

COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY OR CORRUPTION

No 36 Malalasekera Mawatha,
Colombo 07.

07th April 2014

**REQUEST FOR A FULL INQUIRY INTO THE ABUSE OF POWER BY THE CUSTOMS OFFICERS
IN THE CUSTOMS INQUIRY NO: CIB/INV/14/2013/CCR/1384**

1. This is a complaint against the Customs officials involved in the case referred to above, details of which are set out below, for investigation and action as the Commission may deems appropriate.
2. Attention of the Commission is drawn to the following:
 - 2.1 Abuse of office by the officers to;
 - 2.1.1 act in collusion to defraud Government Revenue (refer paragraph 5 below)
 - 2.1.2 manipulate laws, procedures and regulations for unjust enrichment
 - 2.1. 3 insult and make unfounded charges against the defense lawyers
 - 2.1. 4 submit a final report (Order & Observations) with distorted facts.
 - 2.2 Judgment (Case No B1083/06/2013) of the Colombo Magistrate Court Dated 04th June 2013 referring to the dishonest conduct of the Customs Officers
 - 2.3 The improper conduct of the officers directly involved in the case
 - 2.4 The administrative errors committed and the need to take steps to close the gaps in the Customs Inquiry System that leads to corruption, bribery and other malpractices.

3. CASE IN BRIEF

- 3.1 The subject matter discussed herein is directly connected to a smuggling attempt involving ethanol (Ethyl Alcohol).
- 3.2 On 09th March 2013 two containers (2x40 with identification marks TCNU 6480319 & TCNU6287072) containing Ethanol (valued at Rs 33,693,983.54 used to make illicit liquor) were imported by Axis Industries (Pvt) Ltd of 369/42, Sepalika Uyana, Watareka, Padukka. The contraband had been declared as turpentine oil for the Customs purposes, defrauding the government revenue of Rs 22,140,612.00 (ref: X1).

4. CASE HISTORY

- 4.1 **DETENTION OF THE CONTAINERS AND THE COLLUSION OF THE CUSTOMS OFFICERS IN THE FRAUD:** Director of Customs, Mr Leslie Gamini of the Preventive Directorate authorized the detention of the two containers on arrival at the port for 'investigation purposes'. On 13th March

2013, both containers, were released on the orders of Mr Leslie Gamini subject only to a normal cursory examination (not for 100% physical examination applied for detained cargo) along with hundreds of other containers outside the port of Colombo [(ref: **X2** –pg 02 of the inquiry proceedings of 20th May 2013 & **X3** - page 06 of the Order dated 04th Nov 2013)].

4.2 INTERVENTION BY THE EXCISE OFFICERS: Excise officials, apparently acting on information, intercepted these two containers, before they reached the Customs Examination bay (at Grayline II, outside the port of Colombo), and escorted them to the Excise Department yard (ref: **X4** – page 02 of the proceedings of 22nd April 2013). The evidence given by Mr P N Hemantha, Chief Inspector of Excise on 17th May 2013 at the Customs Inquiry states; ‘... *at the time of intercepting the containers I was certain that the containers were containing ethanol as per information I received... As the containers were directed for normal channel I was aware that they have been released by Customs without examination...*’ (ref: **X5** – page 06 of the proceedings dated 17th May 2013).

4.3 INTERVENTION BY AN OFFICER FROM THE PREVENTIVE DIRECTORATE: Meanwhile, the Deputy Superintendent of Customs, Mr Sanath Fernando, another officer attached to the very same Preventive Directorate (claiming that he had received a precise information on the cargo) intervened and took over the two containers from the custody of the Excise officers and brought them back to the Customs premises (ref: **X6** – page 04 of the proceedings dated 26th Aug 2013

4.4 DGC BEING MISLED TO EXAMINE THE CONTAINERS IN THE ABSENCE OF THE IMPORTER: On 16th March 2013 the Director General of Customs (DGC) and the Commissioner of Excise examined the goods with no representation from the importer (The importer R D Samarakkody had informed the Customs his inability to attend due to his farther’s death). The DGC then entrusted the Customs Central Investigation Bureau (CIB) with the investigation and Mr V W Nanayakkara, the Superintendent of Customs (SC) was appointed as the Investigation Officer by the CIB Directorate.

4.5 CUSTOMS INVESTIGATION VIOLATING THE LAW: The cargo in the containers was examined in detail on 19th March 2013 by the Investigating Officer, in the presence of the importer Mr R D Samarakkody. On the following day the importer was produced before the Magistrate’s Court on the basis that ‘*he was a person capable of interfering with the investigations*’ (ref: **X7** – ref paragraph 6 of the B Report filed in Court – Case No 1083/6/13). However this was done by the Investigating Officer without producing the DGC’s certificate which is mandatory before remanding a suspect under Section 127A of the Customs Ordinance (ref: **X8** – paragraph 2.4 of the DOPL 252 of 02nd Oct 1995). At the request of the Investigating Officer the Court gave permission to summon the suspect for interrogation to the CIB as and when required.

4.6 COMPLETION OF THE CUSTOMS INVESTIGATION: The Customs investigation was completed and a formal Customs Inquiry (on the basis that there was a probable case to be answered) was

ordered by the Director of Customs, CIB into the matter. The suspect, however, was not released from the remand custody in spite of the completion of the investigation.

4.7 THE COMMENCEMENT OF THE FORMAL CUSTOMS INQUIRY VIOLATING LAWS AND

NORMS: Mr U Sumathipala, a Deputy Director of Customs (DDC) serving in the CIB, (the same Directorate) was appointed as the Inquiring Officer and the formal inquiry was commenced on 10th April 2013. The suspect R D Smarakkody, the importer, was charged with 4 others (Mr T S I Silva, Mr M Sashidaran, Mr D P J K Peiris and Mr A R K Pullai) with the alleged smuggling attempt (ref: **X9** – pg 03 of the proceedings dated 10th April 2013). In spite of the commencement of the Customs inquiry the Investigating Officer did not inform the Court to release the suspect R D Samarakkody from the remand custody, violating of the Section 127A of the Customs Ordinance. Further Inquiring Officer allowed the Investigating Officer to be present at the inquiry, on the basis that ‘the investigation was not over and that he was there to assist the Inquiring Officer’. This was a clear violation of suspects’ right to a fair and impartial inquiry.

4.8 MISLEADING THE COURT BY THE CUSTOMS OFFICERS TO KEEP THE SUSPECT IN REMAND

CUSTODY WITH ULTERIOR MOTIVES: On the very first day (10th April 2013) of the formal Customs Inquiry, an application was made by the Defense Counsel to the Inquiring Officer, requesting him to direct the Investigating Officer to inform the Court that a formal inquiry had begun and therefore to release the suspect. However, the Inquiring Officer ignored this request. On 22nd of April, the Defense Counsel, Nagananda Kodituwakku brought to the notice of the Inquiry officer that the suspect R D Samarakkody had been forced to admit guilt and to pay a penalty of Rs 18.5 million by the Investigating Officer, if he were to be released from the remand custody.

On 04th June 2013, two months after this submissions was made to the Inquiring Officer the Chief Magistrate ruled that no inquiry can be commenced without completing the investigations and ruled that keeping the suspect in the custody after the commencement was the inquiry is not permitted by law (Ref: X10 – pg 25 of the Court Order in Case No B 1083/06/13 dated 04th June 2013).

4.9 ABUSE OF OFFICE BY THE CUSTOMS OFFICIALS: The main suspect was produced in Court once a fortnight, but in every occasion the Investigating Officer, continued to mislead the Magistrate’s Court, stating that the investigation was still in progress and thus the need to keep the main suspect in the continued remand custody. He always cited that Magistrate Court has no jurisdiction to release a suspect from the remand custody only under exceptional circumstances (ref: **X11** – pg12 of the Court Order in Case No B 1083/06/13 dated 04th June 2013).

