The Eppawela Phosphate Mining Project: Breaking New Ground in Natural Resources Management

Introduction

This case[1] was filed by seven petitioners who are all residents of the Eppawela area in the Anuradhapura district situated in the North Central Province of Sri Lanka. The action was filed as a fundamental rights petition in the Supreme Court under Article 126(1) of the Constitution.[2] The petitioners claimed that they were in danger of losing all or some of their land and their means of livelihood if the Eppawela Phosphate Mining Project was implemented and also claimed that it violated their right to equal treatment under the law.[3]

History of the Project

The history of this project[4] dates back to 1971 when large deposits of apatite or rock phosphate were discovered in Sri Lanka in the Eppawela area. According to estimates the proven reserve is around 25 million metric tonnes and the inferred reserve is around 35 million metric tonnes. The deposits are in an area in which about 26 villages are located, many of them *purana gam* or ancient villages. It is an agriculturally developed area and contains sites of archaeological and historical value.

For about 20 years after the discovery, the phosphate was mined at the rate of around 40,000 metric tonnes per annum for domestic consumption. This was done by Lanka Phosphate Ltd, a fully Government owned company. This level of exploitation did not significantly impact on the environment or the lands and livelihood of the people of the area.

1 *Bulankulama* v. *The Secretary, Ministry of Industrial Development* (2000) Volume 7 No 2 South Asian Environmental Law Reporter 1. This case was filed on 8 October 1999 and judgment was delivered on 2 June 2000.

2 Article 126(1) reads: "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 recognised by Chapter III or Chapter IV."

3 The eight Respondents in the case were: 1) The Secretary, Ministry of Industrial Development; 2) The Board of Investment of Sri Lanka; 3) Geological Survey and Mines Bureau; 4) Central Environmental Authority; 5) Sarabhumi Resources (Private) Ltd.; 6) Lanka Phosphate Ltd.; 7) Geo-Resources Lanka (Private) Ltd.; and 8) The Attorney General.

4 This information is taken from the petition and written submissions filed in the case.

The present project was initiated in 1992 when the Government of the time published a notice in Sri Lankan and foreign newspapers calling for proposals to establish a joint venture to manufacture phosphate fertiliser utilising the Eppawela deposits. Several proposals were received and the Government selected Freeport MacMoran Resource Partners of the U.S. with whom to start negotiations. Negotiations continued until about 1996 and included issues such as the availability of land for a fertiliser manufacturing plant at Trincomalee on the eastern coast, and the displacement of residents of the area and compensation to be paid to them. Freeport MacMoran thereafter submitted a Mineral Investment Agreement (MIA) which was referred to the Attorney General for vetting.[5] According to the report of the final Negotiating Committee, the text of a Mineral Investment Agreement, an Export Distributorship Agreement, a Technical Advisory Services Agreement and the Memorandum and Articles of Association of a project company were agreed to and initialled. The partners of this project company, Sarabhumi Resources (Private) Ltd, would be IMC Agrico (65 per cent shares), Tomen Corporation of Japan (25 per cent shares) and Lanka Phosphate Ltd (10 per cent shares).

According to the materials available to the petitioners the proposed project would contain the following features:

- The initial exploration area would be 56 square kilometres with a 10 kilometre buffer zone on each side bringing the total potential project area to 800 square kilometres;
- Under the MIA, 1.2 million metric tonnes of rock phosphate would be mined per annum for the first 12 years of the project and around 900,000 metric tonnes thereafter. Therefore, the entire deposit as estimated to date would be mined and exported within about 30 years, after which Sri Lanka would have to import its phosphate requirements;
- The phosphate fertiliser produced by the project company would be Di Ammonium Phosphate. This is more expensive than the Single Super Phosphate being produced and used at present. As a result Sri Lankan farmers would have to pay an enhanced rate for fertiliser;
- About 2,600 families or 12,000 persons including the petitioners would be permanently displaced from their homes;
- More than 20 new and ancient irrigation reservoirs and about 100 kilometres of irrigation canals may be destroyed;
- Five kilometres of the Jaya Ganga[6] would be adversely impacted which may affect the entire irrigation system of the North Central Province;

5 In the meantime from about February 1997 the place of Freeport MacMoran was taken by IMC Agrico Company, a partnership registered in the U.S. comprising Freeport MacMoran and IMC Global Inc.

