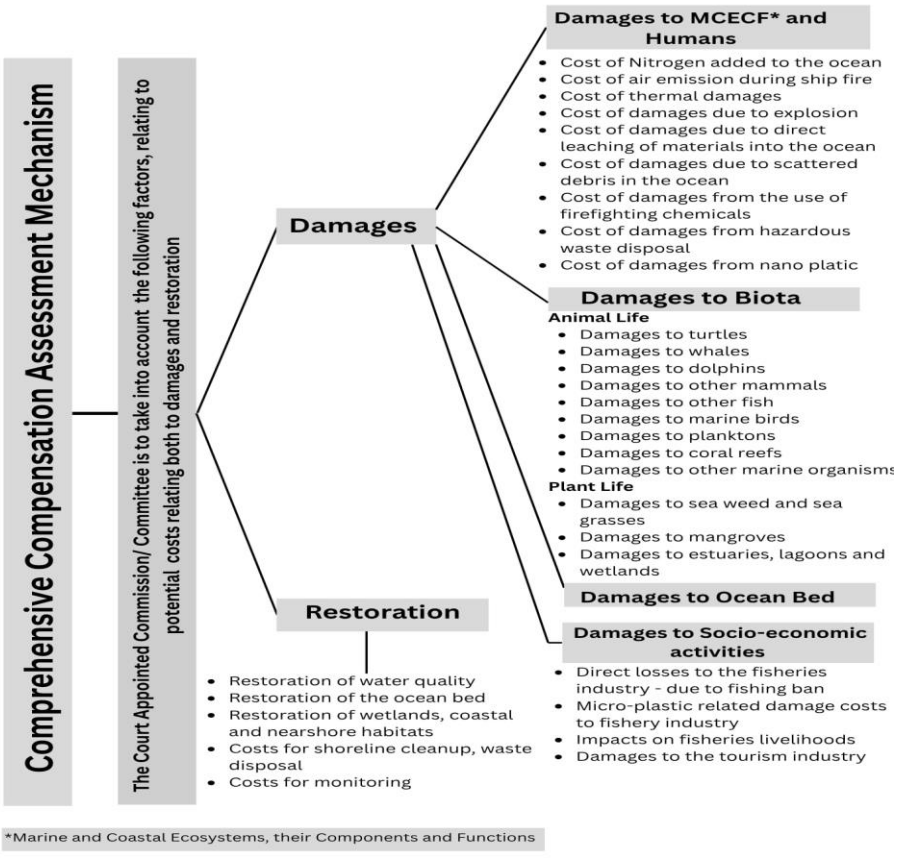
i. Secretary to the Ministry of Environment (Chairman).
ii. The Chief Executive Officer / Director General of the Marine Environment Protection Authority (MEPA) (Secretary)
iii. The Chief Executive Officer of the Coast Conservation Authority.
iv. The Secretary or senior representative of the Secretary to the Ministry in-charge of the marine environment.
v. The Secretary of senior representative of the Secretary to the Ministry in-charge of coast conservation.
vi. An officer representing the Attorney-General (who has so far not been involved in any matter relating to the MV X-Press Pearl

marine and coastal environment disaster) to assist the Committee.

vii. Up to six (6) non-State independent experts who possess expertise on matters relating to the restoration and protection of the marine and coastal environment.

862. The Committee shall be entitled to require the Secretary to the Treasury to expend monies from the **"MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Fund"** for the restoration and protection of the marine and coastal environment affected by the MV X-Press Pearl environmental disaster.

863. Both the afore-stated Commission and Committee may towards the execution of their respective mandates obtain guidance from the following:



Amounts payable by the polluter: MV X-Press Pearl group

864. The X-Press Pearl group who were cited as Respondents to the several Applications shall make an initial payment of USD 1 billion in up to four (4) instalments within a period of one (1) year from the date of this Judgment. The first of such instalments shall be paid within a period not exceeding two months from the date of this Judgment and shall not be less than USD 250 million. A further minimum of USD 500 million should be paid (in either one or two instalments) within a period of not exceeding 6 months from the date of this Judgment. The remaining USD 250 million (from the initial payment) shall be paid during the remaining period, and before the expiry of one year from the date of this Judgment.