4.9.1 Therefore, in number of occasions, it was requested at the Customs Inquiry, seeking permission to lead evidence of the main suspect in this regard and also to obtain his release from the remand custody. The Investigating Officer objected to this

application and accordingly, both requests were turned down by the Inquiring Officer (ref **X12** – page 16 of the Inquiry proceedings dated 10th April 2013 & **X13** page 06 of the proceedings 22nd April 2013). The suspect R D Samarakkody was permitted to submit an affidavit in this regard on the following day. The said affidavit dated 23rd April 2013 (ref **X14** – Affidavit dated 23rd April 2013) was submitted to the Inquiring officer, revealing that the accused had been forced by the Investigating Officer to admit guilt and pay a penalty of Rs 18.5 million, if he were to be released from the remand custody.

4.9.2 Since it was obvious that no relief would be forthcoming, on 26th April 2013, an application (with a copy of the affidavit dated 23rd April 2013) was made to the DGC as well, requesting remedial action to stop the abuse of power by his officers, (ref: **X15** – Submission addressed to DGC dated 26th April 2013).

4.10 **DEFENSE COUNSEL'S SUBMISSION TO THE COURT:** On 29th April 2013, when the main suspect was once again produced before the Court, the Counsel for the suspect, Mr Nagananda Kodituwakku, made a submission explaining the ulterior motive of the officers to keep the suspect in continued remand custody. A copy of the suspect's affidavit dated 23rd April 2013 was also produced in Court (ref **X16** – Defense Counsel's Submission to the Court dated 29th April 2013). Then the Court reserved the order on the application made for the release of the suspect for the next date.

4.11 **DGC'S FAILURE TO TAKE CORRECTIVE MEASURES:** On 30th April 2013, the Defense Counsel Nagananda Kodituwakku made a further submission (ref **X17**) to the DGC with a copy of the affidavit (**X14**) dated 23rd April 2013. It was requested to direct the Inquiry Officer to inform the Court, the fact that the formal inquiry had been commenced and therefore to release the suspect. However DGC failed to take any action in this occasion too.

4.12 **INSULTING DEFENSE LAWYERS AND VIOLATIONG THEIR LEGAL RIGHTS AT THE CUSTOMS INQUIRY AFTER THE EXPOSURE OF ULTERIOR MOTIVES OF THE OFFICERS IN COURT:** On 07th May 2013, unusual arrangements had been made by the Inquiring Officer to deny the lawyers of their presence at the inquiry. An invalid DOPL (Department Order No 177 of dated 26th Aug 1996) (ref: **X18**) had been conspicuously displayed at the entrance to the inquiry room, which was also read out at the inquiry as a warning (ref: **X19** – page 14 of the proceedings dated 07th May 2013) to the lawyers representing the suspects. This was a clear violation of Section 13 (3) of the Constitution and the Section 41(1) of the Judicature Act. (ref: **X20** - page 15 of the proceedings dated 07th May 2013)

4.13 **INDUCING THE SUSPECT TO DROP THE LAWYERS AS A STRATERGY TO ACHIEVE THE IMPROPER MOTIVES OF THE CUSTOMS OFFICIALS:** At the Customs Inquiry on 07th of May 2013, the suspect R D Samarakkody informed the Inquiring Officer that he did ask his Counsel to

see the possibility of having the Inquiring Officer changed as he was clearly biased (ref: **X21** - page 14 of the proceedings dated 07th May 2013). The evidence of D P J K Peiris given at the inquiry on 17th October 2013 (reproduced below) clearly revealed that the suspect Samarakkody and the suspects T S I Silva and D P J K Peiris had been induced by the Prosecuting Officer and the Investigating Officer to attend the inquiry without their lawyers. (ref: **X22** - page 16 of the proceedings dated 17th Oct 2013).

'... We came to that decision because Mr V W Nanayakkara and Mr D P M Gunawardena told us not to bring lawyers so that this inquiry can be concluded within two three day. Thereafter Ranga (Mr R D Samarakkody, Sameera (T S I Silva) and myself (D P J K Peiris) decided to retain lawyers because we did not understand what is happening at the inquiry and we felt that injustice will be caused to us...'

4.14 REQUEST TO REPLACE THE INQUIRING OFFICER: Since it was apparent that the accused had been denied a fair hearing, the Defense Counsel made his written submission dated 09th May 2013 to the DGC. Therein it was requested to replace the Inquiring Officer, as he was clearly biased (ref: **X23** – Defense Counsel's submission to the DGC dated 09th May 2013).

4.15 INVESTIGATING OFFICER AVOIDING CROSS EXAMINATION AND INSTEAD SUBMITTING AN AFFIDAVIT: The prosecution deliberately avoided the leading evidence of the Investigating Officer on the allegations made against him by the suspect R D Samarakkody. They sought time to reply against the serious allegation by way of an affidavit from the Investigating Officer. This was a deliberate ploy to avoid cross-examination of the Investigating Officer by the Defense Lawyers. Yet, despite objections raised by the Defense, the Inquiring Officer allowed this request giving ample time to the Investigating Officer to submit an affidavit (**X24** – Affidavit by Investigating Officer, V W Nanayakkara dated 06th May 2013), a practice never adopted at any Customs Inquiry.

4.16 ILLEGAL RECORDING AND VIOLATION OF PRIVACY TO DISCREDIT LAWYERS: On 10th of May 2013, the Investigating Officer, submitted an affidavit (**X24**) rejecting all the allegations leveled against him by the suspect Samarakkody. He made a counter allegation that the Defense Counsel, Nagananda Kodituwakku, had wanted him to arrest those who were really involved in the fraud (including the Cabinet Minister Johnston Fernando who the investigating Officer himself cited as the major impediment blocking a proper investigation) instead of keeping the suspect R D Samarakkody in remand custody. The Inquiring Officer permitted a recorded private conversation (and informal private discussion between the Counsel N Kodituwakku and the Investigating Officer V W Nanayakkara at his office) submitted by the Investigating Officer in this regard. This was objected on the ground that it revealed no commission of an offence, and permitting of an irrelevant recording would amount to a breach of right to privacy. However, the Inquiring Officer allowed the recording and also refused the cross examination of the Investigating Officer on the subject.

4.17 LEADING EVIDENCE IN THE ABSENCE OF DEFENSE LAWYERS AND DENYING THEM OF

THEIR RIGHTS TO CHALLENGE THE CONDUCT OF THE INVESTIGATING OFFICER: On 16th May 2013 the suspect Samarakkody was produced at the Customs Inquiry from the remand custody. By then all the suspects had been forced to appear at the inquiry without their lawyers (ref: **X22**). On this day, taking the opportunity of the absence of the lawyers, the Prosecution led the evidence of the Investigating Officer in full and the suspects were asked to cross examine him. It was quite obvious that the suspects were not competent to do so and they remained silent. The strategy adopted by the Inquiring Officer to allow the Prosecuting Officer to lead the evidence of the Investigating Officer in the absence of Defense Lawyers, denied the opportunity to challenge the serious allegations made against the Defense Lawyer Nagananda Kodituwakku. This has allowed his evidence going into the records on 16th May 2013, unchallenged.

4.18 FORCING THE SUSPECT TO WITHDRAW THE AFFIDAVIT IN WRITING: On 16th May

2013, when the suspect Samarakkody was brought to the Customs Inquiry from the remand custody there was no legal representation for him. And he was induced to produce a letter to the Inquiring Officer, withdrawing the serious allegations made against the Investigating Officer, in his affidavit dated 23th April 2013, marked **X14**. The Inquiring Officer refers to the said letter in his Order dated 04th Nov 2013 as follows.

‘... Mr R D Samarakkody has tendered a letter at the Inquiry on 16th May 2013 stating that the affidavit was wrong and withdrew the same with an apology...’ (ref **X25** – page 4 of the order dated 04th Nov 2013).