6 Brohier describes the Jaya Ganga or Yodi-ela as "an ingenious memorial of ancient irrigation skills" and says: "The magnificient Yodi-ela about 40 feet wide which carried the copious drainage of the north western slopes of the Matale hills from Kalawewa to Anuradhapura and onward, was undoubtedly designed

- A factory for the production of phosphoric acid and sulphuric acid would be constructed at Trincomalee using a 450 acre site adjoining Trincomalee Bay;[7]
- The commercial benefits of the project to the project company which is 90 per cent foreign owned would be far greater than the economic benefits to the country;
- Since Lanka Phosphate Ltd which is owned by the Sri Lankan Government has only 10 per cent of the equity of Sarabhumi Resources (Pvt) Ltd, the other two shareholders, both of which are foreign entities can vary the terms of the Memorandum and Articles of Association.

Environmental Issues

The petitioners claimed that the environmental pollution caused by the project would be immense and irreversible. Waste products from mining phosphate on this scale include phospho-gypsum and other radioactive substances. The mining operations would also create large pits and craters which would result in an increase in mosquitoes and attendant diseases. The MIA does not contain sufficient safeguards against environmental damage nor provisions to compel the project company to compensate the people or the State for the damage. Further, the foreign shareholders could sell their shares to Sri Lankan nationals at any time thus circumventing their obligations under the MIA.

The Cause of Action

The petitioners' cause of action was the imminent infringement of their fundamental rights under Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution.[8] They claimed that the action of the Government in persisting with the project was arbitrary and unreasonable and therefore discriminated against them. They further claimed that it would deprive them of the right to life and livelihood declared and recognised by the Constitution and particularly their rights under Articles 14(1)(g) and (h). They further claimed that since the Government of Sri Lanka has already made a commitment to carry through this project, any environmental impact

to serve as a combined irrigation and water supply canal. ... It today feeds no less than 60 village tanks and provides a reliable source of drinking water to more than 100 villages and to the town of Anuradhapura." See, R. L. Brohier *Ancient Irrigation Works of Ceylon* Part II (Ceylon Government Press, Colombo: 1935) 7–8.

7 Trincomalee Harbour on the eastern coast of Sri Lanka is the world's fifth largest natural harbour. The surrounding area particularly around the harbour is known for its scenic beauty with unspoilt beaches to the south against a backdrop of hills.

8 Article 12(1) provides: "All persons are equal before the law and are entitled to the equal protection of the law"; Article 14(1): "Every citizen is entitled to ... (g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise; (h) the freedom of movement and of choosing his residence within Sri Lanka."

assessment process as required under the National Environmental Act[9] would be biased and not conducted in good faith and comments made by the petitioners under the provisions of the Act would not be given due consideration. Under the circumstances the petitioners apprehended an imminent infringement of their right to equality under Article 12.

The petitioners prayed *inter alia* for a declaration that there is an imminent infringement of their rights and a direction to the Government to cancel any MIA or other connected agreement between the Government and Sarabhumi. As immediate measures, the petitioners also prayed that the Court issue an interim direction staying the implementation of the MIA pending the hearing and determination of the case and a direction to the Respondents to furnish to the Court any MIA or related agreement entered into or proposed to be entered into by the Government of Sri Lanka as regards the phosphate deposit.[10]

The Legal Issues

This judgment is probably the most significant to date in environmental and human rights jurisprudence in Sri Lanka. The project had generated considerable public controversy and protests, not only from those directly affected by it, but also from scientists, academics, trade unions and the general public. The implications of giving control of some of the country's most valuable natural resources to a foreign multi-national corporation, together with the attendant adverse consequences on the environment, the economy and the human rights of the people of the area in turn raised important issues of environment and development.

Although the cause of action in this case was the imminent infringement of the constitutionally guaranteed fundamental rights of the seven petitioners, principles of environmental law were addressed both in the course of argument and in the judgment. The important issues are discussed in this section.

