

Amended Petition separately marking Documents previously compendiously marked as "X2"

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

*In the matter on an Application under Articles 17
and 126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka*

1. Ven. Thiniyawala Palitha Thero
Nalanmdarama Temple
Nugegoda.
2. Hon. Ravi Karunanayake
Member of Parliament
No. 1291/6, Rajamalwatte Road
Battaramulla.
3. Ravi Jayawardena
Corruption Watch
No. 155/4, Welalanda Gardens
Thalawathugoda.

PETITIONERS

S.C. (FR) No. 536/2008

Vs

1. Hon. A.H.M. Fowzie
Minister of Petroleum & Petroleum
Resources Development
Ministry of Petroleum & Petroleum
Resources Development
Flower Road,
Colombo 7.
2. Ceylon Petroleum Corporation
No. 109, Rotunda Tower
Galle Road
Colombo 3.
3. Asantha de Mel
Chairman
Ceylon Petroleum Corporation
No. 109, Rotunda Tower
Galle Road
Colombo 3.

4. Sumith Abeysinghe
Secretary to the Treasury
The Secretariat
Colombo 1
5. Hon. G.L. Peiris
Minister of Export Development and
International Trade
Ministry of Export Development and
International Trade
6th Floor, Rakshana Mandiraya
No. 21, Vauxhall Street
Colombo 2.
6. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

AND NOW

***In the matter of an Application under and
in terms of Article 134(3) of the
Constitution of the Democratic Socialist
Republic of Sri Lanka***

Nihal Sri Ameresekere
No. 167/4, Vipulasena Mawatha
Colombo 10.

INTERVENIENT-PETITIONER

Vs.

1. Ven. Thiniyawala Palitha Thero
Nalanmdarama Temple
Nugegoda.
2. Hon. Ravi Karunanayake
Member of Parliament
No. 1291/6, Rajamalwatte Road
Battaramulla.
3. Ravi Jayawardena
Corruption Watch
No. 155/4, Welalanda Gardens
Thalawathugoda.

PETITIONERS-RESPONDENTS

1. Hon. A.H.M. Fowzie
Minister of Petroleum & Petroleum
Resources Development
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Resources Development
Flower Road,
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2. Ceylon Petroleum Corporation
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6th Floor, Rakshana Mandiraya
No. 21, Vauxhall Street
Colombo 2.
6. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS-RESPONDENTS

**TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS & LADYSHIPS THE OTHER HONOURABLE
JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 18th day of December 2008

The **Amended Petition** *separately marking Documents previously compendiously marked as "X2"*, of the Intervient-Petitioner above-named (hereinafter referred to as the "Petitioner"), appearing in person, states as follows:

1. The Petitioner is a -

- a) citizen of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as “**the country**”)
- b) Member of the
 - Institute of Chartered Accountants, Sri Lanka,
 - Chartered Institute of Management Accountants, UK.
 - Institute of Certified Management Accountants, Australia
 - Association of Certified Fraud Examiners, USA
 - International Consortium on Governmental Financial Management
 - International Association of Anti-Corruption Authorities
- c) Consultant exposed to both the private and public sectors
- d) public interest activist, particularly, *vis-à-vis*, fraud, corruption and combating the pillage and plunder of the resources of the people of the country.
- e) **person who has been concerned about the foreign exchange position of the country, the leakages thereof, and the rising levels of foreign debts to be serviced.**

A true photostat copy of the National Identity Card of the Petitioner is annexed marked (“X1”), pleaded as part and parcel hereof.

- 2. (a) The Petitioner is presenting this Petition for himself, on his own behalf, and for and on behalf of the people of the country, invoking the jurisdiction of Your Lordships’ Court in terms of the Article 126, read with Articles 3, 4 and 17 of the Constitution, to prevent grave and irreparable loss, damage and detriment being caused to the people of the country; whilst they are the real co-owners of the Consolidated Fund.
- (b) The transactions put in issue in this action have infringed and continues to infringe the fundamental right to equality before the law guaranteed by Articles 21(1) and 12(2) of the Constitution, and if not corrected, would render such constitutional guarantee of equality before the law nugatory.
- (c) In terms of Article 28 of the Constitution, the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, **it is the duty of every person in Sri Lanka, *inter-alia***, to uphold and defend the Constitution, further the national interest, and to preserve and protect public property, and to combat misuse and waste thereof.
- (d) Your Lordships’ Court in SC (FR) Application Nos. 10/07, 11/07, 12/07 and 13/07 *inter-alia* stated :

“The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the ‘Directive Principles of the State Policy’ contained therein shall guide “Parliament, the President and the Cabinet of Ministries in the enactment of ‘laws and the governance of Sri Lanka for establishment of a just and free society.”
- (e) Those who hold elected and selected public office, having made oath or affirmation in terms of the Constitution, to enter upon such public office, are bounden to uphold and defend the Constitution, and duly perform the duties and obligations stipulated in Article 28 of the Constitution.
- (f) That public property is held in trust on behalf of the people, and that there could be no violation of the ‘Doctrine of Public Trust’ was upheld and exhaustively dealt with by Your Lordships’ Court in the recent Judgment in SC (FR) No. 352/2007.