4.18.1 THE INQUIRING OFFICER DELEBERATELY SUPRESSING THE EVIDENCE OF SUSPECT SAMARAKKODY REGARDING THE LETTER OBTAINED UNDER

DURESS: The suspect Samarakkody after his release from the remand Custody, on 04th June 2013 submitted a further affidavit dated 25th June 2013 (**X26**) saying that the said letter of withdrawal was given under duress after he was promised by the Investigating Officer that he would be released from the remand Custody if he did so. It was produced to the Inquiring Officer on 18th July 2013 but this information (refer **5.3.3** below) has been absolutely suppressed by the Inquiry Officer, in his findings.

4.19 THE COURT DIRECTS CUSTOMS TO PROVIDE THE DETAILS OF THE INVESTIGATIONS

AGAINST THE SUSPECT: On 28th May 2013 the Magistrate Court ordered the Customs to submit a comprehensive report on the investigations concluded and investigations pending against the suspect Samarakkody, who had been in the remand custody since 20th March 2013. (ref: **X27** – page 12 of the Court Order dated 04th June 2013.

4.20 DGC’S BELATED WARNING AGAINST THE ABUSE OF POWER BY THE OFFICERS:

Apparently after the submissions made by the Defense Counsel to the DGC on three occasions,

supported by documentary evidence, the DGC on 22nd May 2013 issued the Departmental Order No 861 (ref: X28) with a warning to the officers against the 'abuse of power' during investigations and inquiries.

4.21 THE INVESTIGATING OFFICER FAILED TO COMPLY WITH THE COURT DIRECTIONS

AND THE COURT RELEASE THE SUSPECT: On 04th June 2013, the Investigating Officer failed to submit the comprehensive report called for by the Court (ref: X29 – page 23 of the Court Order dated 04th June 2013) on the alleged investigations pending against the suspect Samarakkody. When the accused was produced in Court, the Investigating Officer made an application to keep the suspect in the continued remand custody until 13th June 2013, on the basis that the investigation was still in progress and also informed the Court that he had no objections if the Court on its own volition, release the suspect. The Court rejected the application and refused to accept the submissions made by the Investigating Officer that the investigation was still in progress. The Court held that no formal inquiry could be commenced without completion of the investigation and ordered the immediate release of the suspect. The Judge in his Order observed; ‘..... ඒ අනුව මෙම නඩුවේ වූදින සැකකරුට චරේඛිව රේගු විමර්ශන අවසන් වී නොමැති බවට මෙම අවස්ථාවේදී වාචිකව අධිකරණයේ කරුණු දැක්වුවද, අධිකරණය විසින් 2013.05.28 දිනැති නියෝගය ප්‍රකාරව සැකකරුට චරේඛිව තවදුරටත් සිදු කිරීමට ඇති විමර්ශන කවරේද යන්න පිළිබඳව යන්න කිසිදු කරුණක් අද දින ඉදිරිපත් කරන ලද වැඩිදුර වාර්තාවේ සඳහන් වී නොමැති බැවින්ද, රේගු විමර්ශන අවසන් වී නොමැති බවට පැමිණිල්ල විසින් මුල් අවස්ථාවේදී ඉදිරිපත් කර ඇති කරුණු පිළිගත නොහැකි බැවින් ප්‍රතික්ෂේප කරමි. (පිටුව 24, 25) ඒ අනුව මෙම නඩුවට අදාළව දැනටමත් රේගු පරීක්ෂණ ආරම්භ කොට ඇති බැවින්ද සැකකරුට චරේඛිව රේගු විමර්ශනයන් අවසන් කිරීමකින් තොරව රේගු පරීක්ෂණ ආරම්භ කළ නොහැකි බැවින්ද, අදාළ සැකකරුට චරේඛිව විමර්ශන කටයුතු දැනට අවසන්ව ඇති බව මෙම අධිකරණයේ නිගමනය වේ..... ඒ අනුව වූදින නිදහස් කරමි. (පිටුව 25, 26)

4.21.1 THE SUBMISSIONS MADE BY THE COUNSEL NAGANANDA KODITUWAKU AT THE CUSTOMS INQUIRY AND THE COURT TWO MONTHS AGO WERE FULLY IN

LINE WITH THE COURT ORDER: The application made at the Customs Inquiry on 22nd April 2013, by the Defense Counsel is given below. ‘...the relevant provisions of Section 127A of the Customs Law is very clear where the permits the custody only in cases where person capable of interfering in the investigations or the nature of the offence is such that it is desirable to keep a person in custody for further proper investigation. However, in this case it is observed that the accused person is kept in the custody only for the purpose of obtaining his consent to pay a single value of the goods...’. These submissions made by the Defense Counsel Nagananda Kodituwakku at the Magistrate’s Court on 29th April 2013 were fully in line with the aforesaid Court order.

4.22 SUSPECTS RETAIN THE LAWYERS AGAIN AND REITERATES THAT THE LAWYERS WERE DROPPED FURTHER TO THE INDUCEMENT MADE BY THE INVESTIGATING OFFICER:

Having fully realized that they had been completely deceived by the Customs Officers, the

suspects once again retained their lawyers to defend them at the inquiry with effect from 3rd June 2013 and the suspects revealed the reasons in their evidence as follows.

‘... We came to that decision because Mr V W Nanayakkara and Mr D P M Gunawardena told us not to bring lawyers so that this inquiry can be concluded within two three day. Thereafter Ranga (Mr R D Samarakkody, Sameera (T S I Silva) and myself (D P J K Peiris) decided to retain lawyers because we did not understand what is happening at the inquiry and we felt that injustice will be caused to us...’ (ref: X22)

4.23 THE SUSPECT SAMARAKKODY REAFFIRMS HIS PREVIOUS AFFIDAVIT (X14) WITH

SERIOUS ACCUSATIONS MADE AGAINST THE INVESTIGATING OFFICER: After his release from the remand custody on 04th June 2013, the suspect Samarakkody on 18th July 2013, produced an affidavit dated 25th June 2013 (ref: X26) reaffirmed the content of his original affidavit dated 23rd April 2013 (X14). He revealed the circumstances under which the original affidavit was withdrawn. He had further stated that he was forced to attend the inquiry without lawyers and to withdraw the serious allegations made against the Investigating Officer, if he were to be released from the remand custody. He said that he was compelled to do so as the Investigating Officer had promised him not to object his release from the remand custody. In fact on 04th June 2013 the Investigating Officer did not object to the release of the suspect R D Samarakkody from the remand custody as in the previous occasions, but at the same time also made an attempt to keep the suspect in continued remand custody up to 13th June 2013 and the Court made its observation on the Investigating Officer’s conduct as follows. ‘... “.... ඒ අනුව පැමිණිලිකාර රේගු අධිකාරී නානායකිකාර මහතා අද දින ඉදිරිපත් කර ඇති වැඩිදුර වාර්තාවේ සානුකම්පිත හේතූන් මත සැකකරු හිදුනස් කිරීමට චිකිත්සා වන බවට සඳහන් කර ඇති නමුදු, මෙම අවස්ථාවේදී විවෘත අධිකරණයේ කරුණු දක්වා ඇත්තේ රේගු විමර්ශන අවසන් වී නොමැති බවත්, සැකකරු තවදුරටත් ඊමාන්ඩ් භාරයට පත් කරන ලෙසත් වේ. ඒ අනුව පැමිණිලිකාර රේගු අධිකාරී වරයා විසින් ඉදිරිපත් කර ඇති වැඩිදුර වාර්තාවට පරස්පර ලෙස විවෘත අධිකරණයේදී මෙම අවස්ථාවේ කරුණු දක්වා ඇති බව පෙනී යයි....” (ref X30 : page 13 of the Court Order B1083/6/2013 dated 04th June 2013)

4.24 CONCLUSION OF THE CUSTOMS INQUIRY WITH BIASED FINDINGS:

on 17th October 2013, the Inquiring Officer Mr U Sumathipala concluded the formal Customs Inquiry. It is pertinent to mention that there was no further Investigations carried out by the Investigating Officer against the suspect Samarakkody after his release from the remand prison. On 04th November 2013, after having spent over a period of 6 months, he made his order, suppressing relevant facts and making very disparaging remarks against the Defense lawyers who strongly contested the patent abuse of power by the Inquiring Officer, Prosecuting Officer and the Investigating Officer. Further he went beyond his mandate and presented his personal views on the distribution of the cash reward offered in the case.