9 Number 47 of 1980 as amended by Act No 56 of 1988 (Sri Lanka). Part IV C of the Act requires an Environmental Impact Assessment for a gazetted list of prescribed projects. The project would come within the item "Mining and Mineral Extraction". See Gazette Extraordinary No 722/22 of 24 June 1993 (Sri Lanka).

10 One of the difficulties faced by the petitioners was the inability to obtain information regarding the signing of the MIAs. The issue was addressed in the judgment of the Court. At the preliminary hearing the Court ordered the State to produce the MIA to Court if it had been signed. However, at the time of filing action the MIA had only been initialled.

The Doctrine of "Public Guardianship"

For the first time the doctrine of the public trust was argued in a matter concerning natural resources. Interestingly, the doctrine was cited by both the Petitioners and the Respondents in support of their respective positions. In the course of argument both parties asserted that the Government holds the mineral wealth of the country in trust for the people. Respondents argued that it was the Government and not the Court which was the "trustee" of the natural resources of Sri Lanka. They pointed out that so long as the Government acts "correctly" the Court has no jurisdiction to interfere even if it does not agree with the final outcome. The Petitioners agreed with the Respondents that the natural resources of the people were held in trust for them by the Government but disputed the former's claim that the Government had in fact acted correctly. They also disputed the contention that the Court had no role to play in the matter.

There was a strong basis on which to argue that the public trust doctrine could be held to be applicable in Sri Lanka. The Petitioners cited, in particular, the decision of the Supreme Court of India in M. C. *Mehta* v. *Kamal Nath*[11] in which the doctrine had been categorically accepted as part of the law of India. In this case Justice Kuldip Singh observed:

> The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close contemporary relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullius*) or by everyone in common (*res communius*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public.[12]

Having given an exhaustive analysis of the origins and development of the doctrine, particularly in American law, Justice Kuldip Singh concluded:

> Our legal system based on English common law includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.[13]

11 (1997) 1 SCC (Supreme Court Cases) 388 (India).
12 Ibid at 407.
13 Ibid.

Sri Lanka's legal system being founded on both the English common law and the Roman Dutch law which has its roots in ancient Roman law,[14] there was even stronger grounds to maintain that the public trust doctrine was a part of Sri Lankan law. The Court however, rejected the concept as it was argued by both the Petitioners and Respondents. In its place it propounded a doctrine of "public guardianship" pointing out that:

> The organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development.[15]

In propounding the theory of "public guardianship", the Court bypassed the two legal systems which form the foundations of modern Sri Lankan law. Instead, Justice Amerasinghe delved into ancient Sri Lankan history and traditional concepts of land tenure to draw a parallel between the role of the monarch or ruler of ancient times and the role of the modern State in the Twenty-First century vis-a-vis the people and the natural resources of the country. He quoted extensively from Judge Weeramantry, Vice President of the International Court of Justice, in the *Gabcikovo-Nagymaros* (Danube) case[16] where the latter referred to the ancient irrigation works of Sri Lanka:

> Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century B.C. The ancient chronicles record that when the King (Devanampiya Tissa, 247-207 B.C.) was on a hunting trip (around 223 B.C.), the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon which converted the King. Here are excerpts from that sermon: "O great king, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it." ... The juxtaposition in this heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation. Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines. Thus Arthur C. Clarke, the noted futurist, with the vision that has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean island ... provides textbook examples of many modern dilemmas: *development versus environment*", and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardian *not* its owners." The task of the law is to convert such wisdom into practical terms.[17]

14 See for instance, H. W. Tambiah *Principles of Ceylon Law* (H. W. Cave & Co, Colombo: 1972) Chs 3 and 4.

15 Note 1 at 11.

16 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1998) 37 ILM 162. See also, Afshin A-Khavari "The *Danube Dam* Case: The World Court and the Development of Environmental Law" (1998) 3 *APJEL* 101 at 118–123 for a discussion on Judge Weeramantry's separate judgment.

17 (1998) 37 ILM 162 at 210–211; see also note 1 at 12.