865. The X-Press Pearl group who were cited as Respondents to the several Applications shall make further compensation payments as may be contained in further directions issued by this Court in the future.

Trusteeship

866. The payment of the afore-stated sums of money shall be made by the X-Press Pearl group cited as Respondents to the several Applications to the Secretary to the Treasury. The Secretary to the Treasury shall hold such funds received from the X-Press Pearl group of companies in trust for the purpose of giving effect directives issued from time to time by (a) this Court, (b) the Commission, and (c) the Committee.

867. The monies received in compliance with this Judgment from the polluter (X-Press Pearl group) shall be deposited by the Secretary to the Treasury in a new and separate account to be maintained within the Consolidated Fund of the Government of Sri Lanka and be held by the Secretary to the Treasury as a trustee. Such account shall be named "**MV**

X-Press Pearl Compensation and Environment Restoration and Protection Fund". Monies contained in such account shall be initially allocated on an equal basis for the execution of the mandates conferred on the Commission and the Committee referred to in this Judgment. Payments to third parties shall be made by the Secretary to the Treasury only on a direction by either this Court, the Commission or the Committee.

868. Following the initial payment being made by the polluter and the Secretary having deposited such sum of money in the "**MV X-Press Pearl Compensation and Environment Restoration and Protection Fund**", shall thereafter assign such money equally to the "**MV X-Press Pearl Compensation Fund**" (which shall be maintained to give effect to directions made by **Commission**) and the "**MV X-Press Pearl Environment Restoration and Protection Fund**" (which shall be maintained for the purpose of giving effect to the directions of the **Committee**).

869. It is the view of this Court that the Commission and the Committee established under this Judgment shall ensure transparency and accountability in the execution of their mandates. In this regard, the Commission and the Committee is advised to pay due regard to the trusteeship established in the United States of America as a result of the Judgment in the Exxon Valdez Oil Spill case in 1989.

870. The Auditor General shall audit the functioning of the Commission and the Committee referred to and the maintenance and disbursement of monies from the funds referred to above by the Secretary to the Treasury.

Findings of Court

871. This Court holds that, for the purpose of gaining entry to the Colombo Port, obtaining anchorage and thereafter using the berthing facility that had been issued by the Harbour Master of the Colombo Port, the Master, Operator and the local Agent of MV X-Press Pearl intentionally suppressed and withheld from the Harbour Master of the Colombo Port, truthful, timely, comprehensive and accurate information regarding the situation that evolved over a period of time and prevailed at the time the afore-stated vessel entered the territorial waters of Sri Lanka.

872. The afore-stated suppression and withholding of information referred to in the preceding paragraph, resulted in the Harbour Master of the Colombo Port and other related parties from not taking necessary measures to properly redress the situation that had arisen on board and in the MV X-Press Pearl and taking necessary measures to effectively protect the interests of Sri Lanka, including its marine and coastal environment.

873. The handling of, responses to and the management of the situation that evolved and later prevailed on board and in MV X-Press Pearl by the Master, Owner, Operators and the local Agent of the vessel, resulted in causing marine and coastal environmental pollution in Sri Lanka. In the circumstances that prevailed, such parties were able to manage the afore-stated situation in a manner that would not have resulted in marine and coastal environmental pollution. Accordingly, they are jointly and severally responsible for the marine and coastal environmental pollution that was caused.

874. The Operators, Master and the Agent of MV X-Press Pearl are jointly and severally responsible and culpable in terms of Sri Lanka's applicable law for the entirety of marine and coastal pollution referred to in this Judgment and for all causal harm and losses caused by such pollution.