4.25 VIOLATION OF THE MANDATE TO MISAPPROPRIATE THE CASH REWARD:

According to the Inquiring Officer’s own observations the subject matter of the inquiry was ‘an illegal importation of two shipments of Ethanol defrauding the government revenue’ (ref: X1).

However, it is observed that considerable time and energy had been wasted to effectively accommodate his own CIB Staff for the cash reward running into over 10 million rupees.

4.25.1 The Inquiring Officer observes that “... *An in-depth investigation had been carried out by the CIB Directorate **on the orders of the DGC** to determine the initiation of the case (for the distribution of the reward), **since there were three parties involved** (CIB Directorate, Officers of the Preventive Division and Department of Excise) ...*” (ref **X31** – page 3 of the Inquiring Officer’s Order dated 04th Nov 2013)

4.25.2 The subject matter very clearly stipulates the purpose for which the inquiry was held (ref: **X1**) and there was no reference whatsoever to the ‘initiation of the case’ in the case. On the other hand the DGC can not give any such mandate to the Inquiring Officer as such issues shall be dealt with by an independent panel of officers. Further it is ludicrous to claim that the DGC had given such a mandate to the Inquiring Officer, who is from the CIB, when the officers of the CIB themselves had made a claim for the cash reward. This naturally invalidates findings/views made by the Inquiring Officer, which is reproduced below.

“... Therefore I am of the view that both officers of the Excise Department and Mr G J S Fernando are not entitled to claim the initiation of the is case since they have failed to take action in appropriate time and according to laid down procedure. ...” (ref: **X32** - page 6 of the Order made by the Inquiring Officer dated 04th Nov 2013)

5. **REVIEW OF THE CONDUCT OF THE INVESTIGATION, INQUIRY AND THE ORDER MADE BY THE INQUIRING OFFICER:** This review facilitates the Commission to grasp the facts concerning the main elements to which its attention has been drawn.

5.1 REVIEW OF THE PARAGRAPH [2.1.1]:

ABUSE OF OFFICE BY OFFICERS TO ACT IN COLLUSION TO DEFRAUD GOVERNMENT REVENUE

5.1.1 It is observed that no attempt had been made to carry out an in depth investigation into ethanol smuggling, despite the claim made ‘in real patriotic terms’ by the Inquiring Officer and the Prosecuting Officer, in the observations. The Inquiring Officer observes;

*“... Special attention was drawn to this inquiry due to... it attracts very high rate of Customs duty and Excise duty... if ... smuggled out... would have been used for the manufacture of illicit alcoholic beverage, which is contrary to a core State policy of ‘**Mathata Thitha**’...”* (**X33** – page 3 of the Inquiring Officer’s Order)

The submission of the Prosecuting Officer on 22nd April 2013 states ‘... *Importation of Ethanol by unlawful means ... is a serious crime that all law-abiding members of our*

society should treat with contempt because it harms the entire social fabric of our beautiful nation and destroys the younger generation, who will be the driving force of our future. These types of crimes by a handful of greedy and selfish individuals for their personal gain, should be abhorred by the state and the public alike...' (X34 – page 5 of the Inquiry proceedings dated 22nd April 2013)

- 5.1.2 It is observed that despite the ample evidence available, no attempt had been made to go for masterminds behind the ethanol smuggling, and to deal with the Customs Officers who had colluded in the smuggling attempt. Instead only four suspects were charged for the illegal importation.

The Inquiring Officer observes that '*... it was also proved ... that this is an organized racket funded by suspects D P J K Peiris, M Sasidaran. The suspects R D Samarakkody, T S I Silva, and A R K Pullai have **aided and abated** to the said fraud...*' (X35 – page 8 of the Inquiring Officer's Order)

The Inquiring Officer refers to several unseen hands operating behind the scene and also to some dubious actions that may lead to locate the final destination of the contraband. It seems that the Investigating Officer had simply ignored these significant factors in the course of his investigations. The Inquiring Officer observes '*... further he (R D Samarakkody admitted that he allowed persons called Ravi and Manawa to import ethyl alcohol using the names of his companies... the suspect was unwilling to give details as to what he did with the goods other than the goods were handed over to Ravi and Manawa whose whereabouts or contact phone numbers are not known to him....*' (X36 – page 9 of the Inquiring Officer's Order)

- 5.1.3 The Inquiring Officer himself in his observations concedes that there were reasonable suspicions 'on the others (specifically referring to the officers of the Customs Preventive Directorate) involved in the fraud'.

- I. '*... Investigations carried out by the Preventive Directorate give rise to '**reasonable suspicion**' but not sufficient to prove their connivance...*' (ref: X37- page 6 of the Inquiring Officer's Order)
- II. '*... when a container is detained for investigation by a branch it is the normal practice that the goods are examined by the same branch... but in this case examination of the goods has been passed to the Gray Line II Staff, without completing the accepted procedure of investigation...*' (ref: X38 - page 6 of the Inquiring Officer's Order)

- III. In addition, this factor was pointed out by the Defense Lawyers several times, which has been observed by the Inquiring Officer as follows.

'...The Inquiry's attention was specifically drawn to the allegations leveled by various parties including Defense Counsels that the Customs Officers were operating in collusion with the smugglers of Ethyl Alcohol...' (ref: **X39** - page 6 of the Inquiring Officer's Order)

- 5.1.4 There was clear evidence elicited at the inquiry that the Director of Customs (Preventive) Mr Leslie Gamini had received 29 telephone calls from the suspect T S I Silva over his mobile phone during the relevant period leading to the shipping of the two containers from Vietnam and to the subsequent detention of them (ref: **X40** – page 3 of the Inquiry proceedings of 29th May 2013). This evidence was more than adequate to initiate investigation into the conduct of the officers concerned and deal with them as required by the Customs Ordinance (Section 137), which render such officers incapable of serving the Government of Sri Lanka in addition to imposition of forfeiture. However, the Inquiry Officer's view on this is quite unacceptable.

*"... Investigations carried out by the Preventive Directorate give rise to '**reasonable suspicion**' but not sufficient to prove their connivance..."* (ref: **X37**- page 6 of the Inquiring Officer's Order)

- 5.1.5 The Inquiring Officer, the Prosecuting Officer and the Investigating Officer had deliberately avoided summoning and testifying Mr Leslie Gamini. This only demonstrates that the inquiry itself was a deliberate attempt to cover-up the 'true character of the fraud' whilst protecting the Customs Officers colluding in the smuggling attempt.

- 5.1.6 As mentioned in paragraph 4.2 above, the two containers under reference, were seized by the Excise officers while the same ***modus operandi*** (setout below) was being adopted by the Customs Officers assisting in the smuggling attempt.

- i. **Customs units tasked with prevention of smuggling:** The Revenue Task Force, Central Intelligence Directorate (CIU), Central Investigation Bureau (CIB) and Preventive Directorate are the main revenue protection units in the department, for the intercepting and seizing any suspected shipments.
- ii. **Practice in force:** Once a shipment is detained/seized by any officer attached to one of these directorates, other officers or other units in the department are barred from intervention.

- iii. **Strategy adopted by the officers colluding with the smugglers:** The officers who collude with the fraudsters make the maximum advantage of the above practice to provide an effective cover to smuggle contraband. They act according to a pre-determined plan to take the containers into their custody. Then no one could involve in the investigation. In doing so these officers ignore the fact that it is a punishable offence under Customs Ordinance (Section 137), which attract severe penalties including the dismissal from the service.
- iv. **Practice in force:** Once the declaration of any goods detained is furnished to the imports division (Customs Long Room) it is referred to the respective Directorate, which is responsible for the seizure of the goods. Then the said Directorate is required to carryout a detailed physical examination of the goods.
- v. **Strategy adopted by the officers to evade enforcement action:** The officers involved, covertly avoid the physical examination of the cargo. Instead, the detained containers are permitted out of the port premises along with hundreds of other containers to be released to the importers with or without a random/casual examination.
- vi. The two containers in this case were stopped by the Excise Officers while being transported out of the Port as referred to in paragraph 4.2 above.