The Court appears to have taken up that challenge in the present case.[18] Justice Amerasinghe went on to observe that:

> The subject of land tenure in Sri Lanka including the status, claims, and rights of the Monarch with regard to the soil, is an extremely complex one ... For the present limited purpose what I do wish to point out is that there is justification in looking at the concept of tenure, not as a thing in itself, but rather a way of thinking about rights and usages about land.[19]

Rejecting the doctrine of the public trust he said:

> The public trust doctrine, relied upon by learned counsel on both sides, since the decision in *Illinois Central R Co.* v. *Illinois*, 146 U.S. 387 at 452, 135 S. Ct. 110 at 118 (1892), commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our ancestors did, and our contemporaries do, recognising a shared responsibility.[20]

Justice Amerasinghe's objection to the public trust doctrine appeared to be based on a reluctance to judicially accept that the Executive in its capacity as "trustee" was vested with the *legal ownership* of the country's natural resources. As Justice Kuldip Singh pointed out in *Kamal Nath* the doctrine as it evolved in the English common law recognised that the Sovereign could own these resources although the ownership was limited in nature. Justice Amerasinghe however, was not prepared to accept that even this limited ownership vested in the modern State. Instead he preferred to view the three organs of the State together with the people of the country as working in partnership in the management of these resources with both rights and obligations towards them. He asserted that:

> The Constitution today recognises duties both on the part of the Parliament and the President and the Cabinet of Ministers as well as duties on the part of "persons", including juristic persons like the 5th and 7th respondents. Article 27 (14) states that "The State shall protect, preserve and improve the environment for the benefit of the community." Article 28 (f) states that the exercise and enjoyment of the rights and freedoms ... "is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches.[21]

18 Vice President Weeramantry in his separate opinion in the *Danube* case also observed: "In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experiences of the past, searching through the whole range of cultures available to him for this purpose. From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*." Note 16 at 207.

19 Note 1 at 12.

20 Ibid at 13.

21 Articles 27 and 28 are contained in Chapter VI of the Constitution entitled "Directive Principles of State Policy and Fundamental Duties". Article 27 contains the Directive Principles and Article 28 the

> The loose use of legal terms like "trust" and "trustee", is apt, as this case has shown, to lead to fallacious reasoning. Any question of the *legal ownership* of the natural resources of the State being vested in the Executive to be held or used for the benefit of the people in terms of the Constitution is at least arguable. The Executive does have a significant role in resource management conferred by law, yet, the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament.[22]

In the light of this decision it is arguable that the public trust has been judicially rejected in Sri Lanka in favour of the concept of public guardianship. On the other hand, since the ultimate decision in the case did not rest on this issue it is also arguable that this statement is in fact *obiter*. Having identified the three organs of the State as collective guardians of its natural resources, the Court did not elaborate any further on their specific obligations vis-a-vis those resources.[23] The legal effects of their roles as guardians, as for instance the ambit of their rights and duties or the circumstances under which those resources may be alienated have been left unresolved. Further litigation would be necessary to determine these issues.

The Jurisdiction of the Supreme Court and the Standing of the Petitioners

Under the provisions of the Constitution, the Supreme Court has 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 contained in Chapter III or Chapter IV.[24] The Respondents argued that the petitions should be dismissed *in limine* as the present case before Court was a matter that was either a breach of trust litigation or a public interest litigation.[25]

Responding to the first argument, the Court observed that the question in the present case was not whether the Court or the Government is a trustee or whether

Fundamental Duties, neither of which are justiciable. However, Article 27(1) states that: "The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society."

22 Note 1 at 14.

23 In M. C. *Mehta* v. *Kamal Nath*, note 11, Justice Kuldip Singh at 407 noted: "According to Prof. Sax the Public Trust Doctrine imposes the following restrictions on governmental authority: Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses."

24 Article 126 of the Constitution of Sri Lanka.

25 Note 1 at 10.

there has been a breach of trust, but whether under the circumstances there has been a violation of the fundamental rights of the petitioners. The jurisdiction of the Court on that issue is, beyond question, established by Article 126(1) of the Constitution. The Court pointed out that it is "neither assuming a role as 'trustee' nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this Court, and this Court alone, by Article 126(1) of the Constitution."[26]

The Respondents also contended that the present case was a public interest litigation matter and therefore should not be entertained under the provisions of the Constitution and should be rejected. Justice Amerasinghe commented: "I must confess surprise, for the question of 'public interest litigation' really involves questions of *standing* and not whether there is a certain kind of recognised *cause of action*. The court is concerned in the instant case with the complaints of individual petitioners."[27]

He went on to point out that the petitioners, as individual citizens have a constitutional right under Article 17[28] to come before this Court:[29]

> They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant.