875. The Master, Operators and the local Agent of MV X-Press Pearl have *inter alia* failed to discharge their reporting obligations towards the State of Sri Lanka and more particularly to the Colombo Port Control (Harbour Master) regarding the situation that arose, evolved and existed on board and in MV X-Press Pearl, and thereby are jointly and severally responsible for the infringement of applicable International Law, norms and standards, namely Protocol I of MARPOL, SOLAS Regulations, and requirements under the IMDG Code, in the manner set out in this Judgment.

876. By deliberately concealing the true situation on board and inside MV X-Press Pearl including the evolving condition of the damaged container, the situation that prevailed inside Cargo Hold No.2, and by failing to provide adequate and timely notifications regarding such matters, the Master, Operators, and the local Agent of MV X-Press Pearl have undermined applicable international reporting norms, and thereby deprived Sri Lanka's competent authorities of the critical response time that was necessary, and exposed the marine and coastal environment, coastal and fisheries communities and marine eco-systems to a marine and coastal environmental disaster that was preventable.

877. The Agent of MV X-Press Pearl is responsible both as a corporate entity and its Directors and principal executive officers are responsible on an individual basis for the suppression of relevant information to the Harbour Master of the Colombo Port, and such suppression *ex-facie* constitutes the offence of Cheating.

878. The 21st Respondent in SC/FR 277/2021 being the then State Minister for Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness Dr. Nalaka Godahewa, MP (former), is responsible for his failure to constitute the Marine Environment Council of the Marine Environment Protection Authority (MEPA) and thereby did not comply with his statutory obligation under Section 14 of the Marine Pollution Prevention Act. This non-compliance resulted in the

MEPA not having the benefit of an instrument designed to enhance both readiness and response capacity in the face of an marine environmental emergency. In this instance, the absence of the said Council to respond to the incident relating to the MV X-Press Pearl and related marine and coastal environmental pollution contributed towards the malfunctioning of the MEPA in response to the incident.

879. The 21st Respondent in SC/FR 277/2021 being the then State Minister for Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness Dr. Nalaka Godahewa, MP (former), is responsible for his failure to exercise the supervisory duties conferred on him by Section 52(3) of the Marine Pollution Prevention Act in respect of the MEPA, and thereby permitted MEPA and its Chairperson to respond to the situation relating to the MV X-Press Pearl incident, without necessary ministerial supervision.

880. The 1st Respondent in SC/FR 168/2021 being the Marine Environment Protection Authority (MEPA) and the 10th Respondent in SC/FR 176/2021 being Mrs. Dharshani Lahandapura the Chairperson of MEPA are jointly and severally responsible for their failure to efficaciously respond to the situation pertaining to the MV X-Press Pearl incident in the manner described in this Judgment, and thereby are responsible for non-compliance with their statutory duties and obligations under and in terms of the provisions of the Marine Pollution and Protection Act.

881. This Court finds that the 10th Respondent in SC/FR 176/2021 being Mrs. Dharshani Lahandapura the Chairperson of Marine Environment Protection Authority (MEPA) failed to convene the Board of Directors of MEPA when it was required to, and thereby failed to obtain the views of the members of such Board specifically appointed to guide decision-making processes of the MEPA, and failed to assess the effectiveness of the measures already taken in light of the worsening emergency. Therefore, the 10th Respondent referred to above has not complied with the statutory obligations in the manner she was required to fulfil such

duties and obligations in relation to the incident surrounding MV X-Press Pearl.

882. The harm and losses suffered by the marine and coastal environment referred to in the several Applications and in respect of which cogent evidence has been presented to this Court, is the direct outcome of the environmental pollution caused by MV X-Press Pearl, and the Master, Owner, Operator(s) and the Agent in Sri Lanka of MV X-Press Pearl, therefore, are jointly and severally responsible for such pollution.

883. The economic and financial losses suffered by fishing communities and others associated with the fishing industry referred to in the several Applications and in respect of which cogent evidence has been presented to this Court, is directly due to the situation that arose as a result of the marine and coastal environmental pollution caused by MV X-Press Pearl, and therefore the Master, Owner, Operator(s) and the Agent in Sri Lanka of MV X-Press Pearl are jointly and severally responsible for such economic and financial losses.