5.2 REVIEW OF THE PARAGRAPH 2:1:2:

MANUPULATION OF THE LAW, PROCEDURE AND REGULATION FOR UNJUST ENRICHMENT

- 5.2.1 **Violation of the right to a fair trial/hearing:** The investigation, prosecution and the conducting of the Inquiry into this case have been carried out by the staff of the same Directorate, CIB (Central Investigation Bureau).
- 5.2.2 **Violation of the natural justice norm that *'justice should not only be done, but should manifestly and undoubtedly be seen to be done'*:** The Investigating Officer's evidence had been permitted at the inquiry, after having denied the attendance of the Defense Lawyers. This is evidently a deliberate manipulation of

the inquiry process to avoid contesting the evidence given by the Investigating Officer.

- 5.2.3 Violation of Rule of Law as observed by the Magistrate Court in its Order on 04th June 2013:** Investigation process had been allowed to be continued by Inquiring Officer, permitting the abuse of the legal process against the accused R D Samarakkody.
- 5.2.4 Violation of the Departmental Regulations:** As per the directive issued by the DGC (DOPL 252 of 02nd Oct 1995) a certificate from the DGC is mandatory for the remanding of any suspect. This was not complied with in this case, when the suspect R D Samarakkody was remanded on 20th March 2013.
- 5.2.5 Violation of fundamental human rights Guaranteed by the Constitution:** Customs Officers denied the suspects' right to legal representations guaranteed under Article 13 (3) of the Constitution and the Section 41 (1) of the Judicature Act.
- 5.2.6 Denial of right to cross-examination:** At the Inquiry the all accused were denied their legal right to cross-examine the Investigating Officer through the lawyers.
- 5.2.7 Violation of Section 127A:** Section 127A of the Customs Ordinance was abused to keep the suspect R D Samarakkody in the remand custody after the formal inquiry had been commenced.
- 5.2.8 Abuse of the inquiry process to make an observation on the cash reward:** The Inquiring Officer deviated from the subject matter of the inquiry (ref: X1) and made unwarranted observation on the cash reward effectively awarding it to his own CIB Staff.
- 5.2.9 The Inquiry process has been abused permitting the investigating officer to be present at the inquiry throughout:** The process so adopted at the inquiry had clearly violated the Natural Justice maxim that '*the Justice not only to be done but seen to be done*'. A fair inquiry against the suspects had been denied in the given circumstances.

5.3 REVIEW OF THE PARAGRAPH [2.1.3]:

INSULTING AND MAKING UNFOUNDED CHARGES AGAINST THE DEFENSE LAWYERS

- 5.3.1 The Inquiring Officer has stated in his Report/Order (page 4) that, "... Hence separate report will be made to the DGC for necessary action with regard to the said allegation and the conduct

of the AAL...". This is against the Defense Lawyer Nagananda Kodituwakku, apparently for the following reasons.

- I. The presence of the lawyers at the inquiry became a hindrance to achieve the predetermined improper objectives (given below) of the three officers (Inquiring Officer, Prosecuting Officer and the Investigating Officer) involved in the case.
 - To cover up the fraud (refer paragraph 5.1 above)
 - To force the suspect Samarakkody to pay the extortionate penalty of 18.5 million rupees by keeping him in the continued remand custody (refer 5.3.2 below)
 - To misappropriate the cash reward offered in the case (refer 4.25 above)
 - II. The Lawyer Nagananda Kodituwakku was responsible for exposing the abuse of the Section 127A by the Customs Officers, which has now been effectively stopped after the Judgment dated 04th June 2013 (refer paragraph 6 below) delivered by the Chief Magistrate, Colombo
- 5.3.2 As per the Inquiring Officer, the allegations involving the Lawyer Nagananda Kodituwakku emanate from the submissions made by him at the Customs Inquiry on 22nd and 23rd of April 2013 and at the Magistrate's Court on 29th April 2013, exposing the involvement of the officers and also from an informal private conversation (between the Investigating Officer and Lawyer Nagananda Kodituwakku) which has been secretly recorded. Further the Lawyer Nagananda Kodituwakku had submitted two Affidavits (**X14** and **X26**) given by the suspect Samarakkody to the Court, the DGC and to the Inquiring Officer exposing the improper conduct of the Investigating Officer and the Prosecuting Officer.
- 5.3.3 The Inquiry Officer has deliberately suppressed the presence of the final affidavit (**X26**) made by the main suspect after his release from the remand prison. The under mentioned extract taken from the said affidavit (**X26**) explains abuses committed by the officers involved in detail.

'... I state that thereafter SC, V W Nanayakkara severely reprimanded me that I will never be released from the remand Custody and warned that if I were to be released from the remand custody I should do away with my lawyers who were looking after my interests and appear at the inquiry without any legal representations and to accept the liability for the importation of the Ethanol and also to deny the contents in the affidavit presented at the inquiry on 23rd April 2013...'

'... I state that in this background where my liberty was unlawfully denied I had no other option but to attend the inquiry with no legal representations. Thereafter from 16th May 2013 I was forced to attend the inquiry with no lawyers. And as per the directions of the SC, V W Nanayakkara, I produced a written statement, accepting the liability for the alleged importation of Ethanol and also made a statement, denying the contents of the Affidavit tendered to the Inquiry Officer on 23rd April 2013. I state that I was also forced to say that the

contents of the affidavit and the reporting of the incident took place at the Washroom was false and the said Affidavit was prepared and given on the instructions of the Attorney-at-Law N Kodituwakku, who represented me at the inquiry...'

'... I state that thereafter on 04th June 2013, when I was produced before the Magistrate, SC, V W Nanayakkara informed Court that he has no objection for my released from the Remand Custody, to which he repeatedly objected citing that the Magistrate has no power to release me from the remand custody. I state the Court refused to accept the submission made by the SC, V W Nanayakkara and reprimanded him for abusing his office at different times and for misleading the Court to suit his purposes and ordered my release from the remand Custody...'

'... I state further that the officer who conducts this inquiry U Sumathipala is manifestly biased from the inception of this inquiry and I have instructed my lawyers to request for an independent Inquiry Officer appointed to hear this case. However all the applications made in this regard on my behalf have been not been considered by the said Inquiry Officer, who simply refuses to withdraw from the hearing of this case...'

5.3.3 The Inquiring Officer makes the following observations on the conduct of the Lawyer in his Order dated 04th Nov 2013

- a) *"... Conduct of some Attorneys-at-law was a barrier to conclude the inquiry expeditiously and also disgraceful to the profession..."*
- b) *"... Mr R D Samarakkody in his evidence on 21st May 2013 admitted that his Attorney-at-Law Mr N Kodituwakku was aware that the former was making false statement in the Affidavit marked as X2 (referred to herein as **X14**)..."*
- c) *"... Mr N Kodituwakku (AAL) slowly withdrawn from the Inquiry without confirming or denying his statements after the above said recorded evidence..."*
- d) *"... Mr Kodituwakku was aware that he (main suspect) was making false statement..."*
- e) *"... Audio recordings marked as P19 confirmed that Mr N Kodituwakku has mentioned that he had discussed this matter with Gotabaya and Gamini Senarath without reference to their respective offices. This is a clear evidence of threat and influence to the Investigating Officers by the Lawyers of the suspects which should be considered seriously ..."*

5.3.4. The responses to the above allegations are set out below.

- a) Allegations made on the conduct of the lawyers are baseless and manifestly unfounded. The Prosecuting Officer and the Inquiring Officer should take the full responsibility for the inordinate delay in the disposal of the case, as they had been employing the unlawful and unethical tactics during the pendency of the inquiry to achieve their improper objectives (ref **5.3.1** above)