This dicta appears to indicate that the Court is recognising that the citizenry of the country including future generations, have collective rights which can be infringed by the State in its capacity of guardian of the country's natural resources. The Constitution does not recognise a concept of collective rights or even of group rights, but only makes individual rights justiciable. It is not clear from this observation whether Justice Amerasinghe is holding that the collective rights of the citizenry are also justiciable or only relevant as the context in which to view the grievances of the petitioners before the Court.

The Court also took note of the fact that although only seven petitioners were before it, many thousands of others were in danger of their rights under the

26 Ibid at 14.
27 Ibid at 15.
28 Article 17 of the Constitution of Sri Lanka reads: "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."
29 Note 1 at 15.

Constitution being infringed. Justice Amerasinghe pointing out that if the project were implemented, about 2,600 families or about 12,000 persons were likely to be displaced, observed:

> There are only seven persons who have filed this application; but it must now become clearer why I said that their claims were linked to the collective rights of others and that the alleged infringement of the petitioners' individual rights need to be viewed in the context of the rights guaranteed to them not only as falling within the meaning of "all persons", as for instance within the meaning of Article 12 (1) of the Constitution, but in particular as members of the *citizenry* of Sri Lanka.[30]

He therefore viewed the seven petitioners as being representative of the entire class of persons whose rights under the Articles in question would be infringed. The violation of the rights of the former had to be then viewed in this context.

Infringement of Fundamental Rights

The primary issue in the instant case was the imminent infringement of the fundamental rights of the petitioners guaranteed by the Constitution and the ultimate decision of the Court rested on this. The Court upheld the contention of the Petitioners on all counts.

Articles 14(1)(g) and (h)

Regarding the possible infringement of Articles 14(1) (g) and (h), according to the terms of the MIA the project company was required to submit a feasibility study and a development plan to the First Respondent who had the discretion to withhold approval for the plan for certain specified reasons. However, Article 7.7 of the MIA states that: "The decision shall not be unreasonably delayed and, in light of significant expenditure of time, effort and money which will have been undertaken by the Company, approval shall be granted in the absence of significant and overriding justification." Any objections of the Secretary must be communicated to the Company and if a mutually acceptable solution cannot be reached the Company may refer the matter to arbitration.

The respondents argued that it is only if the Secretary wrongfully approves the feasibility study that a cause of action arises in the Petitioners. The Court categorically rejected this contention in view of the confidentiality clause contained in the MIA. Justice Amerasinghe pointed out "How would the petitioners know after the Feasibility Study or Development Plan that they are likely to be affected, for in terms of Article 7.9 subject to Article 5.5, the Feasibility Study and Development Plan are to be treated as "confidential?" and observed that after the studies are done

30 Ibid at 18.

they would be no better informed. He also pointed out that it would be difficult to decide who may seek judicial review in the event that a cultural monument or the Jaya Ganga is damaged and in any event no judicial remedy would be available to anyone if the Secretary is compelled to grant approval pursuant to an arbitral award. The Court commented that the petitioners acted wisely in coming before the Court when they did and held that there is, within the meaning of the Constitution an imminent infringement of their rights under Article 14.

Article 12(1)

The Petitioners claimed that their rights to equality under the law and to equal protection of the law were in imminent danger of being violated by the project. The Court upheld this contention, finding that the MIA was heavily biased in favour of the project company, and declared: "Fairness to all, including the petitioners and the people of Sri Lanka as well as the 5th and 7th Respondents ... should be our lodestar in doing justice "

The Fifth and Seventh Respondents argued that the Court should not intervene at this stage as the signing of the MIA would only result in exploration and a feasibility study. The Court considered the question whether the MIA required the project company to comply with the provisions of the National Environmental Act. It found that it did not make any reference to an environmental impact assessment required under the Act, but merely provided for an "environmental study" to be prepared by an international firm selected by the Company and approved by the Government of Sri Lanka. This would be done as part of the feasibility study.