884. The Attorney General has failed to perform his statutory function of indicting the Owner and the Operator(s) of MV X-Press Pearl, with regard to their criminal responsibility arising out of Section 26 paragraph (a) of the Marine Pollution Prevention Act.

885. The decision taken by the Attorney General to institute civil legal action against the X-Press Pearl group of companies in a Singapore court, as opposed to instituting action in the High Court of the Republic of Sri Lanka exercising Admiralty jurisdiction, was an unreasonable, irrational and arbitrary decision, and was not in the best interests of Sri Lanka.

886. The Non-State party Respondents (X-Press Pearl group) shall be jointly and severally accountable and liable under the Polluter Pays Principal for the marine and coastal pollution caused by MV X-Press Pearl.

887. This Court holds that the 13th Respondent in SC/FR 168/2021 Sea Consortium Lanka (Pvt.) Ltd. functioned as the Agent in Sri Lanka of MV X-Press Pearl (during the period relevant to these Applications), and as the Representative in Sri Lanka of ESO RO (Pte.) Ltd. and X-Press Feeders.

888. Given the facts and circumstances relating to these Applications and the evidence available as well as the joint representation in these proceedings by common Counsel, this Court holds that for the purposes of this Judgment, the 'X-Press Pearl group' shall be referable to the Owner, Operator(s) and local Agent of MX X-Press Pearl.

889. The evidence relating to the Owner and Operator(s) of MV X-Press Pearl points to the direction that ESO RO (Pte.) Ltd., X-Press Feeders, Killiney Shipping (Pte.) Ltd., and Sea Consortium (Pte.) Ltd. have been or have functioned as the Owner and Operator(s) of MV X-Press Pearl. However, it is noted that on certain occasions their roles in respect of MV Pearl have shifted or have been changed. The Affidavits tendered to Court on behalf of such parties do not enable this Court to cause their identification to a degree of certainty. Furthermore, the Court observes that the Master of the vessel had been an employee of the Operator(s) of the vessel. Thus, the findings contained in this Judgment relating to the Owner and the Operator(s) of MV X-Press Pearl shall jointly and severally relate and be referable to;

(i) 11th Respondent - ESO RO (Pte.) Ltd. in SC/FR 168/2021,
(ii) 12th Respondent - X-Press Feeders in SC/FR 168/2021,
(iii) 12A Respondent X-Press Feeders represented by its local Agent Sea Consortium Lanka (Pvt.) Ltd. in SC/FR 168/2021,
(iv) 11(A) Respondent X-Press Feeders represented by its local Agent Sea Consortium Lanka (Pvt.) Ltd. in SC/FR 176/2021,
(v) 11(B) Respondent Killiney Shipping (Pte.) Ltd. in SC/FR 176/2021, and
(vi) 17th Respondent Sea Consortium (Pte.) Ltd, (X-Press Feeders) in SC/FR 277/2021.

890. In view of the involvement of Directors and certain principal executive officers of Sea Consortium Lanka (Pvt.) Ltd. on behalf of the said company in matters referred to in this Judgment including in the committing of offences and willful conduct aimed at the suppression of required information, this Court holds that the Directors and such principal executive officers of Sea Consortium Lanka (Pvt.) Ltd. shall be individually and jointly personally liable to give effect to the directions made against Sea Consortium Lanka (Pvt.) Ltd. as the local Agent of MV X-Press Pearl and as a company inextricably interwoven with the rest of the companies of the X-Press Pearl group who have been cited as Respondents to the several Applications. Accordingly, such Directors of Sea Consortium Lanka (Pvt.) Ltd. and its principal executive officers whose conduct has been referred to in this Judgment shall be jointly and individually liable to give effect to all directions contained in this Judgment relating to the afore-stated MV X-Press Pearl group of companies.