- b) This charge is absolutely unfounded and this evidence has taken under duress after the suspect had been forced to attend the Inquiry without lawyers. The 2nd Affidavit (X26) given by the suspect Samarakkody is self-explanatory in this regard. The Inquiring Officer has deliberately suppressed this evidence in his final Order/Report.
- c) This allegation too is clearly unfounded. The lawyer Nagananda Kodituwakku never made any withdrawal from the case for the reasons claimed by the Inquiring Officer. The reasons for withdrawal of the lawyers are clearly explained in the 4.13 above. On the other hand there were no 'such statements' made by the Lawyer, Nagananda Kodituwakku. The Inquiring Officer had been duly informed that using a private conversation was not permitted by law and amounted to violation of right to privacy, unless it revealed a commission of an offence. The Inquiring Officer who himself was a lawyer, simply disregarded the submissions and permitted the recording to be used as evidence in the case despite the content of which was completely irrelevant to the inquiry. The sole purpose of this exercise was to discredit the lawyer Nagananda Kodituwakku.
- d) This is another patently unfounded allegation. The accused Samarakkody has made his stand very clear in his affidavit dated 25th June 2013 (Ref X26) on this unfounded allegation. On the other hand the affidavit (Ref X14) referred to by the Inquiring Officer had been signed by the accused Ranga Samarakkody at the Colombo Remand prison on 23rd April 2013 before the prison authorities and a lawyer named I U Kuruppuarachchi). The Lawyer Nagananda Kodituwakku had nothing to do with the affidavit given by the accused Samarakkody to protect his interests.
- e) This is another ploy adopted by the Inquiring Officer to make baseless allegations against the Lawyer Nagananda Kodituwakku. There was no threat whatsoever made against the Investigating Officer V W Nanayakkara by the Lawyer Nagananda Kodituwakku, during the informal private conversation he had on 05th April 2013, except insisting him to do a proper Investigation concerning every person involved in the fraud, including the Customs Staff. The absence of any such complaint of any threat being used against the Investigating Officer, except the baseless accusation made by the Inquiring Officer on 24th Nov 2013, clearly demonstrates that the ulterior motive of the accusations leveled against the Lawyer Nagananda Kodituwakku.

5.4 REVIEW OF THE PARAGRAPH [2.1.4]:

SUBMITTING A FINAL REPORT (ORDER & OBSERVATIONS) WITH DISTORTED FACTS:

The most significant findings suppressed by the Inquiring Officer are given below.

- (a) The facts elicited at the inquiry proving the involvement of the Customs officers in the fraud.
- (b) The judgment in the case No B1086/06 by the Chief Magistrate, Colombo about the abuse of office and misconduct of the Investigating Officer V W Nanayakkara
- (c) The presence of the Affidavit (X26) dated 25th June 2013 given by the suspect R D Samarakkody after his release from the remand custody.
- (d) Evidence given by the suspect D.P.J.K. Peiris (who had been identified by the Inquiring Officer as one of the suspects responsible for organizing and financing the ethanol importation) as to the reasons for dropping the lawyers;

"... we (Ranga Samarakkody, Mr T S I Silva and Mr D P J K Peiris) came to that decision (attending inquiry sans lawyers) because Mr V W Nanayakkara and Mr D P M Goonawardena told us not to bring lawyers. Thereafter Ranga (R D Samarakkody), myself and Sameera (T S I Silva) decided to retain Lawyers because we did not understand what is happening at the inquiry and we felt that injustice will be caused to us ..." [Ref: X22]

- (e) Violation of laws and DOPLs by the Investigation Officer.
- (f) Violation of the trust placed in the Customs by the informant who provided the information about the ethanol smuggling attempt to the Deputy Superintendent of Customs G J S Fernando.
- (g) Misleading of the Court by the Investigating Officer to keep the suspect R D Samarakkody in continued remand custody for improper purposes

6. REVIEW OF THE PARAGRAPH [2.2]

JUDGMENT (CASE No B1083/06/2013) OF THE COLOMBO MAGISTRATE COURT DATED 04th JUNE 2013 REFERRING TO THE DISHONEST CONDUCT OF THE CUSTOMS OFFICERS:

6.1 This Judgment validates the stand taken by the Defense Counsel N. Kodithuwakku (refer to paragraph 4.8 above) from the outset of the case about the abuse of office by the officers for improper purposes.

6.1.1 "... යම් සැකකරුවෙකුට රේගු විමර්ශනයක් අවසන් කිරීමකින් තොරව රේගු පරීක්ෂණයකදී සැකකරුට විරෝධීව චෝදනා හෝ සාක්ෂි ඉදිරිපත් කිරීමට හැකියාවක් නොමැති බැවින්ද, යම් සැකකරුවෙකුට විරෝධීව රේගු විමර්ශනය අතරතුරදී අදාළ සැකකරුවෙකුට විරෝධීව අදාළ රේගු පරීක්ෂණය ආරම්භ කිරීමට හෝ පවත්වා ගෙන යාමට හැකියාවක් නොමැති බව, රේගු කාර්ය පටිපාටි අත්පොත ප්‍රකාරව ද, රේගු විමර්ශන අවසන් වීමෙන් පසු රේගු පරීක්ෂණ

ආරම්භ කළ යුතු බැවින්ද, රේගු විමර්ශන අවසන් වී නොමැති බවට පැමිණිල්ල විසින් මුල් අවස්ථාවේදී ඉදිරිපත් කර ඇති කරුණු පිළිගත නොහැකි බැවින් ප්‍රතික්ෂේප කරමි...”

- 6.1.2 “.... සැකකරුට විරෝධීව රේගු විමර්ශනයන් අවසන් කිරීමකින් තොරව රේගු පරීක්ෂණ අවසන් කළ නොහැකි බැවින් අදාළ සැකකරුට විරෝධීව විමර්ශන කටයුතු දැනට අවසන් වී ඇති බැව් එම අධිකරණයේ නිගමනය වේ... සැකකරුට විරෝධීව විමර්ශන අවසන් වී ඇති අවස්ථාවක රේගු ආඥා පනතේ 127 (ඒ) වගන්තිය අනුව සැකකරු අනුව තවදුරටත් රිමාන්ඩ් භාරයේ තැබීමට හැකියාවක් නොමැති බවට තීරණය කරමි...”

This ruling given by the Court has effectively stopped the abuse of the Section 127C against any accused person held in custody by the officers for ‘improper purposes’.

- 6.2 Further this Judgment raises the misconduct of the Investigation Officer in the Magistrate Court.

- 6.2.1 “.... 2013.05.28 වෙනි දින මාගේ නියෝගයෙන් සැකකරු වෙනුවෙන් මේ දක්වා සිදු කර ඇති විමර්ශන සහ ඔහුට විරෝධීව තවදුරටත් සිදු කිරීමට ඇති විමර්ශන පිළිබඳව සම්පූර්ණ වාර්තාවක් අද දිනට ඉදිරිපත් කිරීමට නියම කර ඇති නමුත් පැමිණිල්ල විසින් අදාළ සැකකරුට විරුද්ධව මේ දක්වා සිදු කර ඇති විමර්ශන සහ තවදුරටත් සිදු කිරීමට ඇති විමර්ශන කවරේද යන්න පිළිබඳව සම්පූර්ණ වාර්තාවක් අධිකරණයට ඉදිරිපත් කර නොමැත....” (පිටුව 12)

- 6.2.1 “.... පැමිණිලිකාර රේගු අධිකාරී නානායක්කාර මහතා අද දින ඉදිරිපත් කර ඇති වැඩිදුර වාර්තාවේ සානුකම්පිත හේතූන් මත සැකකරු නිදහස් කිරීමට එකඟ වන බවට සඳහන් කර ඇති නමුත් මෙම අවස්ථාවේදී විවෘත අධිකරණයේ කරුණු දක්වා ඇත්තේ රේගු විමර්ශන අවසන් වී නොමැති බවත්, සැකකරු තවදුරටත් රිමාන්ඩ් භාරයට පත් කරන ලෙසත් වේ. ඒ අනුව පැමිණිලිකාර රේගු අධිකාරීවරයා විසින් ඉදිරිපත් කර ඇති වැඩිදුර වාර්තාවට පරස්පර ලෙස විවෘත අධිකරණයේදී මේ අවස්ථාවේදී කරුණු ඉදිරිපත් කර ඇති බව පෙනී යයි....”