3. The Petitioner having dealt with the matter of 'Hedging Through Derivative Instruments' in his intervening Petition filed in SC FR No. 535/2008, restricts himself in his Petition to issue of taxes and other levies and 'pricing formula' *vis-à-vis* petroleum products only.
4. The Petitioner respectfully draws the kind attention of Your Lordships' Court to the following;
 - (a) The Petitioners in this Application have only dealt with and deemed the 2nd Respondent (CPC) to be the importer and distributor of petroleum products
 - (b) Whereas there is another importer and distributor of petroleum products, namely Lanka IOC Ltd. (LIOC).
 - (c) Hence, in endeavouring to deal with taxes and other levies and 'pricing formula' *vis-à-vis* petroleum products, the Petitioner believes, that facts pertaining to the dubious privatization of part of the 2nd Respondent (CPC) into LIOC, may need to be taken into reckoning, to prevent any unjust enrichment accruing to LIOC as a consequence.
5. Accordingly, the Petitioner respectfully sets out briefly hereinbelow, the salient facts pertaining to the privatization of LIOC, and the consequences thereof, for the kind attention of Your Lordships' Court;
 - (a) By Cabinet Memorandum of 13.11.2002 the then Minister of Power & Energy initiated the liberalization of the petroleum sector.

A true copy of the said Cabinet Memorandum dated 13.11.2002 is annexed marked ("X2(a)"), pleaded as part and parcel hereof.

- (b) Indian Oil Company (IOC) had been questionably exclusively selected, without any competitive offers transparently being called for – *vide* ("X2(a)")
- (c) By Cabinet Memorandum of 7.10.2003 and Note to Cabinet of the same date, the then Minister of Economic Reform, had set out the transaction with IOC, *vis-a-vis* the privatization of LIOC.

True copies of the said Cabinet Memorandum dated 7.10.2003 and Note to Cabinet are annexed respectively marked ("X2(b)(i)") & ("X2(b)(ii)"), pleaded as part and parcel hereof.

- (d) IOC was to pay US \$ 75 million for 100 Petrol Stations of the 2nd Respondent (CPC), and for 1 / 3rd Share of the Common User Facility – *vide* ("X2(b)(i)").
- (e) The 100 Petrol Stations are said to have been the most lucrative ones, which the 2nd Respondent (CPC) had, and which the LIOC had been given the option to select.
- (f) LIOC had also committed an investment of around Rs. 2 to 3 billion to upgrade the Petrol Stations – *vide* ("X2(b)(i)").
- (g) On a further Cabinet Memorandum of 8.10.2003 by then Minister of Economic Reform, as per observations made thereon by the then Minister of Power & Energy on 10.10.2003, it had stipulated that the above purchase consideration should be paid in foreign currency and should not be raised through local Banks.

True copies of the said Cabinet Memorandum dated 8.10.2003 and Note to Cabinet thereon are annexed respectively marked ("X2(c)(i)") & ("X2(c)(ii)"), pleaded as part and parcel hereof.

- (h) However, in violation thereof, IOC had invested only US \$ 40 million in foreign currency, and had raised the balance of US \$ 35 million through local Banks.
- (i) Ernst & Young had done a Valuation of US \$ 71 million, comprising of US \$ 40 million as 1 / 3rd Share of the Common User Facility and US \$ 31 million as the Valuation for the 100 Petrol Stations, without any valuation from the Chief Valuer – vide (“X2(b)(i)”),
- (j) It is based on such valuation of Ernst & Young that IOC had been permitted to pay US \$ 75 million, without any competitive bids being called for, to establish the proper market value, on a transparent competitive bidding process – vide (“X2(b)(ii)”),.
- (k) In addition, Ernst & Young had valued as an added ‘premium’ upto a maximum of US \$ 30 million, for LIOC to be given the right to acquire Dealer-Owned and Dealer-Operated Petrol Stations, which were outside those operated by the 2nd Respondent (CPC) – vide (“X2(b)(i)”),
- (l) However, in the Share Sale & Purchase Agreement dated 30.12.2003, LIOC had been questionably given such right, without the Government having received any consideration therefor.

A true copy of the said Share Sale & Purchase Agreement dated 30.12.2003 is annexed marked (“X2(d)”), pleaded as part and parcel hereof.

- (m) On the basis that an investment of US \$ 75 million was coming into the country in foreign currency, the Sale & Purchase Agreement had provided for a Subsidy to be paid by the Government to LIOC, based upon a ‘pricing formula’, which had been formulated by the then Chairman PERC.

True copies of the said ‘pricing formula’ for petroleum products and PERC Letter dated 24.8.2005 addressed to Ernst & Young are annexed respectively marked (“X2(e)(i)”) & (“X2(e)(ii)”), pleaded as part and parcel hereof.