Declarations of Court

891. By failing to constitute the Marine Environment Council of the Marine Environment Protection Authority (MEPA) and thereby failing to comply with his statutory obligation under Section 14 of the Marine Pollution Prevention Act, this Court makes a declaration that the 21st Respondent in SC/FR 277/2021 being the then State Minister for Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness Dr. Nalaka Godahewa, MP (former), had infringed the fundamental right of the Petitioners, those whom such Petitioners represent and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

892. By his failure to exercise the supervisory duties conferred on him by Section 52(3) of the Marine Pollution Prevention Act in respect of the MEPA and thereby having permitted MEPA to respond to the situation

relating to the MV X-Press Pearl incident, without necessary ministerial supervision (particularly at a time of emergency), this Court makes a declaration that the 21st Respondent in SC/FR 277/2021 being the then State Minister for Urban Development, Coast Conservation, Waste Disposal and Community Cleanliness Dr. Nalaka Godahewa, MP (former), has infringed the fundamental right of the Petitioner, whom they represent and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

893. By its failure to efficaciously respond to the situation pertaining to the MV X-Press Pearl incident in the manner described in this Judgment, and thereby being responsible for non-compliance with its statutory obligations under and in terms of the provisions of the Marine Pollution and Protection Act, this Court makes a declaration that the 1st Respondent in SC/FR 168/2021 being the Marine Environment Protection Authority (MEPA) has infringed the fundamental right of the Petitioners, whom they represent, and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

894. By her failure to efficaciously respond to the situation pertaining to the MV X-Press Pearl incident in the manner described in this Judgment, and thereby being responsible for non-compliance with her statutory obligations under and in terms of the provisions of the Marine Pollution and Protection Act, this Court makes a declaration that the 10th Respondent in SC/FR 176/2021 Dharshani Lahandapura the Chairperson of MEPA has infringed the fundamental right of the Petitioners, those whom they represent and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

895. By his failure to perform his statutory function of indicting the Owner and the Operator(s) of MV X-Press Pearl, with regard to their criminal responsibility arising out of Section 26 paragraph (a) of the Marine Pollution Prevention Act, this Court makes a declaration that the

Attorney General has infringed the fundamental right of the Petitioners, those whom they represent and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

896. By his unreasonable, irrational and arbitrary decision to institute civil legal action against the X-Press Pearl group of companies in a Singapore court as opposed to instituting action in the High Court of the Republic of Sri Lanka exercising Admiralty jurisdiction, this Court makes a declaration that the Attorney General has infringed the fundamental right of the Petitioners, those whom the Petitioners represent and by extension the People of Sri Lanka guaranteed by Article 12(1) of the Constitution.

Orders of Court

897. Due to the reasons contained in this Judgment, this Court makes the following **Orders**:

i. The Non-State party Respondents to the several Applications (the X-Press Pearl group referred to in this Judgment) shall within one (1) year from the date of this Judgment, make an initial payment of USD 1 billion. Such payment shall be made to the Secretary to the Treasury. The said Respondents shall be entitled to make such payments in instalments in the manner stated previously in this Judgment. Accordingly, the first instalment shall be paid on or before 23rd September 2025.

ii. The Non-State party Respondents to the several Applications (the X-Press Pearl group referred to in this Judgment) shall make such other and further payments this Court may direct in due course in the exercise of the present jurisdiction of this Court.

iii. Sea Consortium Lanka (Pvt.) Ltd. is directed to forthwith make a declaration of the names and present addresses and other contact details of all (a) Directors, and (b) principal executive officers of such company who were involved in different matters relating to MV X-Press Pearl, as at 2nd June 2021. Such information should be submitted by way of an Affidavit issued by the chief executive officer of such company.

iv. This Court hereby establishes and constitutes the **MV X-Press Pearl Compensation Commission**.

v. This Court appoints retired Justice of the Supreme Court E.A.G.R. Amarasekera as the Chairman of the MV X-Press Pearl Compensation Commission.