- 6.2.3 “.... පැමිණිල්ල විසින් වරින්වර තම ස්ථාවරයන් වෙනස් කරමින් විකිහෙකට පරස්පර ආකාරයෙන් කටයුතු කර ඇති බවට පෙනී යන අතර, චලෙස වරින් වර වෙනස් කරනු ලබන ස්ථාවරයන්ට අනුව නියෝග ලබා දීමට අධිකරණයට හැකියාවක් නොමැත....”

- 6 2 4 “.... මෙම නඩුවේදී පැමිණිල්ල විසින් මෙයට පෙර රේගු ආඥා පනතේ 127 (අ) වගන්තිය යටතේ ඉදිරිපත් කර ඇති සැකකරුවෙකු රේගු පරීක්ෂණය අතරතුර හෝ නිදහස් කිරීමට මහේස්ත්‍රාත් අධිකරණයට බලයක් නොමැති බවට හඬ කොට ඇති අතර, එකී තත්වය තුළ අදාළ රේගු පරීක්ෂණය අවසන්ව නොතිබියදී සැකකරු නිදහස් කිරීමට පැමිණිල්ල විරුද්ධ නොවන බවට අද දින වැඩිදුර වාර්තාවක් ඔගින් කරුණු ඉදිරිපත් කරනු ලබන අතර, විවැනි සැකකරුවෙකු නිදහස් කිරීමට අධිකරණයක් බලයක් නොමැති බවට තර්ක කර ඇති අධිකරණයකටම සැකකරුවෙකු නිදහස් කිරීමට ඉල්ලීමක් ඉදිරිපත් කරනු ලබන්නේ කවරකාරයෙන්ද යන්න නිශ්චිත නොවේ.....” (පිටුව 13)

7. REVIEW OF THE PARAGRAPH [2.3]

THE IMPROPER CONDUCT OF THE OFFICERS INVOLVED IN THE CASE:

In order to assist the Commission the following observations are made on the conduct of the officers involved.

7.1 THE CONDUCT OF THE INVESTIGATING OFFICER, MR V W NANAYAKKARA IN THE COVER-UP

- 7.1.1 Conveniently evading the pursuance of action against the masterminds in the Ethanol fraud, abusing the name of the Cabinet Minister Johnston Fernando as an excuse.
- 7.1.2 Keeping the suspect Samarakkody in the continued remand custody, in violation of law and Departmental Orders for improper purposes
- 7.1.3 Deliberately avoiding dealing with the Customs Officers involved in the fraud, disregarding the clear evidence of collusion and violation of the provisions of the DOPL 733 of 08th Nov 2010 by the officers involved
- 7.1.4 Misleading the Chief Magistrate for more than 6 weeks since the commencement of the formal inquiry (10th April 2013), by making a dishonest and false statement in Court that *'investigations were still continuing and that the accused is capable of interfering with the investigations'*
- 7.1.5 Forcing the suspects to attend the inquiry without lawyers and compelling the suspect R D Samarakkody to withdraw the allegations made against the Investigating Officer.
- 7.1.6 Failing to comply with the Order given by the Magistrate on 28th May 2013 to furnish a detailed report by 04th June 2013 on the status of the 'investigation' against the suspect Samarakkody who had been kept in the remand custody on the basis that the investigations were incomplete.
- 7.1.7 **ANOTHER ETHANOL COVERUP BY MR V W NANAYAKKARA:** The Customs case No CIB/INV/08/2011, involved two-container loads of Ethanol, (valued Rs 14.8 million rupees). In this case the investigation had revealed that the contraband had been discharged at the Vat belonged to the suspect Classic Distilleries (Pvt) Ltd, Malambe and it was sealed by the Investigating Officer V W Nanayakkara. At the formal inquiry held on 02nd June 2011, the Managing Director of the company, Mr K P Balanayagam was not dealt with but a further forfeiture of Rs 17,000,000.00 was imposed on a totally unrelated person, named N Kumarachandran. This was followed by an order to remove the Customs seals placed the Vat belonged to the suspect company. It is pertinent to mention that the whole inquiry process had taken less than three hours from start to finish. The issue remains as to why the

contraband was not confiscated and why the suspect company was not dealt with as required by the Customs Ordinance (ref **X41** - Inquiry proceedings of the case CIB/INV/08/2011)

7.2 THE ROLE PLAYED BY PROSECUTING OFFICER, MR D P M GOONAWARDENA (SC) IN THE COVER-UP

- 7.2.1 Making lengthy unfounded submissions against the presence of lawyers who represented the suspects to abuse them for the convenience of the prosecution.
- 7.2.2 Making lengthy unfounded and irrelevant submissions at the inquiry to justify the keeping of the suspect R D Samarakkody in continued remand custody
- 7.2.3 Refusing, the release of the documents used against the suspect Samarakkody at the Inquiry to the lawyers who represented the suspects
- 7.2.4 Compelling the suspects to attend the inquiry without lawyers
- 7.2.5 Forcing the suspects to attend the inquiry without lawyers and inducing them to make baseless allegations against the lawyers
- 7.2.6 Leading evidence outside the scope of the inquiry in the absence of the lawyers (concerning the receipt of information on the fraud) to deny informant who had claimed to have provided a credible information about the illegal ethanol importation of his right to a cash reward of over 10 million offered in the case.
- 7.2.7 Misleading the witness, G J S Fernando, (the officer who had received the information about the release of two containers of ethanol) without producing the full record of the phone call record obtained from the service provider.
- 7.2.8 Deliberately avoiding the summoning of the Director (Preventive) to give evidence at the inquiry, despite the presence of clear evidence of his collusion in the fraud (phone calls and release of the two containers)

7.3 THE ROLE PLAYED BY THE INQUIRING OFFICER, MR U SUMATHIPALA (DDC) IN THE COVER-UP

- 7.3.1 Deliberately deviating from the scope of the inquiry (to determine as to whether the importation of ethanol was illegal and whether the accused persons were knowingly concerned in it) for improper considerations.

- 7.3.2 Aiding and abetting with the Investigating Officer and Prosecuting Officer to keep the suspect Samarakkody in the continued remand custody despite the commencement of the formal inquiry and rejecting requests made by the lawyers.
- 7.3.3 Refusing to direct the Investigating Officer to inform the Court that formal inquiry into the matter had been commenced facilitating the keeping the suspect in continued custody for improper purposes.
- 7.3.4 Conducting the inquiry in spite of repeated submissions made by the Defense Counsels calling for his withdrawal, as he was serving in the same Directorate (CIB) and for being clearly biased towards the prosecution.
- 7.3.5 Conducting the Inquiry in spite of strong objections raised by the accused and the Defense Counsels for being biased
- 7.3.6 Ignoring the rights of the accused persons to legal representation guaranteed by Law
- 7.3.7 Relying on an invalid departmental order No 177 dated 26th Aug 1996 and reading out the copy of the same at the entrance to the CIB Inquiry Room to stop the lawyers from attending the inquiry
- 7.3.8 Denying the suspects of their right to legal representation and forcing them to attend the inquiry without lawyers
- 7.3.9 Inducing the suspect R D Samarakkody to deny evidence given in his affidavit (X14) and avoiding making any reference to the second affidavit (X26) presented at the inquiry in his Order
- 7.3.10 Permitting the Prosecuting Officer to lead evidence outside the scope of the inquiry (concerning the receipt of information on the fraud) abusing the claim for the cash reward made by the informant to facilitate the CIB Staff to claim reward instead
- 7.3.11 Permitting the Prosecuting Officer to mislead the Deputy Superintendent of Customs, Sanath Fernando, denying him access to the information about the phone calls received from the informant
- 7.3.12 Completely acting outside the scope of the inquiry, making a special reference in his Order with regard to the cash reward (over 10 million rupees) offered in the case with a mention made in the order that both Mr Sanath Fernando and Officers of the Excise Department are not entitled to the cash reward.