The Court embarked on a detailed analysis of the environmental impact assessment process in Sri Lanka. Justice Amerasinghe particularly referred to the requirement of public participation both at the scoping stage and at the stage where the report is open to the public for its comments, and to the consideration of alternatives. He concluded that:

> The proposed agreement plainly seeks to circumvent the provisions of the National Environmental Act and the regulations framed thereunder. There is no way under the proposed agreement to ensure a consideration of development options that were environmentally sound and sustainable at an early stage in fairness both to the project proponent and the public. Moreover the safeguards ensured by the National Environmental Act and the regulations framed thereunder with regard to publicity have been virtually negated by the provision in the proposed agreement regarding confidentiality.[31]

Justice Amerasinghe ruled:

> For the reasons given, in my view, the proposed agreement seeks to circumvent the law and in its implementation is biased in favour of the Company as against the members of the public, including the petitioners. I am therefore of the view that the petitioners are entitled to

31 Ibid at 62.

> claim that there is an imminent infringement of their fundamental rights under Article 12 (1) of the Constitution.[32]

This statement is consistent with his position that the rights of the general public or the citizenry of Sri Lanka are also deemed to have been violated by the project. The question which arises then is whether this implies petitioners could go before Court claiming that they are representing the general public on an issue of environment and development. This would have to be determined by subsequent litigation.

Sustainable Development and the Application of International Standards

In an extensive section of the judgment, entitled "Sustainable Development" the Court analysed this principle as well as other international environmental standards and their applicability to Sri Lanka.[33] As regards sustainable development, Justice Amerasinghe asserted:

> In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase "sustainable development", namely that human development and the use of natural resources must take place in a sustainable manner.[34]

Justice Amerasinghe quoted the introduction to the proposed MIA where it was declared that: "The Government seeks to advance the economic development of the people of Sri Lanka and to that end desires to encourage and promote the rational exploration and development of the phosphate mineral resources of Sri Lanka." He pointed out that: "Undoubtedly the State has the right to exploit its own resources pursuant, however to its own environmental and developmental policies."[35]

The question which arises is how one determines the "environmental and developmental policies" of the State and their applicability to specific projects. The further question is, which organ of the State has the jurisdiction to make that determination. Justice Amerasinghe cited principles of both the 1972 Stockholm and 1992 Rio Declarations[36] and stated:

> 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 regarded merely as "soft law". Nevertheless, as a Member of the United Nations, they could hardly be

32 Ibid at 64.

33 The concept of sustainable development and other principles within it have been cited in decisions of the Supreme Court of India. See for instance, M. C. *Mehta* v. *Kamal Nath*, note 11. The Court in this case referred to previous decisions of the Indian Supreme Court in *Vellore Citizens Welfare Forum* v. *Union of India* (1996) 5 SCC 647 (India) and *Indian Council for Enviro Legal Action* v. *Union of India* (1996) 3 SCC 212 (India). It was addressed for the first time in international case law in the separate opinion of Judge Weeramantry in the *Case Concerning the Gabcikovo-Nagymaros Project*, note 16.

34 Note 1 at 30.

35 Ibid at 28.

36 1972 Stockholm Declaration (1972) 11 ILM 1416, Principles 14 and 21, and later Principle 5; and 1992 Rio Declaration (1992) 31 ILM 874, Principles 1 and 4 and later Principle 3.

> ignored by Sri Lanka. Moreover, they would, in my view be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.

This position of the Court is significant since it holds that Sri Lanka as a "member of the United Nations" or in other words of the global community is duty bound to take into consideration the principles of these two Declarations which it has signed. The Court goes further in saying that the principles contained in the Declarations may become legally enforceable principles of law, as opposed to mere guidelines, if they are deemed to be so by the higher courts. This position would therefore give citizens a cause of action against the State in issues of environment and development and gives the Court the jurisdiction to determine whether the principles have been violated. This position is consistent with the doctrine of public guardianship since all three organs of the State as well as the people, are deemed to be working in partnership in the protection and utilisation of the country's natural resources.