vi. This Court hereby establishes and constitutes the **MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Committee**.

vii. This Court appoints the Secretary to the Ministry of Environment (*ex-officio*) as the Chairman of the MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Committee.

viii. The Chairpersons and members of the **MV X-Press Pearl Compensation Commission** and the **MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Committee** including the independent experts shall be jointly responsible for the execution of the respective mandates entrusted to such Commission and Committee, and shall be answerable to the Supreme Court. The Chairpersons and Members (including the independent experts) of the Commission and the Committee shall be remunerated in the manner to be prescribed by this Court in due course. The Marine Environment Protection Authority (MEPA) shall make such remuneration

payments on a monthly basis. The MEPA shall be entitled to seek reimbursement of such sums of money expended, from the MV X-Press Pearl Compensation Commission.

ix. This Court directs the Attorney General to give necessary advice to the Criminal Investigation Department to conduct further investigations and conclude such investigations within a period not exceeding three (3) months from the date of this Judgment into all offences disclosed, including offences already identified and in respect of which investigations are ongoing, offences in the Penal Code, several laws relating to the marine and coastal environment, and thereafter consider the institution of criminal proceedings against all offenders.

x. This Court directs the Attorney General to re-appraise all existing investigational material already collected by the Criminal Investigation Department and other law enforcement authorities (including the MEPA), and consider the institution of criminal proceedings against all offenders disclosed in such investigations and thereafter institute criminal proceedings or cause the institution of criminal proceedings against all offenders in appropriate courts.

xi. The Director of the Criminal Investigations Department is directed to cause the conduct of criminal investigations relating to matters in respect of which the Attorney General gives advice, and ensure the completion of such investigations within a period of not exceeding three (3) months.

xii. The Attorney General is directed to report to the Supreme Court once in every three months of investigational and prosecutorial action taken by the Attorney General to give effect to the orders contained herein.

xiii. The Attorney General is directed to in consultation with other competent authorities and independent experts, undertake and carry out a gap analysis between international law, norms and standards relating to shipping and related maritime affairs and the applicable domestic laws and regulations, and advise the Government of the need to enact or amend existing legislation, regulations and rules, should there be a need to ensure compliance with international law, norms and standards to which international law requires Sri Lanka to be compliant with.

xiv. The Attorney General is directed to in consultation with the relevant competent authorities including independent experts and facilitated jointly by the Marine Environment Protection Authority and the Coast Conservation Authority, undertake and carry out a study and advise the Government on the need to amend legislation including the Marine Pollution Prevention Act and the Coast Conservation Act should there be a need to do so, for the purpose of bringing such legislation in line with contemporary international norms and standards, and to provide for an efficacious legislative framework for the effective protection of the marine and coastal environments, respond effectively to imminent or actual pollution of the marine and coastal environments, mitigate harm, and to secure adequate reparations to compensate for harm caused, and for the restoration and protection of affected marine and coastal environments.

xv. The Attorney General is directed to advice the Director of the Criminal Investigation Department to take necessary steps in terms of the law, to ensure that (a) individuals whom this Judgment has referred to, to be deemed to be responsible to give effect to the directions for the payment of compensation are available in Sri Lanka, should the need arise to take action against them for non-compliance with any direction made against Sea

Consortium Lanka (Pvt.) Ltd. or any other party of the MV X-Press Pearl group, and (b) individuals whom the Attorney General intends to prosecute are available in Sri Lanka when steps are taken by him to institute criminal proceedings against them.