- 7.3.13 Making no reference in the order on the adverse remarks made by the Court on the improper conduct of the investigator, Mr V W Nanayakkara, ('abuse of power' concerning the arrest, detention and remand of the suspect Mr Ranga Samarakkody) to the DGC
- 7.3.14 Forcing the suspect Mr D P J K Peiris, to withdraw the allegations of bribery made against the officer V W Nanayakkara in relation to another ethanol case (CIB/INV/08/2011) until his evidence was concluded.
- 7.3.15 Making reference to the letter addressed to the Inquiring Officer (marked **X5** at the inquiry) about the withdrawal of the affidavit dated 23rd April 2013 given by the accused Mr R D Samarakkody about the allegation made against the Investigating Officer Mr V W Nanayakkara. This letter was presented to the Inquiring Officer on 16th May 2013, after being forced the suspect to attend the inquiry without Lawyers. The Inquiring Officer makes his 'observation' on this as follows. *"... the prosecution proved that allegations (made by the suspect) were unfounded and they were made on the instruction of lawyers. The Suspect withdrew it (allegations) voluntarily in writing..."*
- 7.3.16 Deliberately avoiding making any reference to the affidavit dated 25th June 2013 by the suspect Mr R D Samarakkody (submitted at the inquiry on 18th July 2013) reaffirming the accusations made against the Investigating Officer Mr V W Nanayakkara in his previous affidavit submitted on 23rd April 2013, wherein the accused stated that he was forced to attend the inquiry without his lawyer and to withdraw the allegations made in his first affidavit (**X14**).
- 7.3.17 Deliberately ignoring the following piece of evidence given by the suspects at the conclusion of the inquiry, and using office he held as a Inquiring Officer, to protect the Investigating Officer and the Prosecuting Officer.

*"... We (Ranga Samarakkody, Mr T S I Silva and Mr D P J K Peiris) came to that decision (attending inquiry sans lawyers) because Mr V W Nanayakkara and Mr D P M Goonawardena told us not to bring lawyers..." (ref: **X22**)*

This statement illustrates the scale of interference by the Prosecuting Officer, and the Investigating Officer and the gross denial of the legal rights of the accused persons by all three officers involved in the inquiry.

- 7.3.18 Making manifestly unfounded accusations against the lawyers who had challenged the manner in which the inquiry was conducted violating the basic norm of justice and fair play.
- 7.3.19 Conniving with the Prosecution to exculpate the liability of the Director Preventive Mr Leslie Gamini, despite overwhelming evidence of his collusion in the fraud was surfaced during the

cause of the inquiry, which had compelled the Inquiring Officer to make the following remark in the order, demonstrating the several ramifications of the case.

'When containers are detained for investigation the practice is that the goods are examined by the same branch and release them. But in this case, the examination of the goods has been passed to Gray line II staff without completing the accepted procedure of investigation.' (ref: X38)

- 7.3.20 **Demonstrating incompetence as an Inquiring Officer:** Making a manifestly wrong decision (Ref: X42) in the Customs case CINT/HQB/028/2013 (imposing a heavy penalty of 61,582,778.00 on the suspect), denying the suspect an opportunity to answer the show cause notice issued on him. As the suspect challenged this decision in the Court of Appeal (Case No 429/2013) the DGC was compelled to revoke the wrong decision made by the Inquiring Officer U Sumathipala.

7.4 THE ROLE PLAYED BY DIRECTOR OF PREVENTIVE, MR LESLIE GAMINI IN THE COVER-UP

- 7.4.1 Abuse of office to detain the two containers carrying contraband (ethanol) exploiting the DOPL 733 of 08th Nov 2010 for improper purposes (ref: X43)
- 7.4.2 Releasing the containers and providing a safe passage (ref: 5.1.6 above) for the contraband out of the port premises, violating Customs Ordinance (Section 137)
- 7.4.2 Maintaining covert contacts with the suspects over his mobile phone (29 occasions between 11th March 2013 and 15th March 2013 (ref X40) (before and after the arrival of the two containers of Ethanol).

8. REVIEW OF THE PARAGRAPH [2.4]

THE ADMINISTRATIVE ERRORS COMMITTED AND THE NEED TO TAKE STEPS TO CLOSE THE GAPS IN THE CUSTOMS INQUIRY SYSTEM THAT LEAD TO CORRUPTION, BRIBERY AND OTHER MALPRACTICE

8.1 Administrative errors committed:

- 8.1.1. Allowing a team of officers from the same Directorate (CIB) to conduct investigation, prosecution and the formal inquiry (CIB/INV/14/2013) violating the basic norms of the Administrative Law
- 8.1.2 Permitting the same team of officers (as claimed by the Inquiring Officer in his Order) who had pecuniary interest in the cash reward, to have access to the

confidential information provided by the Informant to the DGC and allowing them to decide on the entitlement of the cash reward

- 8.1.3 Disregarding the legitimate rights of the informant who had made a claim for the cash reward and expressed his concerns about the conduct of the Inquiring Officer (ref **X44** and **X45**)
- 8.1.4 Allowing the suspect R D Samarakkody be remanded without the written sanction from the DGC (refer: **X08** - Departmental Directive 252).
- 8.1.5 Permitting the Officers to keep the suspect (disregarding applications made for his release by the Defense Counsels) in the continued remand Custody after the completion of the investigation until the Court made a disparaging remark on the conduct of the officers and release the suspect
- 8.1.6 Allowing the officers to deny the rights of the accused persons for legal representations guaranteed by law
- 8.1.7 Turning a blind eye on the officers who collude in revenue frauds, encouraging corrupt practices whilst ignoring the loss of revenue

8.2 THE NEED TO TAKE STEPS TO CLOSE THE GAPS IN THE CUSTOMS INQUIRY SYSTEM THAT LEAD TO CORRUPTION, BRIBERY AND OTHER MALPRACTICE: What is depicted in this document is only a tip of the ice-burg of the total failure to observe the Rule of Law at the Customs Inquiries, which are conducted with no respect to the principles of natural justice.

The administration of justice afforded to the Customs, outside the normal Court system by the Parliament, has completely and miserably failed to meet the objective of the legislature.

The current system tolerates unlawful practices such as permitting the same team of officials to be the investigator, prosecutor and the Inquiring Officer in a given case. Unlike the other law enforcement agencies, in all Customs cases the investigators have a clear pecuniary interest in the proceeds realized from the cases. And therefore, they are not permitted by law to play any role in the prosecution, as per the established Administrative Law principles, which demand for, *inter alia*, justice, fair play, transparency and above all integrity.

In the given circumstances, this is a fit and proper case for the Commission for Allegations of Bribery or Corruption to take serious notice of and to initiate a thorough investigation with a view to restore the law and order in the Customs Department, and to recommend the government for a total revamp in the Customs Inquiry system. A proposal in this regard to

enhance the effectiveness of the management of the Customs with special reference to the Customs Inquiry System will follow.

The present system has to be replaced with a panel of competent officials specially recruited for the purpose. It would gradually minimize the abuses, whilst ensuring justice and fair play with an advanced disclose of the prosecution case with all evidence that would be used against accused persons made available before the commencement of the hearing. It is also important to encourage mandatory case management hearing, allocating agreed specific time scale for both parties, within which a matter shall be heard and disposed of from start to finish.

The Customs is the primary tax collector for the government and thus the need of the hour is to establish a vibrant and effective inquiry system that would ensure the compliance with the natural justice maxim that '*justice should not only be done, but should manifestly and undoubtedly be seen to be done*' [H W R Wade, *Administrative law* 10th Edition page 381].



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Copy to: The Director General of Customs