- (n) Consequently, the Claims for subsidies from the Government made by LIOC had accumulated upto Rs. 9620 million as at April 2006, which afforded LIOC unjustifiable enrichment; including covering approximately 70 Dealer-Owned and Dealer-Operated Petrol Stations, which had been acquired by LIOC, in addition to the 100 Petrol Stations acquired from the 2nd Respondent (CPC).

A true copy of the said Claims for subsidies by LIOC is annexed marked (“X2(f)”), pleaded as part and parcel hereof.

- (o) The said Claims for Subsidies had been disputed by the Petitioner on the basis of Opinions obtained from the Hon. Attorney General, and private Counsel on a *pro-deo* basis, and on the basis that the actual costs incurred were less than the components therefor provided in the ‘pricing formula’.

True copies of the said Opinions from the Hon. Attorney General and private Counsel and Letter dated 13.6.2006 addressed by the Petitioner to the High Commissioner for India in Sri Lanka are annexed respectively marked (“X2(g)(i)”), (“X2(g)(ii)”) & (“X2(g)(iii)”), pleaded as part and parcel hereof.

- (p) Thereafter, agreement had been reached with LIOC by the former Secretary to the Treasury, without any transparency, reducing part of the subsidy, and affording LIOC, the Petitioner verily believes, Government Bonds for the balance payment agreed to be paid; the terms of which are not known.

- (q) In addition, in December 2002 LIOC had received BOI Approval, in addition to the core business, for other businesses, such as automatic car wash, car service, departmental stores, internet cafes, ATMs, food courts, etc., which would be a violation of the fundamental rights of those others engaged in such businesses.

True copy of Agreement No. 10 dated 5.12.2002 by and between the BOI and LIOC is annexed marked "X2(h)", pleaded as part and parcel hereof

6. The Petitioner respectfully seeks to intervene in this Application to assist Your Lordships' Court, and to bring the foregoing facts to the kind attention of Your Lordships' Court in relation to the matters of taxes and other levies and 'pricing formula' *vis-à-vis* petroleum products, taking into account all facts relevant thereto.
7. (a) The Petitioner respectfully states that the fundamental right of equality before law guaranteed under Articles 12(1) and 12(2) have being infringed, and continuing to be infringed, causing irreparable loss and damage and irremediable mischief to the Petitioner and the public of the country; whereby a cause of actions arises to invoke the Jurisdiction of Your Lordships' for the exercise of the judicial power of the people and for remedial action to be taken to protect national and public interest.
- (b) The Petitioner respectfully states that he has not invoked the jurisdiction of Your Lordships' Court previously on this matter.
8. The Petitioner respectfully seeks the permission of your Lordships' Court to intervene in this action, without seeking Your Lordships' Court to file a separate action.
9. The Petitioner respectfully reserves the right to adduce, with the permission of Your Lordships' Court, further documents and facts pertaining to this matter of national and public importance, should the necessity arise.
10. The Affidavit of the Petitioner is annexed in support of the averments herein

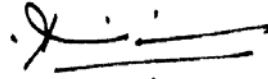
WHEREFORE the Intervening-Petitioner respectfully prays that Your Lordships' Court pleased to :

- (a) make Order permitting the Intervening-Petitioner to intervene in this Application, adding him as a Petitioner.
- (b) make Order to issue Notices of this intervention Application on the Respondents
- (c) make Order declaring that the fundamental rights guaranteed under Article 12(a) and 12(2) of the Constitution of the Petitioner and the People of Sri Lanka have been infringed
- (d) make Order as Your Lordships' Court seems meet and fit to have a just and equitable resolution of the taxes and other levies and 'pricing formula' *vis-à-vis* petroleum products
- (e) make Order directing the 4th Respondent, Secretary to the Treasury to disclose the Agreement reached with Lanka IOC Ltd., in writing-off in part and settling the balance Subsidy Claims of Lanka IOC Ltd., and as to whether such Subsidies paid pertained also to the Dealer-Owned and Dealer-Operated Petrol Stations, which had been acquired by Lanka IOC Ltd.
- (f) make Order directing the 4th Respondent, Secretary to the Treasury to take steps to
- (i) recover from Lanka IOC Ltd., due and proper consideration then valued at a maximum of US \$ 30 million for the right granted to acquire Dealer-Owned and Dealer-Operated Petrol Stations,
- (ii) ensure that Lanka IOC Ltd., brings in foreign currency the balance US \$ 35 million investment

(iii) cause the annulment of BOI approval and concessions granted to Lanka IOC Ltd., for business activities outside the core business of dealing in petroleum products, and to cause the recovery of import duties exempted and taxes exempted hitherto for such business activities.

(g) grant costs, and

(h) grant such other and further relief as to Your Lordships' Court shall seem meet

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a series of horizontal strokes and a final flourish.

Intervient-Petitioner