xvi. The Director General of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) is directed to cause the conduct of a fresh investigation into the allegations of bribery and corruption referred to in this judgment and deviate from the unnecessary investigation that appears to have been launched into the causes of the incident of pollution relating to MV X-Press Pearl. In that regard, he is directed to pay attention *inter alia* to (a) the contents of this Judgment, (b) the speeches made in Parliament by several Members of Parliament during the debate into the matter relating to MV X-Press Pearl environmental pollution disaster (referred to in this Judgment), (c) other allegations that exist in the public domain, and (d) intelligence and information that may be available at the CIABOC and may be called for from different sources. To facilitate the conduct of such investigations, the Director General of CIABOC shall initially call for and consider investigations already conducted into such allegations by the Criminal Investigations Department. The Director General of the CIABOC shall obtain the assistance of the Financial Intelligence Unit of the Central Bank of Sri Lanka and the State Intelligence Service and process intelligence that may be received for the purpose of directing the conduct of investigations into possible instances of bribery or corruption. Interim Reports relating to the progress and outcomes of investigations conducted by CIABOC shall be submitted under confidential and sealed cover (with the covering Motion being appended to the external cover of the sealed envelope) to the Registrar of the Supreme Court, once in every three months.

xvii. These Applications shall be **Mentioned** at a session of this Divisional Bench to be held on **25th September 2025** for the purpose of (a) taking cognizance of compliance with the directions / order contained in this Judgment, (b) considering the appointment of independent experts to the MV X-Press Pearl Compensation Commission and to the MV X-Press Pearl Marine and Coastal Environment Restoration and Protection Committee, and (c) making necessary ancillary orders for the full implementation of the directions / orders contained in this Judgment. Should any of the parties to the several Applications (including the Respondents) wish to nominate such independent experts for their appointment to the Commission and or to the Committee, nominations in that regard shall be submitted to the Registrar of the Supreme Court on or before 10th September 2025.

xviii. Notwithstanding the delivery of this Judgment, the Supreme Court shall remain vested with the jurisdiction invoked by the several Petitioners till further notice.

xix. The Petitioners shall be entitled to claim from the Attorney General the actual costs of litigation (including counsel fees, payments to instructing Attorneys, and documentation charges) relating to the several Applications filed by them and prosecuted. Following the payment of such sums of money, the Attorney-General shall be entitled to claim reimbursement of such sums of money from the MV X-Press Pearl Compensation Commission.

xx. The Registrar of this Court is directed to take cognizance of the findings, declarations and orders contained in this Judgment, and forward copies of this Judgment to all parties in respect of whom such findings have been arrived at and declarations and orders have been issued at by this Court, directing them to take notes of the contents of this Judgment and comply with the orders

contained herein. Such notifications should be dispatched under registered post to all parties known to be resident in Sri Lanka and by courier to parties believed to be resident overseas. Additionally, soft copies of the Judgment may be forwarded via electronic mail.

Outcome

898. Due to the reasons stated in this Judgment, subject to the several orders contained herein, **all Applications are allowed**.

Next step

899. Proceedings relating to these Applications are not terminated, and the Registrar of the Supreme Court is directed to **Mention** this matter on **25th September 2025** for the purposes stated herein and for the Court to take cognizance of the status of implementation of the several orders contained in this Judgment. The Registrar is directed to constitute a bench comprising the present Divisional Bench for such purpose. As the Honourable Chief Justice who has presided over this Divisional Bench will retire soon, the Registrar is directed to bring this matter to the attention of the succeeding Honourable Chief Justice, and draw his attention to the need to make an appointment to fill the vacancy that will arise.

An observation

900. This Court wishes to place on record its sincere appreciation to all counsel who appeared for the several parties to the Applications. The effort they exercised towards the protection and advancement of the interests of their respective clients while remaining as officers of Court and assisting in the administration of justice, is a true reflection of their gentlemanly character, professional eminence, and the respect for the compelling need to adhere to professional ethics. The Court is pleased by

the dignified manner in which counsel conducted themselves towards Court, interacted with each other, and argued their respective cases. Such conduct is a testament to the professionalism of the members of the Sri Lankan Bar.

Murdu Fernando, PC, CJ
Chief Justice

Yasantha Kodagoda, PC, J
Judge of the Supreme Court

Shiran Gooneratne J
Judge of the Supreme Court

Achala Wengappuli, J
Judge of the Supreme Court

Priyantha Fernando, J
Judge of the Supreme Court