Having declared that principles of sustainable development are legally enforceable in Sri Lanka, the Court went on to determine whether the present project was in fact consistent with those principles. The Court agreed with Counsel for the Respondents that the phosphate deposits must be utilised for the benefit of the country and that this has in fact been the policy of successive governments for the past three decades. The way in which it had been done up to now did not cause concern. It was the present proposal which raised the fears of the petitioners that the existing supplies would be exhausted too quickly and the scale of operations within the stipulated time frame would cause serious environmental harm that would affect the health, safety, livelihood and the cultural heritage of the petitioners.

In addressing these issues the Court referred to the elements encompassed in the principle. Justice Amerasinghe said that some of these elements are:

> [O]f special significance to the matter before this Court are, first, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is "sustainable" or "prudent" – the principle of sustainable use; the integration of environmental considerations into economic and other developments plans, programmes and projects – the principle of integration of environment and development needs.[37]

Discussing the principle of inter-generational equity he pointed out that international standard setting instruments have clearly recognised this principle. He said "the inter-generational principle in my view, should be regarded as axiomatic in the decision-making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before

37 Note 1 at 30. See also Philippe Sands *Principles of international environmental law I* (Manchester University Press, Manchester: 1995) 199.

us". He also pointed out that "contemporary law makers have been alive to their responsibilities to future generations" and referred to Section 17 of the National Environmental Act which incorporates the principle.[38]

Discussing the potential widespread pollution which would be caused by the project, the Court, quoting Principle 15 of the Rio Declaration asserted that:

> The precautionary principle ... ought to be acted upon by the 4th Respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.[39]

Commenting on the potential environmental damage which could be caused by the project Justice Amerasinghe rejected as inadequate the conditions in the MIA relating to environmental compliance and restoration. He referred to Principle 16 of the Rio Declaration and said:

> Today, environmental protection, in the light of the generally recognised "polluter pays" principle ... can no longer be permitted to be externalised 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.[40]

He also pointed out that this is a matter which the Central Environmental Authority must take into account in evaluating the project and in prescribing conditions.

Conclusion

In its final order the Court declared that the petitioners had established an imminent infringement of their fundamental rights guaranteed by Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution. It is interesting to note that the Court made reference to Article 15(7) of the Constitution which states that the exercise and operation of the fundamental rights guaranteed *inter alia* by Articles 12 and 14

38 Section 17 of the Act entitled "Natural Resources" states: "The [Central Environmental] Authority in consultation with the [Environmental] Council shall recommend to the Minister the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits therefrom and to preserve the same for future generations and the general measures through which such policy may be carried out effectively."

39 Note 1 at 38.

40 Ibid at 53.

are subject to certain restrictions including the necessity of meeting "the just requirements of the general welfare of a democratic society".[41] The Court was not convinced that in the light of the available evidence the proposed project was necessary to meet such requirements.

The Court also directed the Respondents to desist from entering into any contract relating to the Eppawela phosphate deposit until:

(1) a comprehensive exploration and study has been done and published on
    (a) the locations,
    (b) the quantity, (moving inferred reserves into the proven category) and
    (c) the quality of apatite and other phosphate minerals in Sri Lanka; and
(2) any project proponent obtains the approval of the Central Environmental Authority in accordance with the law, including the decisions of the superior courts of record of Sri Lanka.

This decision has, potentially, broad implications for the development of both environmental and human rights law in Sri Lanka. It covered, for the first time, a wide range of issues, particularly in environmental law, but also in an expansive interpretation of the fundamental rights contained in the Constitution. The decision is particularly valuable because it established a connection between fundamental rights and issues of environment and development. The judgment was replete with references to the Stockholm and Rio Declarations, which the Court declared to be a part of the law of Sri Lanka. As noted above in its final order it directed that approval for the project must be obtained in accordance with the law, including the decisions of superior courts of record. Therefore in determining issues relating to environmental impact assessment it appears that international standards and principles will necessarily have to be considered. Perhaps the most significant feature of the decision however, was the origin of the concept of public guardianship and the examination of the rights and duties of the three organs of the State as well as the people vis-a-vis natural resources. Although some of the important dicta contained in the decision may be *obiter*, and may require subsequent litigation to expand on it, this case will serve as a catalyst for the further development of environmental law in Sri Lanka.

CAMENA GUNERATNE
Regional Editor

41 The Article reads: "The exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."